REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA,

FROM JUNE 1st, 1892
TO MARCH 3d, 1894,

ALSO

Rules of Practice in the Supreme and District Courts

EDITED BY

JOHN M. COCHRANE, Reporter.

VOLUME 3

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OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

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

R. D. HOSKINS, Bismarck, Clerk.
JOHN M. COCHRANE, Grand Forks, 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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SUPREME COURT RULES.

RULE I.

CLERK'S OFFICE, WHERE.] Until otherwise directed by a rule of court, the Clerk of the Supreme Court shall keep his office at the capital of the state. When absent from the capital, the office shall be kept open, and the duties of the Clerk shall be performed by a deputy. The Clerk shall not practice as an attorney or counselor.

RULE II.

CLERK, DUTIES OF.] He shall keep a complete record of the proceedings of the court, and shall perform all the duties pertaining to his office. He must not allow any written opinion of the court, or any original record or paper pertaining to his office, to be taken therefrom without an order from the court, or one of the judges thereof. He shall promptly announce, by letter, any decision rendered or order entered in any cause or matter, to one of the attorneys of each side, when such attorneys are not in attendance upon the court.

RULE III.

CLERK'S FEES, DEPOSIT OF.] The appellant, on bringing a cause to this court, shall, at or before the filing of the record, deposit with the Clerk of said court the sum of eight dollars, to apply on his fees; and in all cases (except habeas corpus) originally brought in this court, the plaintiff or petitioner, at or before the filing of the first papers in the case, shall deposit with the Clerk the same amount for the same purpose.

RULE IV.

NOTICE OF APPEAL, HOW SERVED.] The notice of appeal shall be served in the manner indicated by Section 4 of an act regulating appeals, approved February 11, 1891, and Chapter 23 of the

Compiled Laws of 1887, and the acts amendatory thereto; and if not served ninety days before the first day of the next succeeding term of the Supreme Court, the cause shall not then be tried.

Rule V.

Writs of error, allowed when, how.] Writs of error in criminal causes shall be allowed in all cases from the final decisions of the District Courts to the Supreme Court. The party seeking the writ must apply to the Chief Justice or to one of the Judges of the Supreme Court, by petition, verified by affidavit, setting forth clearly and succinctly the chief matters of error complained of. All superfluities and unnecessary recitals must be excluded from the petition. Immediately after the issuing of the writ of error, a citation to the adverse party to be and appear at the Supreme Court, on a day and hour to be therein designated, shall be issued by the Clerk of this court, and by him delivered or sent by mail to the plaintiff in error or his attorneys, who shall cause the same to be served on such adverse party or his attorney at least ten days before such designated day.

Rule VI.

Citation, when returnable.] When a sufficient time intervenes, the citation provided for in the preceding rule shall be made returnable on the first day of the next succeeding term; otherwise it shall be made returnable on some day during such term; and writs of error in criminal cases may issue and citations be made returnable on any day during term time.

Rule VII.

Writ of error, when filed.] When a writ of error is allowed and issued, it shall be the duty of the plaintiff in error forthwith to file with the Clerk of this court the petition in error, and a failure to do so shall be cause for the dismissal of the writ; and such petitions shall be filed by the Clerk as of the day when the writ was allowed.

RULE VIII.

APPEAL HOW TRANSMITTED.] When an appeal is taken, either from a judgment or an order, (except in cases where by special order of the District Court copies are sent to the Supreme Court in lieu of the originals,) the Clerk shall transmit the original judgment roll or order and papers used upon the motion as required by Section 5 of an act of 1891 regulating appeals. Whether the original or copies are transmitted, the judge's certificate or a copy thereof as prescribed by Rule 12 must be appended to the record in all cases. The original notice of appeal and undertaking must be transmitted to the Supreme Court. Where original papers are sent up, the certificate of the Clerk of the District Court must conform substantially to the requirements of said Section 5. Where copies of the record on appeal are transmitted to this court, it shall be the duty of the Clerk of the District Court, without unnecessary delay, and within the periods limited by law, to make out a full and perfect transcript and copy of the judgment roll; or if the appeal is from an order, or any part thereof, a complete copy of such order, and of the papers upon which said order was granted, and the certificate of the judge, as prescribed by Rule 12 of these rules; or where a writ of error is sued out in criminal causes, a complete copy of the record and of all bills of exception, together with an assignment of errors, and prayer for reversal, and embracing the certificate of the Judge of the District Court provided in the Code of Criminal Procedure, Compiled Laws, Section 7510, and to certify the same under his hand and seal of the court, and transmit the same to the Clerk of this court, which certificate shall be substantially in the following form:

[Form of Clerk's Certificate when the appeal is from a judgment in Civil Cases.]

STATE OF NORTH DAKOTA, } ss. .....JUDICIAL DISTRICT.
COUNTY OF..... }

I, A. B., Clerk of the District Court within and for the said County of....., in the.....Judicial District of the State of North Dakota, do hereby certify that the above and foregoing papers are the original notice of appeal, with proof of service thereof, and the undertaking given thereon, and also the original judgment roll and certificate of the Judge thereto appended (or full, true and complete copies of said

judgment roll and certificate, as the case may be) in the above entitled action, wherein ----------is plaintiff and----------is defendant, as the same now remain of record in said court, and the same are transmitted to the Supreme Court pursuant to such appeal.

In witness whereof, I have hereunto set my hand and affixed the seal of said court this ----------day of----------, A. D. 189--

[SEAL.] ----------
Clerk.

[Form of Clerk's Certificate when the appeal is from an order.]

STATE OF NORTH DAKOTA, } ss. ----------JUDICIAL DISTRICT.
COUNTY OF---------- }

I, A. B., Clerk of the District Court within and for said County of----------, in the----------Judicial District of the State of North Dakota, do hereby certify that the above and foregoing is the original notice of appeal, with proof of service thereof, and the original undertaking given thereon, also the original order from which an appeal is taken, with all the papers used by each party on the application for such order, with the certificate of the Judge attached thereto (or full, true and complete copies of such order, papers and certificate, as the case may be) in the above entitled action, wherein----------is plaintiff and---------- is defendant, as the same now remain of record in said court, and the same are transmitted to the Supreme Court pursuant to said appeal.

In witness whereof, I have hereunto set my hand and affixed the seal of said court this----------day of----------, A. D. 189--

[SEAL.] ----------
Clerk.

[Form of Clerk's Certificate in Criminal Case.]

STATE OF NORTH DAKOTA, } ss. ----------JUDICIAL DISTRICT.
COUNTY OF---------- }

I, A. B., Clerk of the District Court in and for the County of----------in the----------Judicial District of the State of North Dakota, in obedience to the annexed writ of error, do hereby certify and return that the above and foregoing is a true, full and complete copy and transcript of the record in this case, to-wit: the indictment, the minutes of the plea (or demurrer,) the minutes of the trial, the charges given and the charges refused, with all the endorsements thereon, and the judgment, all bills of exception, together with an assignment of errors and prayer for reversal, and also of the original certificate of the Judge in the above entitled case, wherein the State of North Dakota is plaintiff and----------is defendant, as the same now remains of record in the said court, and the same are transmitted to the Supreme Court pursuant to said writ of error.

In witness whereof, I have hereunto set my hand and affixed the seal of said court this----------day of----------, A. D. 189--

[SEAL.] ----------
Clerk.

RULE IX.

RESPONDENT MAY REQUIRE RETURN TO BE FILED, WHEN.] The appellant shall cause the proper return to be made and filed with

the Clerk of this Court within sixty days after the appeal is perfected. If he fails to do so, the respondent may, by notice in writing, require such return to be filed within twenty days after the service of such notice, and if the return is not filed, in pursuance of such notice. the appellant shall be deemed to have abandoned the appeal, and on an affidavit proving when the appeal was perfected and the service of such notice, and a certificate of the Clerk of this court that no return has been filed, the respondent may apply to any Judge of this court for an order dismissing the appeal for want of prosecution, with costs, and the court below may thereupon proceed as though there had been no appeal; *Provided, nevertheless*, that this Rule shall have no application to cases where the respondent has elected to cause the record to be transmitted to the Supreme Court as regulated by the priviso contained in Section 5 of the act of February 11, 1891, regulating appeals.

Rule X.

Criminal causes to be placed first on the calender.] All criminal causes shall be placed first on the calender in the order of the date of the filing of the petition, and shall have precedence of all other business, and shall be tried at the term at which the transcript is filed, unless continued or otherwise disposed of; and shall, if practicable, be decided at the same term, and the presence of the defendant in the Supreme Court shall in no case be necessary, unless specially ordered by the court.

Rule XI.

Order of civil causes on calender.] All civil causes shall be placed on the calender by the Clerk in the order of the filing of the transcript, and shall (with the criminal causes) be numbered consecutively from term to term in one continued series; and no civil cause shall be placed on the calendar after the day preceding the opening of the court, unless ordered by the court.

RULE XII.

CERTIFICATE OF JUDGE.] In all civil and criminal actions and in all special proceedings which are brought into this court, the Judge of the District Court shall append to the original judgment roll or record, filed in the court below, a certificate, signed by him, as follows: In civil actions and special proceedings the certificate shall state in substance that the above and foregoing papers —naming each separately—are contained in and constitute the judgment roll (or other record as the case may be) and the whole thereof. The original certificate (or copy thereof) in cases where a copy is transmitted) must be embraced in the record sent to this court. The certificate required in criminal cases is indicated by Rule 8 of these rules.

RULE XIII.

JUDGMENT ROLL, CONTAINS WHAT.] The judgment roll mentioned in Rule 8 must only contain the pleadings, the judgment, the verdict of the jury, or decision of the Judge, the report of the referee, if any, the offer of the defendant, if any, the bill of exceptions or statement of the case, as settled and certified by the court or Judge, and such orders and papers as have been, by direction of the court or Judge, incorporated into and made a part of the judgment roll; also all orders and papers which necessarily involve the merits and effect the judgment. Bills of exception and statements of the case, whether to be used on a motion for new trial or on appeal without such motion must, when brought into this court, be framed in substantial conformity to the requirements of Section 5090, Compiled Laws of 1887, and if such bill or statement fails to contain the specifications of errors of law complained of, or, where the finding of fact is attacked, fails to specify the particulars in which the evidence is claimed to be insufficient, such bill or statement will be disregarded. When a bill or statement contains superfluous matter, or fails to contain the certificate of the trial judge, as specified in Rule 12 hereof, it will be liable to be stricken out on motion. The specifications required by statute to be embraced in bills of exception and statements are vital parts

thereof; and such specifications shall be either prefixed or appended to all bills of exception and statements, and shall be settled and allowed by the District Courts as essential parts thereof. Attention is directed to Section 5090 of the Compiled Laws of 1887.

RULE XIV.

ORDER OF PAPERS IN JUDGMENT ROLL.] In making up the judgment roll or records in all cases to be brought to this court; the parties, and the Clerks of the District Courts, must arrange the process, pleadings, orders and proceedings in the chronological order provided in Rule 16 for the preparation of an abstract; and when a transcript is prepared for this court it must be plainly written, carefully paged, and the lines on each page carefully numbered.

RULE XV.

ASSIGNMENT OF ERRORS.] In civil actions and proceedings the appellant shall subjoin to his brief an assignment of errors, which need follow no stated form, but must, in a way as specific as the case will allow, point out the errors objected to, and only such as he expects to rely on and ask this court to examine. Among several points in a demurrer, in a motion, in the instructions, or in other rulings excepted to, it must designate which is relied on as error, and the court will, in its discretion, only regard errors which are assigned with the requisite exactness. And in criminal causes the counsel for the plaintiff in error may also file a new assignment of errors in this court, specifically setting forth the errors he desires to have reviewed, as in this rule provided. The assignments of error must not quote or duplicate the specifications of error as appended or prefixed to bills and statements, but shall refer to the page of the abstract where the particular specification of error is found and also to the page or pages of the abstract in which the matter is found upon which the error is assigned.

RULE XVI.

ABSTRACT—NUMBER OF COPIES AND SERVICE.] In all civil causes the appellant shall deliver or mail to the Clerk of this

court, twenty-five days before the first day of the term of the court at which the cause may be heard, nine printed copies of an abridgment or abstract of the record in the cause, setting forth so much thereof, only as is necessary to a full understanding of all the questions presented to this court for decision. He shall at the same time also deliver a copy of the same to the counsel for the respondent, and, if there be more than one respondent, to the counsel of each. The abstract shall be prepared and printed in substantially the following form:

IN THE SUPREME COURT,

STATE OF NORTH DAKOTA.

.....Term, 189..

JOHN DOE, Plaintiff and { Appellant or Respondent, as case may be.

vs.

RICHARD ROE, Defendant and { Appellant or Respondent, as case may be.

COMPLAINT.

The plaintiff in his complaint states his cause of action as follows:

(Set out all the complaint necessary to an understanding of the questions to be presented to this court, and no more. In setting out exhibits, omit all merely formal irrelevant parts; as, for example, if the exhibit be a deed or mortgage and no question is raised as to the acknowledgement, omit the acknowledgement. When the defendant has appeared, it is useless to encumber the record with the summons or the return of the officer.)

DEMURRER.

To which complaint the defendant demurred, setting up the following grounds:

(State only the grounds of the demurrer, omitting all formal parts. If a pleading was attacked by motion below and the ruling thereon is one of the questions to be reviewed, set out the motion, omitting all formal parts.)

And on the.....of.....189.. the same was submitted to the court, and the court made the following ruling thereon:

(Here set out the ruling. In every instance let the abstract be made in the chronological order of the events in the case—letting each ruling appear in the proper connection. If the defendant pleaded over, and thereby waived his right to appeal from these rulings, no mention of them should be made in the abstract; but it should continue.)

ANSWER.

Which complaint the defendant answered, setting up the following defenses:

(Here set out the defenses, omitting all formal parts. If motions or demurrers were interposed to the pleading, proceed as directed with reference to the complaint. Frame the record so that it will properly present all questions to be reviewed and raised before issue is joined. When the transcript shows issue joined, proceed.)

On the.....day of.....189.. said cause was tried by a jury (or the court, as the case may be,) and on the trial the following proceedings were had.

(Set out so much of the bill of exceptions, or statement containing exceptions, as is necessary to show the rulings of the court to which exceptions were taken during progress of the trial; and if the evidence or any part thereof be embraced in the bill of exceptions, or statement containing exceptions, epitomize the same by excluding all superfluous matter and unnecessary verbiage. Where a review of the verdict or findings of fact is sought upon the ground that the evidence is insufficient to justify the same, the evidence shall be reduced to a narrative form, except in those particulars where a rescript of the stenographer's report becomes necessary to preserve the sense or present the particular points of error. In statements, not less than in bills of exception, all superfluous matter, including all evidence not bearing upon specifications, is required to be rigorously excluded. A stenographic report of the trial, if settled and allowed, does not constitute a bill of exceptions or a statement of a case within the meaning of the law, and will not be so regarded by this court. Questions propounded upon which no rulings are made, and objections followed by rulings against the successful party, should be eliminated from the record, unless their preservation is necessary to the sense.)

INSTRUCTIONS.

At the proper time the plaintiff (or the defendant, as the case may be) asked the court to give each of the following instructions to the jury:

(Set out the instructions referred to and, continue:)

which the court refused as to each instruction, to which several rulings the plaintiff (or defendant) at the proper time excepted, and thereupon the court gave the following instructions to the jury:

(Set out the instructions.)

To the giving of those numbered (give the numbers, if numbered,) or (if not numbered) to the giving of the following portions thereof (setting out the portions,) and to the giving of each thereof, plaintiff (or defendant) at the proper time specifically excepted.

VERDICT.

On the.....day of.....189.. the jury returned the following verdict into court:

(Set out the verdict.)

(If the cause be tried by the court, instead of the instructions and verdict of the jury, set out so much of the finding of fact and conclusions of law, and requests for findings, if any, together with the exceptions relating thereto, as may be necessary to present the errors complained of.)

MOTION FOR NEW TRIAL.

On the.....day of.....189.. the plaintiff (or defendant) served notice of intention to move for a new trial, as follows:

(Here insert notice of intention, ommitting all formal parts.)

On the.....day of.....189.. the plaintiff (or defendant) moved for a new trial upon the grounds therein specified.

On the.....day of.....189.. the court made the following rulings upon said motion:

Set out the record of the ruling to which the plaintiff (or defendant) at the proper time excepted.)

JUDGMENT.

On the.....day of.....189.. the following judgment was entered:

(Set out the judgment entry (or order) appealed from.)

On the.....day of.....189.. the plaintiff (or defendant) perfected an appeal to the Supreme Court of the State of North Dakota by serving upon the defendant (or plaintiff, as the case may be) and the Clerk of the District Court of..... county a notice of appeal.

(If supersedeas bond was filed, state the fact.)

(This outline is presented for the purpose of indicating the character of the abstract or abridgment of the record contemplated by the rule, which like all rules, is to be

substantially complied with. Of course, no formula can be laid down applicable to all cases. The rule to be observed in abstracting a case is: *Preserve everything material to the question to be decided, and omit everything else.*

This rule, with some additions, has been borrowed from the rules of the late Supreme Court of the Territory, and we have continued it in force as a rule governing the preparation of abstracts of the record proper. But in this court we adopt it chiefly for still another purpose for which it is well adapted, viz: *as a guide and rule to be observed in framing statements and bills of exception to be settled in the District Courts.* Bills of exceptions and statements must be framed substantially in accordance with the requirements of the statute and this rule of court. When so framed the work of abstracting the record for use in this court will be reduced to the minimum, and will generally relate only to matters of form.)

The abstract, when it consists of more than five printed pages, must be followed by an index of its contents. In exceptional cases where a reference to the record proper is desired the appellant must, by apt words, refer the court to such parts of the record as he desires to have examined. All material parts of the record shall be embodied in the abstract or amended abstract, and this court will, as a rule, decline to explore the record coming up from the District Court.

RULE XVII.

RESPONDENT'S ABSTRACT AND SERVICE OF.] If the respondent shall deem the abstract of the appellant imperfect or unfair, he may within fifteen days after receiving the same deliver to the counsel of the adverse party one printed copy, and deliver or mail to the Clerk of this Court nine printed copies of such further or additional abstracts as he shall deem necessary to a full understanding of the questions presented to this court for decision.

RULE XVIII.

BRIEFS—SERVICE OF, ETC.] Not less than twenty-five days before the first day of the term at which any civil cause may be heard, the counsel for the appellant shall serve upon the counsel of the adverse party one copy, and shall deliver or mail to the Clerk of this court nine copies of his brief; and not less than five days before the first day of such term the respondent shall serve upon the counsel of the adverse party one copy, and deliver or mail to the Clerk of this court nine copies of his brief; which brief shall

be printed, and shall contain a statement of the points relied on, and authorities to be cited in support of the same.

RULE XIX.

PRINTED BRIEFS DISPENSED WITH IN CASE OF POOR DEFENDANTS —WHEN.] Rules 16, 17 and 18 are hereby made applicable as well to criminal causes, with the following exceptions and modifications: When, because of the poverty of the defendant, counsel has been assigned to his defense, and such defendant makes and files with the Clerk of this Court an affidavit stating in substance that he is financially unable to pay the expense thereof, the printing of such abstracts and briefs may be dispensed with, and only eight copies each of the united abstracts and brief need be filed with the Clerk. And in all criminal causes the abstracts must be served by the plaintiff in error not less than ten days before the return day of the citation; and the amended abstract not less than three days before such return day, and the brief of the plaintiff in error must be served not less than six days before such return day, and the brief of the defendant in error not less than one day before such return day.

RULES XX.

SERVICE OF CITATION, ABSTRACTS, BRIEFS, ETC., IN CRIMINAL CASES.] In all cases in which by law the Attorney General is required to appear for the state in this court, and in which the state is party, respondent or defendant in error, the notice of appeal or citation in error, as the case may be, and the abstracts and briefs prescribed by law or the rules of this court, shall be served upon the Attorney General; and in criminal causes the citation, abstracts and briefs shall also be served upon the State's Attorney of the proper county.

RULE XXI.

NOTICE OF ARGUMENT IN CRIMINAL CAUSES.] The manner of bringing on the argument in criminal causes, and the hearing thereof, are prescribed in Sections 489, 490, 491 and 492 of the Code

of Criminal Procedure. (Compiled Laws, 1887, Sections 7516, 7517, 7518.)

RULE XXII.

FORM AND SIZE OF ABSTRACT, BRIEF, ETC.] All cases and points and all other papers furnished to the court in calendar causes, shall be printed on white paper with a margin on the outer edge of the leaf one and a half inches wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long and three and a half inches wide. The folios, numbering from the commencement to the end of the case, shall be printed on the outer margin of the page. Small pica, solid, is the smallest letter and most compact mode of composition which is allowed. No charge for printing the papers mentioned in this rule shall be allowed as a disbursement in a cause, unless the requirements of this rule shall appear to have been complied with, in all papers printed.

RULE XXIII.

NUMBER OF COUNSEL TO ARGUE CAUSE—SUBMISSION OF CAUSE ON BRIEFS.] Only two counsel shall be permitted to argue for each party in a cause, except in capital cases, and the court may limit the time to be occupied by counsel for each side, before the argument shall commence; and any cause may be submitted on printed arguments or briefs.

RULE XXIV.

ARGUMENT—LENGTH OF TIME, ETC.] In the argument of a cause, not more than one hour shall be occupied by counsel upon each side, exclusive of the time necessarily occupied in reading the record, unless by the express permission of the court, obtained before commencement of the argument.

RULE XXV.

CALL OF CALENDAR—ARGUMENT OF CAUSES, ETC.] The court on the first day in each term shall commence calling the cases for argument in the order in which they stand on the calendar, and proceed from day to day during the term in the same order, (except as hereinafter provided,) and if the parties or either of

them shall be ready when the case is called, the same shall be heard. And if neither party shall be ready to proceed in the argument, the case shall go to the foot of the calendar, and be continued or dismissed, as the court may direct.

TEN CASES LIABLE TO CALL EACH DAY.] Ten cases only shall be considered as liable to be called on each day during the term, including the one under argument.

ADVANCEMENT OF CRIMINAL CAUSES.] Criminal causes may be advanced by leave of the court on motion of either party.

RULE XXVI.

ABSTRACTS AND BRIEFS, HOW DISTRIBUTED.] The Clerk shall distribute the printed abstracts and briefs required by these rules to be furnished him, as follows: One copy of each to each of the judges when the case is called for hearing; one copy of each to the Reporter of the Supreme Court, and the remaining copies to be by him kept with the papers in the case. In criminal causes, when under Rule 20, the printing of briefs and abstracts is dispensed with, the Clerk shall deliver one copy of each to each of the judges, (two of which, upon the determination of the case, will be returned to the Clerk, one for the use of the reporter, and the remaining copy he shall retain with the papers in the case.)

RULE XXVII.

MOTIONS, HOW NOTICED.] Motions, except for orders of course, shall be brought upon notice; and when not made upon the records or files of the court, the notice of motion shall be accompanied by the papers on which the motion is founded, copies of which shall be served with the notice of motion. Motions shall not be taken up until the day following the service thereof, unless the case is sooner reached for hearing. Upon the hearing of a motion, or order to show cause, the moving party shall be entitled to open and close; *Provided*, that the papers on both sides shall be read in the opening.

RULE XXVIII.

MOTIONS.] All motions for continuance and dismissal, and all

motions affecting the place of causes upon the calendar shall be noticed for the first day of the term, and will be for hearing previous to the calling of causes for argument.

RULE XXIX.

RE-HEARING PETITIONS.] Whether a decision is handed down in term time or in vacation, a petition for re-hearing will be entertained if five copies of the same be filed with the Clerk within twenty days after the decision is filed, and the remittitur will be stayed during the twenty days, except in cases where, by special order, the court shall direct that the remittitur be sent forthwith to the court below. The petition for a re-hearing shall be *ex parte*, and shall not be orally argued. The petition must be printed or type written, and shall briefly and distinctly state the grounds upon which the re-hearing is requested. It need not be served upon opposite counsel. Where a re-hearing is granted in term time, the case will not (unless by special order of the court) be re-argued at the same term except by consent. When the re-hearing is granted in vacation, and less than six days prior to the first day of the next regular term, the case shall not, except by consent or by special order of the court, be argued at such term. Re-arguments of cases shall ordinarily take precedence on the calendar of all other matters before the court except motions and criminal business.

RULE XXX.

OPINIONS OF COURT.] The opinion of the court in all cases decided by it, whether originating in the Supreme Court, or reaching it by appeal or writ of error, will be reduced to writing and filed with the Clerk either in open court or in vacation. The court will also file written opinions upon all motions, collateral questions or points of practice when the same are deemed exceptionally important.

RULE XXXI.

COSTS, HOW TAXED.] In all cases originating in this court the costs and disbursements will be taxed by the Clerk of this court. In other cases the costs and disbursements of both courts—except

the fees of the Clerk of this court, which shall be taxed by him without notice—shall be taxed in the District Court after the remittitur is sent down, and the amount thereof shall be inserted in the judgment of the court below. In civil cases the remittitur will not be transmitted until the fees of the Clerk of this court shall first have been paid. In all cases where parties are dissatisfied with any bill of costs as taxed by the Clerk of this court the matter complained of will be reviewed in formally and readjusted by this court at any regular session thereof.

RULE XXXII.

CAUSE MAY BE DISMISSED—FAILURE TO COMPLY WITH RULES.] A failure to comply with any of the requirements contained in these rules within the times therein provided will, in the discretion of the court, be cause for dismissal of the appeal, or writ of error, or affirmance of the judgment, as the case may demand.

RULE XXXIII.

PREPARATION OF BRIEFS.] In the preparation of briefs in causes to be argued in this court, counsel for appellant or plaintiff in error shall prefix to their brief or argument a concise and true statement of the facts in the case which are material to the points of law to be argued, with proper reference to the folios of the abstract which sustain them, which statement may be read, or its substance stated orally to the court. No further reading of the abstract will be allowed without permission of the court. See Rule 15 as to assignment of error.

RULE XXXIV.

DISMISSAL OF APPEAL AFFIRMS JUDGMENT.] The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal be expressly made without prejudice to another appeal.

RULE XXXV.

EXECUTIONS.] Executions signed by the Clerk, sealed with the seal of this court, attested of the day when the same issued, may

issue out of this court to enforce any judgment for costs made and entered in cases which originate in this court. Such executions may issue and be directed to any Marshal of the Supreme Court of North Dakota, and may be enforced in any county in the state in which a transcript of such judgment for costs is filed and docketed.

RULE XXXVI.

WRITS, HOW ISSUED AND RETURNED.] All writs and process issued from and out of this court shall be signed by the Clerk, sealed with the seal of the court, attested of the day when the same issued, and made returnable at any day in the next term, or in the same term when issued in term time; and a Judge may, by endorsement thereon, order process to be made returnable on any day in vacation, when, in his opinion, the exigency of the case requires it. When process is made returnable in vacation, the court or Judge directing the same to issue shall state in the order allowing the same the time and place when and where the writ shall be returnable.

RULE XXXVII.

DEFECTIVE RETURN, HOW CURED.] If the return made by the Clerk of the court below is defective, either party may, on an affidavit specifying the defect or omission, apply to the Chief Justice or one of the Judges of this court for an order that such Clerk made a further return and supply the omission or defect without delay.

RULE XXXVIII.

ATTORNEYS, HOW ADMITTED.] Applications for admission to practice at the bar of this state, when made upon a certificate issued by the courts of any other state, may be made at any regular or special term of this court. Such application shall be upon written motion made by a member of the bar of this court and filed with the Clerk, and with such motion shall be filed an affidavit, or the certificate of an attorney of this court, showing that the said applicant is at least twenty-one years of age, of good moral character and an inhabitant of this state, and that such applicant practiced law regularly in the state where he was

admitted for at least one year after such admission. All other applications shall be made on the first day of a regular term of this court, and shall be upon like motion, and with such motion shall be filed affidavits, or the certificate of an attorney of this court, showing that the applicant possesses the qualifications, and has devoted to the study of law the time specified in Section 2 of an act approved March 7, 1891. If satisfied with such affidavits, the court shall appoint a committee of not less than three members of the bar of this court to examine such applicant touching his qualifications to practice as an attorney in the courts of this state. All examinations shall be had in open court unless otherwise directed, and when the examination is not had in open court the applicant shall not be admitted to practice except upon the unanimous written recommendation of the committee making such examination, which recommendation shall be filed with the Clerk and attached to and preserved with the motion and affidavits. But any party who has been or may be prior to July 1, 1891, admitted to practice in the District Courts of this State, in accordance with the law in force at the time of such admission, may thereafter be admitted to practice in this court under the rules heretofore existing. This rule shall not take effect until July 1, 1891.

ORDERED: That the above and foregoing rules (38 in number) be, and the same are, hereby adopted as the Rules of Practice of the Supreme Court of North Dakota. Until abrogated or modified, said rules shall govern the practice in this court, and shall be considered supplemental to other provisions of law regulating the practice. Except Rule XXXVIII, which does not take effect until July 1, 1891, all of said rules shall take effect upon and after June 5, 1891.

Adopted at Bismarck, May 5th, 1891.

CLERK'S CERTIFICATE.

SUPREME COURT, STATE OF NORTH DAKOTA. } ss.

I, R. D. Hoskins, Clerk of the Supreme Court of North Dakota, do hereby certify that the above and foregoing Rules of Practice of the Supreme Court of North Dakota are true and correct copies of such rules as adopted by the court at a regular term thereof.

Witness my hand and the seal of this court this 5th day of May, A. D. 1891.

[L. S.]

R. D. HOSKINS,
Clerk.

DISTRICT COURT RULES.

Rules I and II providing for examination of applicants for admission, are repealed by operation of Chapter 119, Laws 1891.

Rule III.

Papers to be served—endorsing attorney's residence.] On process or papers to be served, the attorney, besides subscribing or endorsing his name, shall add thereto or endorse thereon his place of residence, and if he shall neglect to do so, papers may be served on him through the mail, by directing them according to the best information that can conveniently be obtained concerning his residence. This rule shall apply to a party who prosecutes or defends in person, whether he be an attorney or not.

Rule IV.

Several defenses or causes of action.] In all cases of more than one cause of action, defense, counterclaim or reply, the same shall not only be separately stated, but plainly numbered, and all pleadings not in conformity with this rule may be stricken out on motion.

Rule V.

Folioing papers.] The attorney or other officer of the court who draws any pleading, affidavit, case, bill of exceptions, or report, decree, or judgment exceeding three folios in length, shall distinctly number and mark each folio of 100 words in the margin thereof, or shall number the pages and lines upon each page, and all copies, either for the parties or court, shall be numbered and marked so as to conform to the originals, and if not so marked and numbered, any such papers may be returned by the party on whom the same shall be served, and such service deemed a nullity.

RULE VI.

MOTIONS—NOTICES—WHAT NOTICE SHALL CONTAIN.] Notices of motion shall be accompanied with copies of the affidavits and other papers on which the motions are made, except papers in the action of which copies shall have been served, and papers on file at the time of service of the notice, which shall be referred to in the notice. When the notice is for irregularity, it shall set forth particularly the irregularity complained of; in other cases it shall not be necessary to make a specification of points, but it shall be sufficient if the notice state generally the grounds of the motion.

RULE VII.

MOTIONS AND ORDERS TO SHOW CAUSE—DEFAULT.] Whenever notice of a motion shall be given, or an order to show cause served, and no one shall appear to oppose the motion or application, the moving party shall be entitled, on filing proof of service, to the relief or order sought, unless the court shall otherwise direct. If the moving party shall not appear, or shall decline to proceed, the opposite party, on filing like proof of service, shall be entitled to an order of dismissal.

RULE VIII.

HEARING MOTIONS AND ORDERS TO SHOW CAUSE—ORDER OF PROOF AND ARGUMENT.] On motion, the moving party, and on order to show cause, the party citing, shall have the opening and closing of the argument. Before the argument shall open, the moving party in the motion or order shall read his papers, or state the substance of their contents in support of the application; the adverse party shall then read his papers or state the substance of their contents, in opposition, and except in motions or orders to show cause on discharging of attachments, no evidence shall be allowed in rebuttal or avoidance thereof. No oral testimony shall be received on the hearing of any motion or order to show cause.

RULE IX.

ORDER TO SHOW CAUSE—WHEN GRANTED.] No order to show

cause returnable within less than three days from date of personal service thereof, or double that time if served by mail, shall be granted, unless a special and sufficient reason for requiring such shorter notice shall be stated in the papers presented upon application for the order.

RULE X.

MOTIONS TO STRIKE OUT.] Motions to strike out of any pleading matter alleged to be irrelevant or redundant, and motions to correct a pleading on the ground of its being so "indefinite or uncertain that the precise nature of the charge or defense is not apparent," must be noticed before demurring or answering the pleading.

RULE XI.

EXTENDING TIME TO ANSWER—AFFIDAVIT OF MERITS.] No order extending the time to answer a complaint shall be granted unless the party applying for such order shall present to the Judge to whom the application shall be made, an affidavit of merits or an affidavit of the attorney or counsel retained to defend the action, that from a statement of the case made to him by the defendant, he verily believes the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint, or to some part thereof, and the affidavit shall state whether any, and what extension or extensions of time to answer or demur have been granted by stipulation or order, and where extension have been had, the date of issue shall be thirty days after the service of the complaint.

RULE XII.

AFFIDAVIT OF MERITS—WHAT IT MUST CONTAIN.] In an affidavit of merits the affiant shall state that he has fully and fairly stated the case, and the facts in the case, to his counsel, and that the defendant has a good and substantial defense to the action, on the merits, as he is advised by his counsel, after such statement, and verily believes true, and shall also give the name and place of residence of such counsel.

Rule XIII.

Enjoining sale on execution or foreclosure.] In cases where a sale of real estate upon execution or foreclosure by advertisement is sought to be enjoined, the application for an injunction shall be heard and determined upon notice to the adverse party, either by motion or order to show cause, and no injunction in such case shall be allowed *ex parte*, unless the rights of the applicant would otherwise be prejudiced, nor unless a satisfactory explanation is furnished, showing why the application was not made in time to allow the same to be heard and determined on notice before the day of the sale. If such execution be issued or mortgage foreclosed by an attorney residing without the territory, service of such notice may be made by mail, addressed to him at his place of residence, according to the best information thereof readily obtainable.

Rule XIV.

Time to plead when demurrer overruled.] When a a demurrer is overruled with leave to answer or reply, the party demurring shall have thirty days after notice of the order, if no time be specified therein, to file and serve an answer or reply, as the case may be.

Rule XV.

Change of venue—application for—affidavits.] A change of venue, or place of trial, will not be granted unless the party applying therefor uses due diligence to procure the same within a reasonable time after issue joined in the action, and the ground for the same shall have come to the knowledge of the applicant.

In addition to what has usually been stated in affidavits concerning venue, either party may state the nature of the controversy, and both parties must show how their witnesses are material, and either party may also show where the cause of action, or defense, or both of them, arose, and these facts will be taken into consideration by the court in fixing the place of trial.

Rule XVI.

Taking papers from file.] No papers on file in a cause shall

be taken from the custody of the Clerk, except by the Judge for his own use, or a referee appointed to try the action, or by an attorney in the case on an order of the Judge.

If a referee or an attorney shall take any papers filed in such action, the Clerk shall require a receipt therefor, signed by such referee or attorney, specifying each paper so taken.

Rule XVII.

Trial by referee—filing report.] Upon a trial of issues by a referee, such referee shall file his report in the Clerk's office, upon his fees being paid or tendered by either party.

Rule XVIII.

Filling undertakings and affidavits—penalty for not doing.] It shall be the duty of the plaintiff's attorney forthwith to file with the Clerk of the court, all undertakings given upon procuring an order of arrest, injunction or an attachment, with the approval thereon, and in case such undertaking shall not be so filed, the defendant shall be at liberty to move the court to vacate the proceedings for irregularity, as if no undertaking had been given, but such attorney may file such undertakings on terms to be fixed by the court, at any time. It shall also be the duty of the attorney to file at the same time and under the like penalty, the affidavits upon which an injunction or attachment has been granted, and also the affidavit upon which an order for the service of a summons by publication, or an order for a substituted service of a summons has been granted, together with an order for such service.

Rule XIX.

Sheriff to file papers.] The sheriff shall file with the Clerk the order or process and original affidavits on which an arrest is made, within ten days after the arrest is made.

Rule XX.

Neglect of sheriff—order to show cause.] At any time after the date when it is the duty of the sheriff or other officer to

return, deliver or file any process or other paper, by the provisions of the Code of Civil Procedure, any party entitled to have such act done, may serve on the officer a notice to return, deliver or file, such process or other paper, as the case may be, within ten days, or show cause at a time to be designated by said notice, why an attachment should not issue against him.

Rule XXI.

Filing motion papers.] When any order on a motion is entered, all the papers used on the motion shall be filed with the Clerk, unless otherwise directed by the court, or the same may be set aside as irregular.

Rule XXII.

Orders—service of.] A copy of any order made upon notice must be served with notice of the filing and entry thereof by the prevailing upon the adverse party, within ten days after notice of the decision upon which the order is based.

If any time be by such order given for performance of an act it shall not commence to run untill such service.

Rule XXIII.

Injunctions—order to show cause.] Whenever an injunction shall be granted, or a receiver appointed *ex parte*, the order granting such injunction, or appointing such receiver, shall contain an order to show cause, returnable within ten days, why such order should not be continued in force.

Rule XXIV.

Attorney's stipulation—must be in writing.] No private agreement or consent between parties, or their attorneys, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced to the form of an order of consent and entered, or unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel, where one shall have appeared for him in the action.

RULE XXV.

APPLICATION FOR JUDGMENT—AFTER PUBLICATION.] In any action for the recovery of money only, when the summons has been served by publication, under subdivision 3 of Section 104 of the Code of Civil Procedure, no judgment shall be entered unless the plaintiff at the time of making the application for judgment, shall show by affidavit that an attachment has been issued in the action, and levied on property belonging to the defendant, which affidavit shall contain a specific description of such property, and a statement of its value, and shall be attached to and filed with the affidavits of publication.

RULE XXVI.

SERVICE BY OTHER THAN SHERIFF—WHAT AFFIDAVIT MUST CONTAIN.] If any other person than the sheriff make the service of the summons, and of the complaint or notice, if any accompanying the same, such person shall state in his affidavit of service, his age, or that he is more than 18 years of age, and when, and at what particular place he served the same, and that he knew the person served to be the person named in the summons as the defendant therein, and shall also state in his affidavit that he left with the defendant such copy, as well as delivered it to him.

RULE XXVII.

CONTINUANCE—MOTIONS FOR—AFFIDAVIT.] All motions for continuance shall be made within the first three days of the term, unless the cause for such continuance shall have arisen or come to the knowledge of the party subsequent to that day, and all affidavits for continuance on account of the absence of a material witness or material evidence shall show to the satisfaction of the court, by facts therein stated, that the applicant has a valid cause of action or defense in whole or in part, and if in part only he shall specify particularly to what part, and shall also show as aforesaid that he has used due diligence to prepare for trial, and the nature and kind of diligence used, and the name and residence of the absent witness or witnesses, and what he expects or

believes such witness or witnesses would testify to were he or they present and orally examined in court, or the nature of any document wanted, and where the same may be found, and that the same facts cannot satisfactorily be shown by other available evidence. No counter affidavits shall be received on motions for continuance. No continuance shall be granted for the term, except upon such terms and costs as the court shall impose, and if the terms or costs shall be imposed the same shall be complied with or paid within 24 hours after the making of the order, or such continuance shall not be had.

Rule XXVIII.

Trial—examining witnesses—argument.] On the trial of actions before the court, but one counsel on each side shall examine or cross-examine a witness, and one counsel only on each side shall sum up to the jury, except with the permission of the court. Upon interlocutory questions, the party moving the court or objecting to the testimony shall be heard first. The respondent may then reply by one counsel, and the mover rejoin by one counsel, confining his remarks to the points first stated and a pertinent answer to the respondent. Discussion on the question shall then be closed, unless the court request further argument.

Rule XXIX.

Verdict—presence of parties not necessary.] It shall not be necessary to call either party, or that either party be present or represented when the jury return to the bar to deliver their verdict.

Rule XXX.

Costs—re-taxation—notice of.] Where costs are taxed without notice in an action in which an appearance has been made, the party taxing shall forthwith serve upon the adverse party a copy thereof, in detail, and verified as prescribed by Section 387 of the Code of Civil Procedure, together with notice of re-taxation thereof, and that any sums deducted therefrom, upon such re-taxation, will be applied upon the judgment and execution in the action.

RULE XXXI.

COSTS—TAXATION—MOTION TO CORRECT.] Within thirty days after taxation of costs by the clerk, but not afterwards, a motion may be noticed to be made before the court in term, or at chambers, by either party, to correct such taxation. Upon such motion, the court will review only the items objected to before the Clerk, and only upon the grounds and proofs submitted to the clerk at the time of taxation or re-taxation, as the case may be.

RULE XXXII.

FILING DECISION—CLERK TO NOTIFY.] Upon the filing of any decision by the court or Judge, the Clerk shall forthwith give notice of such filing to the attorney of record of the successful party.

RULE XXXIII.

ENTRY OF JUDGMENT—NOTICE OF.] Within ten days after entry of judgment in an action in which an appearance has been made, notice of such entry, together with a general description of the nature and amount of relief and damages thereby granted, shall be served by the prevailing upon the adverse party.

RULE XXXIV.

CHANGE OF ATTORNEYS.] An attorney may be changed by consent, or upon application of the client, upon cause shown, and upon such terms as shall be just, by order of the court or the Judge thereof, and not otherwise.

RULE XXXV.

MOTIONS—PAPERS USED ON—TO BE FILED AND SPECIFIED IN ORDER.] When any order on a motion, made upon notice, or on an order to show cause, is entered, all the papers used on the hearing of the motion, or order to show cause, shall be specified in the order and filed with the Clerk, or the same may be set aside as irregular.

RULE XXXVI.

IRREGULARITY—WAIVER OF—HOW WAIVED.] A party upon

whom a paper is served, shall be deemed to have waived any objection of irregularity thereto, unless within forty-eight hours after the receipt thereof he return such paper to the party serving the same, with a statement of each particular objection to its receipt.

Rule XXXVII.

Motion costs—when paid.] In all cases where a motion shall be granted on payment of costs, or on the performance of any condition, or where the order shall require such payment or performance, the party whose duty it shall be to comply therewith shall have fifteen days for that purpose, unless otherwise directed in the order. And all further proceedings upon his part in the action shall be stayed until such payment or performance. But where costs to be adjusted are to be paid, the parties shall have fifteen days to comply with this rule after the costs shall have been adjusted by the Clerk, on notice; unless otherwise ordered.

Rule XXXVIII.

Calendar— motions to correct—when made.] All motions to correct the calendar, or to strike cases therefrom, shall be made by the second day of the term, and not thereafter.

Rule XXXIX.

Appeals from justice court—motions to dismiss.] Motions to dismiss appeals, except for want of jurisdiction, must be made by the second day of the term.

Rule XL.

Preliminary call of the calendar.] On the opening of the court on the first day of every general term thereof, the court shall call all actions on the calendar, for the purpose of determining which are for trial by jury at such term, and they shall be so marked on the calendar.

Rule XLI.

General term— morning hour.] At the opening of the court on the morning of each day, so much time as shall be necessary,

not exceeding one hour, shall be devoted to the hearing of such motions as relate to actions on the calendar for trial by jury, and to *ex parte* business.

RULE XLII.

DAY CALENDAR—HOW CONSTITUTED.] The first five jury causes shall constitute the day calendar for the first day of each general term.

Prior to the adjournment of court on the first day of the term, the Clerk, under direction of the court, shall prepare a list of ten causes in the order in which the same shall appear upon the general calendar, which list shall constitute the day calendar for the second day of the term, and for each subsequent day, until at least eight of such causes shall have been disposed of, when a new list of ten causes to be made in the same manner, including cases undisposed of upon such preceding day calendar, shall be made for the succeeding day, and lists in the like manner shall be made, until all the causes on the general calendar are disposed of, or the term shall be finally adjourned.

RULE XLIII.

CASES FIXED FOR A DAY CERTAIN.] No cause shall go to the foot of the general calendar, nor be set down for a particular day, unless the court, upon application, so orders, and when a cause is so set down by order of the court, it shall have precedence of all other cases not on trial.

RULE XLIV.

JUDGMENT—ENTRY OF.] Whenver judgment is entered on a promissory note, or other instrument for the payment of money only, against all the parties thereto, and the note or other such instrument is in the possession or under the control of the party entering the judgment, the same shall be filed with the judgment roll.

RULE XLV.

WITNESSES IN CIVIL CAUSES —TO CLAIM FEES—WHEN.] Upon their discharge from further attendance under subpœna, witnesses

in civil causes shall report to the Clerk their names, distances traveled, number of days' attendance, and the title of the case in which they were subpœnaed.

NOTE—The foregoing rules were adopted to govern the practice in the District Court of the Third Judicial District of the Territory of Dakota, August 1, 1883. At that time all the territory within the State of North Dakota comprised but one Judicial District, (the third.) These rules have never been abolished or superceded, and are still in force within the state.

The following additional rules have been adopted in the First Judicial District.

RULE XLVI.

PAPERS FILED WITH CLERK- WHEN.] In every action, or proceeding, the summons and complaint and all the pleadings in said action or proceeding shall be filed in the office of the Clerk of court, on, or before the first day of the term at which said action or proceeding may be properly tried, or heard; and no action or proceeding shall be tried or heard, until the summons and complaint and other pleadings are so filed, or copies thereof, when the parties desiring to proceed have not the custody or control of the originals.

RULE XLVII.

JUDGMENT ROLL—WHAT TO CONTAIN.] No judgment, upon a default, or upon trial by court, or jury, shall be signed by the court, or filed, docketed, or recorded by the Clerk, unless all papers constituting the judgment roll are presented to the court when application for judgment is made and immediately filed with the Clerk, after judgment is signed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH DAKOTA

HERMAN P. GAUTHIER *vs.* FELIX RUSICKA.

Opinion filed June 4th, 1892.

Vacation of Judgment—Failure to File Affidavit of Merits.

It is error to vacate a Judgment, under § 4939, Comp. Laws, where defendant fails to make an affidavit of merits, his answer not being verified.

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

Action by Herman P. Gauthier against Felix Rusicka to recover for services as physician and surgeon. Judgment for plaintiff. From an order vacating the judgment, plaintiff appeals.

Reversed.

D. W. Yorkey, (*McLaughlin & Morrison*, of counsel,) for appellant.

No brief filed for respondent.

CORLISS, C. J. The appeal is from an order vacating a judgment. The motion was made on the ground of surprise to defendant. The complaint was verified. The answer was not verified, but was received by plaintiff without objection. The case being at issue on the calendar of the District Court in and for the County of Walsh, the defendant failed to appear when the cause

was reached for trial, and the plaintiff, after proving his case, recovered judgment. Defendant was represented by his attorney at the time plaintiff proved his case. Subsequently, on motion of defendant, the court vacated this judgment. In this we think the court erred. Without considering whether the defendant, by his motion papers, made out a case to warrant the court in vacating the judgment, under the statute, (§ 4939, Comp. Laws,) it is elementary that the moving party must disclose merits, or the motion will be denied. He is in default, and the court will relieve him only in furtherance of justice. It is not even sufficient that he has a legal defense. If it is only technical in its character,—if it is unconscionable, repugnant to fair dealing,—the court will not grant him any indulgence. 1 Black, Judg. §§ 348, 349. The defendant did not present any affidavit of merits, nor was its place supplied by a verified answer. It is true that plaintiff accepted the answer without verification. But by this act he did not admit that defendant had a meritorious defense. He simply waived his right to insist on a verified answer as essential to put in issue the allegations of his complaint for the purposes of a trial, so long as defendant could stand on his legal rights. The question which the court is to determine on such a motion is whether there are merits on behalf of the defendant. The burden is on defendant to show this *prima facie*, and this he must do under oath. The answer is not verified. The affidavits used on the motion merely recite that an answer has been filed, setting up a certain defense. They do not attempt to support that defense under oath. They refer to it historically. They merely assert that it has been embodied in an answer. Whether it actually exists, they in no manner disclose. It is doubtful whether a verified answer would obviate the necessity of an affidavit of merits. There is much authority in support of the view that it will not, and the reasoning on which this doctrine stands is by no means destitute of force. See Id. § 347; Freeman Judg. § 108; *Jones* v. *Russell*, 3 How. Pr. 324; *Mowry* v. *Hill*, 11 Wis. 146. In *Town of Omro* v. *Ward*, 19 Wis. 232; the court regarded this rule as abrogated by statute in

that state, but the court was careful to assert that there must be a verified answer in such a case. "It is insisted that the judgment should not have been set aside, without an affidavit of merits accompanying the motion. Such an affidavit, on taking a default, was formerly held to be indispensable, [citing cases,] but probably the practice has been changed in this respect by chapter 211, laws of 1861, where the answer itself shows merits and is verified." As supporting the rule requiring an affidavit of merits, see 1 Black, Judg. § 347; Freeman Judg. § 108, and cases cited; *Parrott* v. *Den*, 34 Cal. 80; *Bailey* v. *Taaffe*, 29 Cal. 422; *Ice Co.* v. *Schlenken*, (Minn.) 52 N. W. Rep. 219. The order vacating the judgment is reversed. All concur.

(53 N. W. Rep. 80.)

FINLAY DUN, TRUSTEE *vs.* JOS. DIETRICH *et al.*

Opinion filed June 18th, 1892.

Implied Covenants in Deed, Restrained by Express Covenants.

The implied covenant against incumbrances raised under § 3249, Comp. Laws, by the use of the word "grant" in a conveyance in fee, is restrained, as against the grantor, by an express covenant against incumbrances limited by its terms to the heirs, executors, and administrators of the grantor.

Wife Joining in Deed to Release Homestead not Bound by Implied Covenant.

A wife who joins her husband in a deed of conveyance for no other purpose than to release her homestead right in the property is not bound by the implied covenant arising from the use of the word "grant."

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

Action by Finlay Dun, trustee of the North American Land Association (limited) against Joseph Dietrich and Nora Dietrich, to recover on the covenants in a deed against incumbrances. Judgment for defendants; plaintiff appeals.

Affirmed.

George W. Newton, for appellant.

"From the use of the word "grant" in any conveyance, the following covenants and none other on the part of the grantor, are implied unless restrained by express terms contained in such conveyance, viz: That such estate is, at the time of the execution of such conveyance, free from incumbrances done, made or suffered by the grantor or any person claiming under him."

Comp. Laws § 3249. There are no express terms contained in the conveyance in question restraining the force of the word "grant," as a covenant raised by the provisions of the statute. The deed then, contains the covenant of both respondents that the estate conveyed thereby was free from incumbrances done, made or suffered by them, or any person, claiming under them at the date of its execution. *Funk* v. *Voneida*, 11 Serg. & R. 109; *Seitzinger* v. *Weaver*, 1 Rawle 377; *Gates* v. *Cadewell*, 7 Mass. 68; *Hawk* v. *McCullough*, 21 Ill. 220; Rawle on Covenants, 369 and 383. The covenant of freedom from incumbrances is proved to have been broken by any evidence showing that a third person has a right to or an interest in the land granted, to the diminution of the value of the land, though consistent with the passing of the fee by the deed of conveyance. 2 Grf. Ev. § 42. Every burden on the estate or clog on the title is an incumbrance. *Seitzinger* v. *Weaver*, 1 Rawle 377; *Prescott* v. *Truman*, 4 Mass. 627; *Fritz* v. *Pusy*, 18 N. W. Rep. 94. An inchoate right of dower is an incumbrance. *Sherer* v. *Ranger*, 22 Pick. 447; *Jones* v. *Gardner*, 10 Johns. 267; *Bigelow* v. *Hulbard*, 97 Mass. 195; Rawle on Covenants 112, 113. So taxes levied upon an estate after transfer, upon an assessment made before. *Hill* v. *Bacon*, 110 Mass. 388; *Richard* v. *Bent*, 59 Ill. 38; *Long* v. *Moler*, 5 Ohio St. 271; *Cochrane* v. *Guild*, 106 Mass. 29.

Louis Hanitch and *Francis & Barnes*, for respondents.

The force of the statute (§ 3249, Comp. Laws) is destroyed by the special covenant against incumbrances contained in the deed, and the implied covenant from the use of the word "grant" is restrained by express terms contained in the deed, whereby the said Joseph Dietrich, covenants, not for himself, but for his heirs,

executor and administrators, that the premises are free from all incumbrances.

An express covenant in a deed takes away all implied covenants. *Vanderkarr* v. *Vanderkarr*, 11 Johns. 122; *Douglass* v. *Lewis*, 131 U. S. 75; 9 Sup. Ct. Rep. 634; *Bowne* v. *Wolcott*, 1 N. D. 497; 48 N. W. Rep. 426. The vendor selling in good faith is not responsible for the goodness of his title beyond the extent of his covenants in the deed. *Patton* v. *Taylor*, 48 U. S., (L. Ed.) 649; *Noonan* v. *Lee*, 17 (L. Ed.) 278. In an action on the covenant against incumbrances, the burden of proof is upon the plaintiff to show that any incumbrance was lawful. *Lathrop* v. *Grosvenor*, 76 Mass. 52; *Ogden* v. *Ball*, 41 N. W. Rep. 453; *Hamilton* v. *Cutts*, 4 Mass. 352. A covenant against incumbrances is not broken by the existence of a recorded tax deed which passes no valid title. *Tibbetts* v. *Leeson*, 18 N. E. Rep. 679.

BARTHOLOMEW, J. In February, 1883, the defendants, who are husband and wife, executed to plaintiff a deed to certain real estate in the city of Bismarck. Subsequently, plaintiff purchased a claim under a tax deed upon said premises. The tax deed was based upon a city tax for a sidewalk abutting the premises, which sidewalk was constructed prior to the execution of the deed from defendants to plaintiff, and while the defendant, Joseph Dietrich, was the fee owner of the premises. This claim is brought upon the covenants against incumbrances in the deed from defendants to plaintiff, to recover the amount paid for the claim under the tax deed. The case was tried to the court, and defendants prevailed. Plaintiff brings the case into this court. Numerous errors are assigned, but they all arise under one of two points: *First.* Does the deed sued upon contain any covenants that will sustain this action? *Second.* Was the claim for the sidewalk tax a valid lien against the property at the time of the conveyance? The second point becomes material only in case the first is resolved in favor of the plaintiff. The conveyance from defendants to plaintiff contains in the granting clause the words, "do hereby grant, bargain, sell, and convey," etc. It also contains the following special

covenant: "And the said Joseph Dietrich, party of the first part, for his heirs, executors, and administrators, does covenant with the party of the second part, his heirs and assigns, that he is well seized in fee of the lands and premises aforesaid, and has good right to sell and convey the same in manner and form aforesaid, and that the same are free from all incumbrances," etc. It is not claimed in this court that either of the defendants is liable upon the last covenant quoted, as by its terms it is limited to the heirs, executors, and administrators of Joseph Dietrich. See *Bowne* v. *Wolcott*, 1 N. D. 497; 48 N. W. Rep. 426. Section 3249, Comp. Laws, provides: "From the use of the word 'grant' in any conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants, and none other, on the part of the grantor, for himself and his heirs, to the grantee, his heirs and assigns, are implied, unless restrained by express terms contained in such conveyance: *First.* * * * *Second.* That such estate is at the time of the execution of such conveyance free from incumbrances done, made or suffered by the grantor, or any person claiming under him. Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance." It is upon the implied covenant arising from the use of the word "grant" in the deed that plaintiff bases his right to recover in this court. This right is challenged by respondent on the ground that the subsequent express covenant against incumbrances found in the deed restrains the implied covenant. A number of the states have statutes similar to ours. These statutes have for their foundation an act of the colony of Pennsylvania passed in 1715, which act was in turn based upon the statute of 6 Anne, c. 35, passed in 1707. These statutes have a common object, and that is to raise certain covenants by the use of the word "grant" or "grant, bargain and sell," against the grantor,—and sometimes his heirs also, as with us,—and in favor of the grantee, his heirs and assigns. Under the rule that covenants should be construed most strongly against the covenantor, courts have generally given effect to these implied covenants, even in cases where

there were limited express covenants, where the two were not inconsistent or were independent of each other, limiting the implied covenant against incumbrances to the personal act or sufferance of the grantor. *Gratz* v. *Ewalt*, 2 Bin. 68; *Seitzinger* v. *Weaver*, 1 Rawle 377; *Funk* v. *Voneida*, 11 Serg. & R. 109; *Shaffer* v. *Greer*, 87 Pa. St. 370; *Finley* v. *Steele*, 23 Ill. 56; *Alexander* v. *Schreiber*, 10 Mo. 460; *Shelton* v. *Pease*, Id. 473.

This statute has repeatedly met the animadversions of courts by reason of its dangerous tendency, because "calculated to entrap the ignorant and unwary into liability which they never intended to incur," and because "it has a bad effect to annex to words and arbitrary meaning far more extensive than their usual import, and which must be unknown to all but professional men." In this jurisdiction the use of the word "grant" is universal in conveyances of fee-simple estates, and it is almost equally universal that the parties to such conveyances guard their respective rights by the express covenants inserted. It is seldom, if ever, that a grantee receives a conveyance relying upon any covenants except such as are expressed, and certainly no grantor delivers a conveyance expecting to be held to a liability that he has not knowingly incurred. The only effect of the statute with us would seem to be to create liabilities not in the mind of both parties—probably of neither—at the time of the execution of the conveyance. But the implied covenants do not arise when inconsistent with the express covenants, or when it appears from the language used by the parties that it was not intended that any such covenant as that implied by the statute should take effect. *Douglass* v. *Lewis*, 131 U. S. 75; 9 Sup. Ct. Rep. 634; *Finley* v. *Steele*, *supra*; *Weems* v. *McCaughan*, 7 Smedes & M. 427. We held in *Bowne* v. *Wolcott*, *supra*, that when the covenant was limited to the heirs, executors and administrators of the grantor, and there was no charge of fraud or mistake in the deed, we were bound to presume that the parties intended the covenant to be so limited, and that the grantee accepted that covenant because he could get no better. Applying the law to this case, plaintiff accepted a deed

with an express covenant against incumbrances limited to the heirs, executors and administrators of Joseph Dietrich; that he accepted such deed because Dietrich refused to incur any personal liability upon such covenant. It is then morally certain that when the deed was delivered Dietrich did not intend to be bound by an implied covenant to a liability that he had refused to assume by an express covenant, and the plaintiff must have so understood it when he accepted the deed. This view is strengthened by the fact that, under our statute, the implied covenant applies to the grantor, his heirs, executors and administrators. It would be most unreasonable to suppose that the parties intended to have the representatives bound by one covenant and the grantor by another in the same deed. It follows from these views that the liability of Joseph Dietrich under the implied covenant is restrained by the terms of the express covenant, and that there is no covenant in the deed upon which Joseph Dietrich can be held in this action. The defendant, Nora Dietrich, is not a party to the express covenant, but, under the authorities already cited, the implied covenant is limited to the personal acts or sufferance of the grantor. Nora Dietrich had no interest in the land conveyed except her homestead interest. No obligation, legal or moral, rested upon her to pay the sidewalk tax, and it was not an incumbrance created or suffered by her. It follows that there is no covenant in the deed upon which plaintiff can recover in this action, and the judgment of the lower court must be affirmed. All concur.

(53 N. W. Rep. 81.)

EDMOND S. DOTY *vs.* FIRST NATIONAL BANK OF LARIMORE.

Opinion filed Aug. 5th, 1892.

National Banks—Transfer of Stock.

Section 5139, Rev. St. U. S., providing that the stock of a national bank shall be "transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association," was enacted for the benefit of the corporation, its shareholders and creditors, only: As to all other parties a transfer of such stock, good at common law, is good under the statute.

Priority of Transferee over Attachment Creditor.

Under the federal statutes, the rights of a transferee of national bank stock, under an unrecorded transfer, good at common law, are superior to the rights of a subsequent attaching creditor of the transferrer without notice.

State Cannot Regulate Transfer of National Bank Stock.

It is not competent for state legislation to limit or interfere with the transferable quality of national bank stock, as the same is left by the statutes of the United States.

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

Action by Edmund S. Doty against the First National Bank of Larimore, to recover damages for the refusal of defendant to transfer certain shares of stock on its books. Judgment for defendant. Plaintiff appeals.

Affirmed.

Bosard & Van Wormer, for appellants.

If plaintiff had a right to insist on the transfer, defendant is liable in damages for refusing to make the transfer. The damages are the value of the stock with interest. Boone on Corp. § 122, Note 13. *Bond* v. *Mt. Hope Iron Co.*, 99 Mass. 505; *Bank of America* v. *McNeil*, 10 Bush. (Ky.) 54; *Sargent* v. *Franklin Ins. Co.*, 8 Pick. 90; *Kortright* v. *Buffalo Bank*, 20 Wend. 91; S. C., 22 Wend. 348; *Dayton Nat. Bank* v. *Merchants Nat. Bank*, 37 Ohio St. 208; *Case* v. *Bank*, 100 U. S. 446; *Freon* v. *Carriage Co.*, 42 Ohio St. 30; *Kimball* v. *Union Water Co.*, 44 Cal. 173; *Baltimore City Passenger Ry. Co.* v. *Sewell*, 35 Md. 238; S. C., 6 Am. Rep. 402; *Baker* v. *Marshall*, 15 Minn. 177. Lawson's Rights Rem. & Pr., § 466. It is

insisted that the case falls within the provisions of § 2915, Comp. Laws. Under such a statute the rights of attaching creditors, without notice of a prior unrecorded transfer, are superior to such transfer. Cases cited in opinion of court *in re.* Argus Printing Co., 1 N. D. 434; S. C., 48 N. W. Rep. 347, 350; *Conway* v. *John*, 23 Pac. Rep. 170; *Buttrick* v. *Nausha R. R.*, 62 N. H. 413; S. C., 13 Am. State Rep. 578.

Newman & Resser, for respondents.

The defendant is a creature of the statutes of the United States, and claims immunity under those statues. The state can exercise no control over national banks, except in so far as congress may permit. *Farmers & Mechanics Nat. Bank* v. *Dearing*, 91 U. S. 29.

National banks are means and instrumentalities adopted by congress to promote and faciliate the fiscal operations of the government and as such are under the exclusive control of congress, *Bank* v. *Deering*, 91 U. S. 29; *Osborne* v. *Bank*, 9 Wheat, 708; *McCulloch* v. *Maryland*, 4 Wheat, 316. To the point that the transferee of stock not recorded, has a superior right to a subsequently attaching creditor, *Bank* v. *Lanier*, 11 Wal. 369; *Bank* v. *Eliot Nat. Bank*, 7 Fed. Rep. 369; *Scott* v. *Pequannock Nat. Bank*, 15 Fed. Rep. 494; *Dickinson* v. *Central Nat. Bank*, 129 Mass. 179; *Boston etc. Assn.* v. *Cory*, 129 Mass. 435; *Libby* v. *Bank*, 133 Mass. 515.

BARTHOLOMEW, J. This case was tried by the court, and the facts are undisputed. On and prior to November 6th, 1886, one C. C. Wolcott was the absolute owner of 220 shares of stock of the respondent bank, and held certificates for the same. On the 6th and 20th days of November, 1886, said Wolcott in writing assigned said certificates to A. J. Bowne, president of respondent bank, and delivered the same to him as collateral security for the amounts which Wolcott was owing the respondent bank and the Hastings National Bank, of Hastings, Mich. These amounts aggregated $23,000, and no portion of such indebtedness had been paid when the case was tried below. The value of the stock assigned was $22,000. The stock was not transferred on the

books of the respondent bank, but, so far as shown by said books, Wolcott continued to be the absolute owner thereof, until after the attachment hereafter mentioned was levied. On July 5th, 1888, an action was commenced by D. B. Doty & Co. against said Wolcott and others in the District Court of Grand Forks County. The action was aided by attachment, and on July 19th, 1888, the sheriff of said county duly levied upon said shares of stock by serving the proper notice upon the cashier of the respondent bank. At the time of such levy the stock stood upon the books of the bank in the name of said Wolcott, and neither the plaintiff in the attachment action nor the officer making the levy had any knowledge of the assignment to Bowne. The certificates of stock provided that the stock should be transferable only on the books of the bank upon the surrender of the certificates. Subsequently D. B. Doty & Co. recovered judgment in the attachment action, execution was issued, and the sheriff of said county, under such execution, sold the shares of stock upon which the attachment had been laid to Edmund S. Doty, the appellant herein, and executed the usual sheriff's certificate of sale therefor. Immediately thereafter appellant presented to the respondent bank a duplicate copy of such certificate, together with a written demand that such stock be transferred to him upon the books of the bank, and stock certificates issued to him therefor. This the bank refused to do or to permit to be done; whereupon this action was brought to recover from the bank the value of such shares of stock. But one question of law is urged for our determination, and it is this: Under the facts disclosed, could appellant, under and by virtue of said sheriff's sale, acquire any right or title to the shares of stock of a national bank superior to the title and rights of Bowne under the assignment and delivery? If so, then the respondent bank improperly refused to make the transfer, and is liable for the value. *Sargent* v. *Insurance Co.*, 8 Pick, 90; *Bond* v. *Iron Co.*, 99 Mass. 505; *Shipley* v. *Bank*, 10 Johns, 484; *Freon* v. *Carriage Co.*, 42 Ohio St. 30. If not, the refusal was justified, and no liability attaches. Sections 5003, 5005, Comp. Laws, make property in this

state, incapable of manual delivery, liable to seizure upon attachment or execution, and specify the means by which it may be so seized. Section 5003 reads: "The rights or shares which such defendant may have in the stock of any association or corporation, together with the interest and profits thereon, and all other property in this territory of such defendant, shall be liable to be attached and levied upon, and sold to satisfy the judgment and execution." Section 5004 provides, in effect, that shares in a corporation may be attached by a sheriff by leaving with the president, secretary, cashier, or managing agent of such corporation a certified copy of the warrant of attachment, with a written notice specifying the property attached. Section 5005 provides: "Whenever the sheriff shall, with a warrant of attachment or execution against the defendant, apply to such officer, debtor, or individual, for the purpose of attaching or levying upon such property, such officer, debtor, or individual shall furnish him with a certificate, under his hand, designating the number of rights or shares of the defendant in the stock of such association or corporation, with any dividend or incumbrance thereon, or the amount and description of the property held by such association, corporation, or individual, for the benefit of or debt owing to the defendant." The sufficiency of the formal steps in this case is not questioned, nor is any claim made that shares of corporate stock, when actually owned by a defendant in attachment at the time of the levy, are not subject to the levy. Section 2915, Comp. Laws, provides: "* * * Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock are personal property, and may be transferred by indorsement, by the signature of the proprietor, or his attorney or legal representative, and delivery of the certificate; but such transfer is not valid, except between the parties thereto until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of the transfer." The last sentence in § 2937 reads:

"Such stock and transfer book must be kept open to the inspection of any stockholder, member, or creditor."

The learned counsel for the appellant contend that our statutes constitute a registry law in the fullest sense, and that under the law a creditor attaching corporate stock without notice is fully protected against any transfer or assignment which does not appear upon the books of the corporation. The decisions of the state courts, under statutes more or less similar to our own, are by no means uniform, and we do not feel called upon in this case to rule upon the question presented, but will assume that our law is a registry law.

But the stock here involved consists of shares in a national bank, organized and existing under and by virtue of the laws of congress. National banks are fiscal agencies of the government, and congress is the sole judge of the necessity for their creation, and, having been brought into existence by congress, the state can exercise no control over them, nor in any wise effect their operation, except in so far as congress may see proper to permit. *Bank* v. *Dearing*, 91 U. S. 29. Section 5136, Rev. St. U. S. gives to a national bank power to prescribe, by its board of directors, by-laws not inconsistant with law, regulating the manner in which its stock shall be transferred; and § 5139 provides that shares of stock shall be transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. It appears from the findings that the certificates of stock stated that said stock should be transferable only on the books of the bank on surrender of said certificates, and, as such certificate issues under the corporate seal, we must assume, nothing to the contrary appearing in the record, that such statement was in pursuance of a duly adopted by-law. But, giving the statement the force of a by-law, still we think the federal authorities would sustain the assignment to Bowne as against appellant. In *Bank* v. *Lanier*, 11 Wall. 369, the owner of national bank stock pledged the same with power of attorney to sell and transfer the same on the books of the bank, but did not assign nor deliver the

certificates. Subsequently he sold the shares, and assigned and delivered the certificates to Lanier and Handy. The certificates contained the same statement as to the manner of transfer that is found in this case. Two years after their purchase Lanier and Handy applied to the bank to have the stock represented by the certificates which they held transferred to them. This the bank refused to do, on the ground that the stock had already been transferred by virtue of a sale under the former power of attorney. It was held that this refusal was unwarranted; that the party who held the certificates was entitled to the stock; and that the bank could only transfer the stock upon the surrender of such certificates. Upon the authority of *Bank* v. *Lanier*, it was held in *Continental Nat. Bank* v. *Eliot Nat. Bank*, 7 Fed. Rep. 369, that an unrecorded transfer of national bank stock will take precedence of subsequent attachment in behalf of a creditor without notice. This case was followed by *Scott* v. *Bank*, 15 Fed. Rep. 494, and *Hazard* v. *Bank*, 26 Fed. Rep. 94, in each of which the same ruling is made, and the Supreme Court of Massachusetts in *Sibly* v. *Bank*, 133 Mass. 515, construing the national bank act in the light of federal decisions and policy, reached the same conclusion.

We do not think these decisions are weakened in the least by an uncertain *dictum* contained in *Johnston* v. *Laflin*, 103 U. S. 800, where it is said that the transfer on the books of the bank required by the act of congress "is necessary to protect the seller against subsequent liability as a stock holder, and perhaps to protect the purchaser against proceedings of the seller's creditors. Purchasers and creditors, in the absence of other knowledge, are only bound to look to the books of registry of bank." The question of the rights of the seller's creditors was in no manner involved in *Johnston* v. *Laflin*. Following the decisions heretofore cited, we hold that the act of congress pertaining to the transfer of national bank stock, and the by-laws adopted in pursuance of said act, do not constitute a registry law; that such provisions were enacted for the benefit of the corporation, its stockholders

and creditors, and that as to all other persons a transfer of stock, good at common law, is good under the federal statutes; and that under said statutes the rights of a transferee under an unrecorded transfer, good at common law, are superior to the rights of a subsequent attaching creditor of the transferrer without notice. It remains, then, only necessary to ascertain what effect, if any, a state statute can have in limiting the mode of transfer of such stock.

It was settled by the case of *Black* v. *Zacharie*, 3 How. 483; that the validity of an assignment of corporate stock depended upon the law of the state where the corporation was located, and not upon the law of the state where the assignment was made. Authority is hardly necessary upon the proposition that the sovereignty which creates the corporation must have the exclusive right to direct the manner in which the stock of such corporation must be transferred, at least when the corporation is located and doing business exclusively within the jurisdiction of the creating sovereignty. The effect to be given state statutes, so far as they may interfere with or limit the transferability of national bank stock, is, of course, purely a federal question, and we ought to be governed in this matter by the decisions of the United States courts. In *Continental Nat. Bank* v. *Eliot Nat. Bank*, *supra*, a party residing at Boston, Mass., assigned and forwarded certificates of stock in Eliot National Bank, located at Boston, to the plaintiff bank, located at New York. Subsequently, and before any transfer was made upon the books of the Eliot National Bank, that bank attached the stock as the property of the transferrer. United States Circuit Judge Lowell, sitting in Massachusetts, said: "It has been very ably urged that, by the law of Massachusetts, the attachment would have the preference. This I consider doubtful; but the decision does not depend upon the law of Massachusetts. It is not important to consider whether the contract was consummated in Massachusetts or New York. The negotiability or transferable quality of the stock of a national bank depends upon the laws of the United States." Citing, *Dickinson* v. *Bank*,

129 Mass. 279. * * * "The time and mode of attaching property and its effect in general are part of the law of the forum; but its operation upon unrecorded transfers of shares in national banks is regulated by the law which creates the shares, and provides for their conveyance and registration." Again, in *Scott* v. *Bank*, *supra*, the same question was before the United States Circuit Court sitting in New York. The stock involved was stock of a national bank located in Connecticut, and it was urged that, under the decisions of that state, the attachment would have preference, but the court said: "The defendant having been incorporated under the national banking act, the rules which regulate the transfers of its stock are to be found in the statutes of the United States." And, after quoting the statute, the court adds: "The construction of the statute, and the question of title as between the assignee and the attaching creditor, are not controlled by the tenor of the decisions of any one state." These decisions seem to be decisive of the point under discussion. In their absence we might, perhaps, have reached a different conclusion, under the broad language used in *National Bank* v. *Com.*, 9 Wall. 353. In speaking of the principle that government agencies cannot be subjected to state legislation, as announced in *McCulloch* v. *Maryland*, 4 Wheat. 316; and the cases following that decision, Justice Miller, speaking for the full bench, said: "The principle we are discussing has its limitation,—a limitation growing out of the necessity on which the principle is founded. That limitation is that the agencies of the federal government are only exempted from state legislation so far as that legislation may interfere with or impair their efficiency in performing their functions by which they are designed to serve that government. * * * It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." But the cases cited from the Federal Circuit Courts were decided long after *Bank* v. *Com.*, and involve the precise point here raised, and we deem them conclusive upon us.

The judgment of the District Court is therefore affirmed.

WALLIN, J., concurs.

CORLISS, C. J., having been of counsel, did not sit in the case or take part in the decision.

(53 N. W. Rep. 77.)

FRED. H. SMITH *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

Opinion filed Aug. 26th, 1892.

Removal of Causes Amount in Controversy—Allegations of Complaint.

The amount demanded in the complaint, in an action for damages caused by negligence, controls in determining whether the matter in dispute exceeds the sum or value of $2,000, exclusive of costs and interest, on application to remove the cause to the Federal Court on the ground of diverse citizenship, although the value of the property destroyed by the negligence is alleged in the complaint to be greater than $2,000.

Notice of Trial—Sufficiency.

When the notice of trial contains an error in the date of the commencement of the term, the month and year being stated correctly, the notice is sufficient, as a litigant is bound to know when terms of court are held, and is therefore apprised of the mistake in the notice and of the true date intended to be specified therein.

Additional Terms of Court.

Under chapter 79, § 10, Laws 1891, the same business can be transacted at an additional term of court called by the judge as at the terms fixed by the statute. New cases can be noticed for such term and placed on the calendar thereof, and tried thereat.

Sparks from Locomotive—Presumption of Negligence.

The presumption of negligence from the setting out of a single fire by an engine is one of law, and whether such presumption has been fully met and overthrown is in the first instance a question for the court. Evidence examined, and *held* sufficient to overthrow the presumption in this case.

Question of Negligence for the Jury.

The mere fact that the fire was started 118 feet from the track is not sufficient in itself to warrant submission of the question of negligence to the jury.

Appeal from District Court, La Moure County; *Rose*, J.

Action by Fred. H. Smith against the Northern Pacific Railroad

Company, for damages caused by a prairie fire set by one of defendant's locomotives. Judgment for plaintiff. Defendant appeals.

Reversed.

W. F. Ball and *J. S. Watson*, (*John C. Bullitt, Jr.*, of counsel,) for appellant.

Section 5097, Comp. Laws of N. D., is identical with § 580, Code of Civil Procedure of California. Under this section it has been held that if there is an answer, the court may disregard the prayer in the complaint and give the plaintiff suitable relief. *Truebody* v. *Jacobson*, 2 Cal. 283; *N. C. & S. C. Co.* v. *Kidd*, 37 Cal. 301; *Cassacia* v. *Phœnix Co.*, 28 Cal. 628. Until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction; but when it is shown that the sum demanded is not the real matter in dispute, the sum shown and not the sum demand, will prevail. *Hilton* v. *Dickinson*, 108 U. S. 165; *Wilson* v. *Daniel*, 3 Dall. 401; *Elgin* v. *Marshall*, 106 U. S. 578; *Platt* v. *Phœnix Co.*, 37 Fed. Rep. 730; *Hullscamp* v. *Teel*, 2 Dallas 358; *Gordon* v. *Longist*, 16 Pet. 97; *Barry* v. *Edmonds*, 116 U. S. 550. The presumption of negligence cast upon defendant by proof that it set out the fire, is a presumption of law and not of fact. In *Johnson* v. *N. P. R. R. Co.*, 1 N. D. 354; S. C., 48 N. W. Rep. 227; it is said that proof of the setting out of fire creates a disputable presumption of negligence. This decision established the same rule with respect to imputed negligence in fire cases as already existed by force of statute in stock-killing cases. Section 5501, Comp Laws. This section of statute construed in, *Volkman* v. *C., St. P., M. & O. R. R. Co.*, 5 Dak. 69; S. C., 37 N. W. Rep. 731; *Knapp* v. *Bank*, 5 Dak. 378; S. C., 40 N. W. Rep. 587; *Gay* v. *R. R.*, 5 Dak. 514; S. C., 41 N. W. Rep. 757; *Huber* v. *C. M. & St. P. R. Co.*, 6 Dak. 392; *Pattee* v. *C. M. & St. P. R. R. Co.*, 5 Dak. 267; S. C.; 38 N. W. Rep. 435. It is a question for the court to determine when this *prima facie* evidence is overcome. *Railroad Co.* v. *Wamscott*, 3 Bush. 149; *Railroad Co.* v. *Talbot*, 78 Ky. 621; *Railroad* v. *Packwood*, 7 A. & E. R. R. C. 584; where the rebutting testimony is as broad

as the negligence alleged and in all points refutes it, it is for the trial court to pass upon the question and withdraw it from the consideration of the jury. *R. R.* v. *Reese*, 85 Ala. 497; *Telley* v. *R. R.*, 49 Ark. 535; *R. R.* v. *Quantance*, 58 Ill. 389; *R. R.* v. *Clampit*, 63 Ill. 95; *R. R.* v. *Campbell*, 86 Ill. 443; *R. R.* v. *Goyette*, 133 Ill. 121; *Railroad* v. *Gibson*, 42 Kan. 34; *R. R.* v. *Brinkman*, 64 Md. 52; *Hoffman* v. *Railroad*, 43 Minn. 334; *Wise* v. *Railroad*, 85 Mo. 178; *Railroad* v. *Westover*, 4 Neb. 68; *Searles* v. *Railroad*, 101 N. Y. 662; *Cleveland* v. *Railroad*, 42 Vt. 449; *Spaulding* v. *Railroad*, 30 Wis. 110; *Contra. Ganda* v. *Chicago, etc., R. Co.*, 30 Ia. 20; *Babcock* v. *R. R. Co.*, 17 N. W. Rep. 909; S. C., 13 N. W. Rep. 740; 28 N. W. Rep. 644. If sparks escape without negligence and inflict damage, the result must be borne by the party suffering the loss. *Pelke* v. *R. R. Co.*, 5 Dak. 444; *White* v. *R. R. Co.*, (S. D.) 47 N. W. Rep. 146; *Gram* v. *R. R. Co.*, 1 N. D. 252; *Johnson* v. *R. R. Co.*, 1 N. D. 354. Accident must be shown to have happened by defendant's negligence in order that it be held. The Nellie Flagg, 23 Fed. Rep. 671; Cooley on Torts, 670; *Rudolph* v. *Fuchs*, 44 How. Pr. 155; *Houfe* v. *Fulton*, 29 Wis. 296; *Fernandez* v. *R. R. Co.*, 52 Cal. 45; *Garrett* v. *Railroad*, 77 Am. Dec. 423; *Gagg* v. *Vetter*, 13 Am. Rep. 322; *Baulec* v. *Railroad*,, 59 N. Y. 356; *Commissioners* v. *Clark*, 4 Otto 278. The presumption of negligence arising from proof of setting out of fire having been overcome by evidence, showing that the most approved appliances for preventing the escape of sparks were in use, that they were in good order and the engine carefully managed and operated by competent servants, the plaintiff cannot recover unless he then proves other acts of negligence which caused the fire to escape. *Wise* v. *Joplin*, 85 Mo. 178; *Railroad Co.* v. *Pennell*, 110 Ill. 437; 1 Thomp. on Neg. 155, *Montgomery* v. *Muskegon*, 50 N. W. Rep. 729.

Samuel L. Glaspel, for respondent.

The defendant by not returning the notice of trial and not making prompt objection thereto and not being misled thereby, waived any defects therein, Waits N. Y. Code, 448, note d; *Ins.*

Co. v. *Kelsey*, 13 How. Pr. 535; *Silliman* v. *Clark*, 2 How. Pr. 160; *Bander* v. *Covill*, 4 Cow. 60. The presumption of negligence on one side and the rebutting evidence on the other produces a conflict and therefore an issue for the jury, *Babcock* v. *R. R. Co.* 17 N. W. Rep. 909; *Dunning* v. *Bond* 38 Fed. Rep. 813; *Hoorer* v. *Ry. Co.* 16 S. W. Rep. 480; *Ry. Co.* v. *Bartlett*, 16 S. W. Rep. 638. Proof that a cinder was thrown 118 feet from the track, was evidence for the jury from which they might infer negligence. *Greenfield* v. *Ry. Co.* 49 N. W. Rep. 95; to same effect, *Ry. Co.* v. *McClelland*, 42 Ill. 355; *Doyscher* v. *Ry. Co.* 45 N. W. Rep. 719; *Ry. Co.* v. *Boss*, 41 Fed. Rep. 917.

CORLISS, C. J. The plaintiff and respondent has recovered judgment for damages occasioned by a prairie fire set out by one of defendant's locomotives. Before coming to the merits we, have several questions to dispose of. In due time the defendant presented to the District Court of the state its petition for removal of the cause to the Federal Circuit Court. The denial of this application for removal is assigned as error. The only point here involved is whether the matter in dispute in this case at the time of filing this petition exceeded, exclusive of interest and costs, the sum or value of $2,000. If not, the trial court was right in refusing to grant the prayer of the petition. If, on the other hand, it did exceed $2,000, the trial court had no jurisdiction, after the filing of the petition, to proceed further with the cause, and the judgment is void. We are satisfied we must sustain the action of the trial court in this behalf. While it is true that it is stated in the complaint that the value of the property destroyed by the fire was over $2,000, the plaintiff expressly limited his demand to that sum. This demand governs in actions of this character. Of course it might not control when in excess of the alleged value of the property destroyed. But the injured party may, if he sees fit, waive his right to recover full damages, and in that case the litigation involves only the amount which he seeks to recover. We cite, as sustaining our ruling on this point, Fost. Fed. Pr. § 16 and cases cited: Desty, Rem. Causes, p. 246,

§ 10; Dill. Rem. Causes, c. 16; *De Camp* v. *Miller*, 44 N. J. Law, 617-620.

It is next urged that the court erred in proceeding with the trial of the case against the objections of the defendant, because, it is insisted, the notice of trial was insufficient. The notice stated that the issues would be tried at LaMoure, in the County of LaMoure, on the 1st day of September, 1891. As a matter of fact the term did not commence on that day, nor until September 15th, 1891. The term fixed by the statute would have commenced on the 4th Tuesday of October. Chapter 79, Laws 1891, § 4. But a term had been called by the district judge for September 15th, and it was at this term that plaintiff moved the cause for trial. The objection is devoid of merit. The only object of a notice of trial is to give the party on whom it is served a chance to prepare for trial. A notice of trial, erroneous as to the day of trial, is nevertheless sufficient, if such notice, when read in the light of other information which the law gives, truly informs the party as to the time and place of trial. The defendant could not have failed to understand that the purpose of the plaintiff was to insist on a trial of this cause at the next ensuing term to be held in LaMoure county. As the time of the holding of such a term was fixed by the call of the district judge, the defendant, in common with all others interested in the matter, had notice that a term would commence September 15th, and not September 1st, as stated in the notice of trial, and was therefore aware that the date in the notice was an error, and was bound to know what the correct date was. We are clear that the trial court was right in over-ruling the point. See *Insurance Co.* v. *Kelsey*, 13 How. Pr. 535. Where an error in the date of a notice of trial occurs, it cannot mislead the opposing party, as the date of the commencement of the term is a matter of which he is bound to inform himself, and a comparison of that date with the date specified in the notice of trial will always disclose the error.

The point is made that at a term called by the district judge under the statute no new business can be taken up, and no new

cases placed on the calendar and tried. We think there is nothing in this point. The judge is authorizcd to call additional terms of court. Chapter 79, Laws 1891, § 10. There is nothing in the statute to limit the nature of the business to be transacted at such terms. They are as much terms of court as those fixed by the statute itself.

We now come to the merits of this litigation. Plaintiff had judgment below. It is contended by the defendant that although there is sufficient evidence to support the finding of the jury that sparks from defendant's engine set the fire which destroyed plaintiff's property, yet that, on the whole case, there was no question of negligence to submit to the jury. There was only one fire set out. We have already held that this fact raises a disputable presumption of negligence. *Johnson* v. *Railroad Co.*, 1 N. D. 354; (48 N. W. Rep. 227.) Whether such a presumption has been fully met and overthrown by the defendant's evidence is, we think, in the first instance, a question of law. We do not think that an inference of negligence naturally arises from the mere fact that a single fire has been started by a passing engine. That locomotives in operation do emit sparks which set fires is a matter of common knowledge. The inference that the fire was accidently started is certainly as strong as the inference of negligence in the origin of the fire. But to prevent a denial of justice some of the courts have created an artificial presumption of negligence, to the end that the defendant may be compelled to produce the witnesses who are familiar with the facts on which the issue of negligence depends, that they may be subjected to full and searching cross-examination on all the phases of the case,—on all the possible grounds of negligence. Some courts have refused to go so far. To extend this presumption of negligence beyond the reason for its existence would be irrational. It summons defendant to show that there was no negligence; and the evidence must fully meet every possible ground of negligence under the circumstances and the pleadings. But when the whole case, independently of this artificial presumption, shows that there

was no negligence, the presumption cannot be considered for the purpose of making an issue for the jury. It has fully served its purpose, and can have no other effect. We therefore establish it as the rule in this state that the court must, in the first instance, determine the question whether the inference of negligence arising from the mere setting out of a single fire has been fully overthrown. We cite the following cases, out of a large number, as sustaining our view: *Spaulding* v. *Railroad Co.*, 30 Wis. 110, 33 Wis. 582; *Volkman* v. *Railroad Co.*, 5 Dak. 69, 37 N. W. Rep. 731; *Huber* v. *Railroad Co.*, 6 Dak. 392; 43 N. W. Rep. 819; *Koontz* v. *Railroad Co.*, (Or.) 23 Pac. Rep. 820; *Kelsey* v. *Railroad Co.*, (S. D.) 45 N. W. Rep. 204; *Railroad Co.* v. *Talbot*, 78 Ky. 621; *Railroad Co.* v. *Packwood*, 7 Am. & Eng. R. Cas. 584; *Railroad Co.* v. *Reese*, 85 Ala. 497; 5 South Rep. 283. It remains to be seen whether defendant overthrew the presumption of negligence, and, if so, whether there were facts in addition to the mere starting of the fire tending to show negligence on the part of the defendant. After a careful review of the evidence we are convinced that defendant, by its evidence, did all that was incumbent on it,—*i. e.*, disproved that it was negligent in respect to the condition of the engine and the manner of operating it. We will not incumber this opinion with a statement of the evidence. Cases of this kind are of little value as precedents, for the facts differ so in different cases. The language of the court in *Hoffman* v *Railroad Co.*, (Minn.) 45 N. W. Rep. 608; that a jury is not bound to accept as conclusive the statements of a witness that an engine was in good order and carefully operated, although there is no direct evidence to the contrary, must be read in the light of the facts of that case. There the testimony as to inspection was not satisfactory to the court, not because the connection of the witness with the defendant was regarded as affecting their credibility, but because the evidence as to inspection left a suspicion that proof of an inspection made at a time nearer to the time of the setting out of the fire would have disclosed some defect. It is apparent that if the testimony of the railroad employes is to be

regarded as insufficient to disprove negligence, because of the relation they sustain to the defendant to the litigation, then in every case the question of negligence must be left to the jury, although there is nothing to support a finding of negligence, save an arbitrary presumption, not founded in reason, and adopted merely to compel a full disclosure by the railroad of all the facts surrounding the case.

We think the presumption was fully met, and it only remains to be considered whether there was any evidence tending to show negligence. After this presumption was overthrown, all that seems to be urged as supporting the claim of negligence is the fact that the fire started 118 feet from the track. But there is no evidence that this is an unusual occurrence, or that it is at all inconsistent with the exercise of due care. We cannot say that the mere fact that a fire was set that distance from the track indicates negligence in any respect. The wind was blowing very hard, and we cannot say, in the absence of testimony to that effect, that a spark, which, without fault on the part of the defendant, might have escaped through the meshes of the wire netting, could not have been carried 118 feet from the track, and set a fire, as well as 50 feet, and set a fire. The time consumed in the flight of a spark 118 feet through the air must, with a high wind blowing, be scarcely appreciable. There is nothing in the evidence to show that it would require an unusually large spark to live through such a flight, and start a fire. We have examined many cases, but, as each case depends upon its own peculiar facts, it would be useless to cite them. We will, however, refer to one which is confidently relied on as an authority. It is *Greenfield* v. *Railroad Co.*, 49 N. W. Rep. 95,—an Iowa case. The opinion is not satisfactory in its reasoning. The chief thought running through the opinion is that defendant failed to overthrow the presumption of negligence, because there might have been other particulars in which defendant might have been negligent, aside from defects in the engine or in its construction, and aside from carelessness in operating it. In what such negligence could

consist, or how it could have been instrumental in causing the fire, was not pointed out by the court. We do not approve of holding one liable on a conjecture of possible negligence. The better rule is that the arbitrary presumption is overcome when the defendant has disproved negligence in those particulars as to which negligence might reasonably exist under the circumstances. And of course the plaintiff must be limited to the grounds of negligence set forth in his complaint. The court in this case justified this extreme doctrine by the language of the statute of that state, which, by its terms, clearly imports an absolute liability for fire, irrespective of negligence; the statute providing that "any corporation operating a railroad shall be liable for all damages by fire that is set out or caused by the operation of any such railroad." Civil Code, Iowa, § 1289. Say the court: "The construction of § 1289, of the Code requires a holding of absolute liability for such fires, or such a rule as this as to presumptions." If that court intended to decide that the mere fact that a single fire was set, as in that case, 116 feet from the track, was enough to carry the case to the jury, we must express our disapproval of such a rule. The other cases cited to support the claim that the setting of the fire 118 feet from the track was enough to carry the case to the jury, do not warrant any such doctrine. There were other elements which controlled these decisions. In *Railroad Co.* v. *McClelland*, 42 Ill. 355, where the fire caught 100 feet from the track, the court say: "There was no proof that the engine which threw the sparks into the plaintiff's meadow was provided with any means by which they might have been arrested. Indeed it is shown by the testimony of some of the engine drivers, sworn on behalf of the defendant, that an engine thus provided will not throw sparks 100 feet, though the wind might carry them twenty or thirty feet." In *Doyscher* v. *Railroad Co.*, (Minn.) 45 N. W. Rep. 719; where the fire started eighty-six feet from the track, there was testimony that, at the point where the fire was set out, there was found a coal cinder so large that it could not have passed through the meshes of the wire netting had it been in proper condition. In

Railroad Co. v. *Boss*, 41 Fed. Rep. 917; there was no evidence whatever showing that the engineer was a competent man, or that he operated the engine in a skillful manner. In this case the sparks were not only carried 100 feet from the track, but were thrown fifty feet into the air above the smoke stack, and there was evidence in the case, coming from the lips of the defendant's own skilled employe, tending to show that such a fact indicated that the engine was not in good condition. We are of opinion that the court should have granted the defendant's motion to direct a verdict in its behalf, and the judgment and order are therefore reversed, and a new trial ordered.

WALLIN, J., concurs.

BARTHOLOMEW, J., having been of counsel, did not sit on the hearing of the above case, nor take any part in the decision.

(53 N. W. Rep 173.)

NORTHERN DAKOTA ELEVATOR COMPANY *vs.* CLARK & SMART, AND MCDERMOTT, ASSIGNEE.

Opinion filed June 20th, 1892.

Confusion of Goods—Preferances—Right to Pursue in Hands of Third Party.

Where the property of one is received by another, this, of itself, does not entitle the owner to priority of payment out of the general assets of the one receiving the property. To recover his property, the owner must be able to trace and identify it in some form. When it is mingled indistinguishably with the mass of property of the one receiving it, or when, as in the case of money, it is paid out by him, the right to pursue it is lost, because identification is impospossible. Mere enrichment of the estate or extinguishment of debts with the property received will not make the owner thereof a preferred creditor.

Appeal from the District Court, Griggs County; *Rose*, J.

Action by the Northern Dakota Elevator Company against George Clark and others to recover certain money claimed to be

in the hands of one of defendants as assignee of Clark & Smart. Judgment for plaintiff. Defendants appeal.

Reversed.

David Bartlett, for appellants.

Owners seeking to follow their property or its proceeds, must trace it into defendant's possession, *Whelley* v. *Foy*, 6 Johns. 34; *Van Allen* v. *Bank*, 52 N. Y. 1; *Bank* v. *Ins. Co.* 104 U. S. 54; *Kip* v. *Bank*, 10 Johns 63; *Bank* v. *King*, 57 Pa. St. 202; *Cook* v. *Tullis*, 18 Wall. 332; *Schuler* v. *Bank*, 27 Fed. Rep. 424. To impress a trust character upon funds which an agent has misapplied it is incumbent upon the principal to clearly trace such funds into the hands of the party against whom relief is sought. *Commercial Nat. Bank* v. *Armstrong*, 39 Fed. Rep. 684; *Illinois, Trust & Savings Bank* v. *First Nat. Bank*, 15 Fed. Rep. 858; *Bank of Commerce* v. *Russell*, 2 Dill. 215; Storys, Eq. Jur. 1259; *Edson* v. *Angel*, 25 N. W. Rep. 307; Appeal of Hopkins Exr. 9 At. Rep. 867; *Cavin* v. *Gleason*, 11 N. E. Rep. 504.

Edgar W. Camp, for respondent.

If the property can be traced into the estate of the defaulting agent or trustee, this is sufficient. *National Bank* v. *Ins. Co.* 104 U. S. 54; *Van Alen* v. *Am. Nat. Bank*, 52 N. Y. 1; *People v. City Bank of Rochester*, 96 N. Y. 32; *Peak* v. *Ellicott*, 1 Pac. Rep. 499. The defendants having used respondents money in their business, having benefited their estate by such use a trust attaches to that estate which came to McDermott under the assignment. *Peak* v. *Ellicott*, 30 Kan. 156; S. C. 1 Pac. R. 499; *McLeod* v. *Evans*, 28 N. W. Rep. 173; S. C. 66 Wis. 406; *People* v. *City Bank of Rochester*, 96 N. Y. 35; *Nurse* v. *Satterlee*, 46 N. W. Rep. 1102; *Farmers etc. Bank* v. *Milling Co.* 47 N. W. Rep. 402; *Independent Dist.* v. *King*, 45 N. W. Rep. 908; *Davenport Plow Co.* v. *Lamp*, 45 N. W. Rep. 1049; *Importers Bank* v. *Peters*, 25 N. E. Rep. 319.

CORLISS, C. J. By this proceeding the plaintiff is seeking to follow its money, claimed to be in the hands of the defendant McDermott, as assignee of Clark & Smart. It is insisted by the

defendant McDermott that this money never reached the possession of Clark & Smart, and that, if it did, it had become so mingled with their general assets that it could no longer be traced and identified, either in its original or in a changed form, at the time their property passed to him as their assignee. The facts would seem to support both of these contentions. Clark & Smith were located at Cooperstown, N. D., engaged in banking business, and acted from the opening of the wheat season in 1889 to January 26th, 1891, as paying agents for the plaintiff at that place. As such agents they cashed wheat tickets or checks issued by the plaintiff in buying wheat. The arrangement between plaintiff and them was that they were to furnish all currency necessary to cash these wheat tickets, and were to reimburse themselves by drafts on the plaintiff. Business was carried on under this arrangement until January 26th, 1891, when Clark & Smart made an assignment to defendant McDermott for the benefit of their creditors. At that time the account between the plaintiff and Clark & Smart disclosed a balance of $275.77 in favor of plaintiff. There was a contest in the trial court, and also in this court, over the question whether the simple relation of debtor and creditor existed between the parties, or whether the arrangement between them, in connection with their acts thereunder, created a special relation of a fiduciary character between them. We will assume the latter for the purposes of this case. Still we are unable to sustain the judgment of the court, which gave the plaintiff priority of payment out of the general assets in the hands of the assignee. On January 19th, 1891, there was a balance in favor of the plaintiff of $111.60. Between that time and the date of the assignment, January 26th, 1891, Clark & Smart paid out for the plaintiff in payment of wheat tickets the sum of $335.83. This would have left no funds of the plaintiff on hand, had it not been for a draft for $500, drawn on the plaintiff on January 19th. But no part of the proceeds of this draft ever came to the possession of Clark & Smart. The draft was drawn payable to the order of H. P. Smart, and the proceeds thereof went to his individual

credit in the Citizens' National Bank of Fargo. It is only on the assumption that the proceeds of this draft came to the hands of Clark & Smart that it is at all possible to show any money of the plaintiff in the control of Clark & Smart at the time of the assignment, even giving to the plaintiff the benefit of its theory that a fiduciary relation, and not that of debtor and creditor, existed; for, but for the proceeds of this draft, the balance of account would have been against the plaintiff. It is true that Clark & Smart are doubtless chargeable with liability for the amount of this draft, but the plaintiff, to recover, certainly must follow the proceeds of it into the hands of Clark & Smart in some form. But we prefer to put our decision on a broader ground. The theory on which alone plaintiff can secure priority of payment out of the funds in the hands of the assignee is that the identical money can be traced in some form from plaintiff to Clark & Smart, and that it was still susceptible of identification at the time of the assignment. That this could not be done seems clear to us. The proceeds of the draft never went into a separate fund. If they can be regarded as having ever been in the hands of Clark & Smart, they were immediately turned over to Mr. Smart, and used by him individually, and charged up to him individually on the firm books. But it is claimed that the proceeds of this draft went to enrich the estate of Clark & Smart, and that, therefore, the plaintiff is entitled to priority of payment. Authorities are cited to sustain this view. Some of them do support it. They stand on no principle, and are opposed to a much stronger array of decisions. The plaintiff is seeking to recover its property in the possession of the defendant McDermott, but it is undisputed that it cannot identify any particular portion of the assets in the hands of such defendant as being its property. Neither can it trace such property into any particular fund. The very most that can be claimed is that the plaintiff's property has gone into the general mass of the property owned by the assignors prior to the assignment. But after its receipts by them it is no longer possible to trace it. It must have been paid out by them, as only $3.96

in cash was found on hand by the assignee. We see no principle on which the plaintiff can insist upon priority of payment out of the general assets in the hands of the assignee. The rule governing this class of cases is very simple; the only difficulty is in applying it. If one has not consented to part with his property and take the responsibility of another for the payment of an equivalent therefor, he may follow his property so long as he can trace it. He has not agreed to part with the title. He has not agreed to accept in lieu thereof the personal responsibility of another. The law will not force him into a relation to which he has never assented. He may follow his property, but he must be able to identify it in some form.

It has been supposed by some courts that the decision in *Knatchbull* v. *Hallett*, 13 Ch. Div. 696; has greatly modified the rule as it existed prior to this decision. In that case a solictor sold bonds of his client, and deposited the proceeds in his general account with a banker. Against this account he drew checks for his own personal purposes, and he also deposited, from time to time, his own funds therein. At all times the balance in his favor exceeded the amount of the proceeds of the bonds of his client. It was held that the client might follow his money into this account, and have a charge thereon to the extent of the money received from the sale of the bonds. We find in this decision no extention of the rule allowing property to be followed and recovered. The client's money had gone into a special fund, and, as the account had never been reduced below the amount of his money therein, it was entirely proper to hold that the solicitor had drawn out his own funds from time to time, and not those of the client. The law allows the owner to follow his property not only in its original form, but also in any form into which it may have been changed, providing identification is possible. A new doctrine has sprung up in recent days. It goes upon the theory of the enrichment of the estate out of which priority is sought to be secured. This would entitle every general creditor to preference, and therefore there would be no preferences as between

such creditors and the person whose property, without his consent, had enriched the estate. Reasoning along this line, we would have a preference in favor of general creditors as against one who by a tort had caused a liability against his estate without enriching it, as in case of an assault and battery, libel, slander, seduction or malicious prosecution. But no such preference exists; nor can it exist. The Wisconsin decisions sustaining this rule have been made by a divided court, in every instance three of the judges favoring the rule and two of them dissenting. See *McLeod* v. *Evans*, (Wis.) 28 N. W. Rep. 173, 214; *Bowers* v. *Evans*, (Wis.) 36 N. W. Rep. 631; *Francis* v. *Evans*, (Wis.) 33 N. W. Rep. 93. The case of *People* v. *City Bank of Rochester*, 96 N. Y. 32; is distinguished in a later case,—*Cavin* v. *Gleason*, (N. Y. App.) 11 N. E. Rep. 504,—the court saying of it that it was not claimed in that case that the money sought to be followed had not in some form gone into the hands of the receiver. In this latter case the right to follow money was held to be lost by the payment of that money to a third person, it being no longer possible to trace it, except in the hands of one who, having taken it in the ordinary course of business, could not be compelled to refund it. Certainly the money cannot be said to be in any form in the hands of one who has paid it out. That the New York court of appeals is in no manner committed to this new doctrine invoked in this case is apparent in its language in the case in 11 N. E. Rep. 504: "The trust fund, with the single exception mentioned, was misappropriated by White to the payment of his private debts prior to the assignment. It cannot be traced into the property in the hands of the assignee, for the plain reason that it is shown to have gone to the creditors of White in satisfaction of their debts. The court below seem to have proceeded upon a supposed equity springing from the circumstances that by the application of the fund to the payment of White's creditors the assigned estate was relieved *pro tanto* from debts which otherwise would have been charged upon it, and that thereby the remaining creditors, if entitled to distribution without regard to the petitioner's claim, will be benefited.

We think this is quite too vague an equity for judicial cognizance, and we find no case justifying relief upon such a circumstance. In a very general sense, all creditors of an insolvent may be supposed to have contributed to the assets which constituted the residuum of his estate." This new rule has sprung from a misconception of the decision in *Knatchbull* v. *Hallett, supra.* This case merely decides that, if the holder of the money makes an investment with it, as by depositing it in a bank, thus establishing between him and the bank the relation of creditor and debtor, the owner of the money may follow it in this new form, because he can trace it. His money is in this particular investment. The fact that other money has been placed in the same investment, *i. e.*, the same account, cannot affect his rights, and it is an entirely rational presumption that, whenever the depositor draws for his own use funds from this account, he intends to draw his own money, leaving the other funds untouched. But it is impossible to trace the money when, as in this case, it has been paid out by the one who has it in his possession. If the plaintiff's money went into the hands of the assignors, it was paid out before the assignment, except as to $3.96; this being all the cash found on hand by the assignee. As to this $3.96, it might be that the plaintiff's position would be sound if it were able to show that any of the last $500 had ever come into the possession of the assignors. It may be that, in the view of the established custom of remitting by draft collections made at a distance, it is essential to the protection of the rights of persons owning papers forwarded for collection merely that the cash with which the collecting bank carries on its business, and with which the money collected is mingled, should be regarded as a specific fund, and that all payments made by the bank thereout should be regarded as having been made out of its own cash, and not with the cash collected. A remittance of the specific money collected is probably never made. See, as sustaining this view, *Bank* v. *Weems*, (Tex. Sup.) 6 S. W. Rep. 802. This is a very important question, and we prefer not to decide it without the aid of full argument. Our

views are supported by what we regard as the line of authorities most consonant with sound principle. *Cavin* v. *Gleason*, (N. Y. App.) 11 N. E. Rep. 504; Appeal of Hopkin's Ex'r., (Pa. Sup.) 9 Atl. Rep. 867; *Edson* v. *Angell*, (Mich.) 25 N. W. Rep. 307; *Bank* v. *Armstrong*, 39 Fed. Rep. 684; *Bank* v. *Dowd*, 38 Fed. Rep. 172; 2 Story, Eq. Jur. §§ 1258, 1259; 2 Pom. Eq. Jur. §§ 1051, 1058; *Bank* v. *Gœtz*, (Ill. Sup.) 27 N. E. Rep 907; *Englar* v. *Offutt*, 16 Atl. Rep. 497; 70 Md. 78. The decision in *Bank* v. *Peters*, (N. Y. App.) 25 N. E. Rep. 319; is not in conflict with the case in 11 N. E. Rep. 504. It belongs to the class of cases of which *Knatchbull* v. *Hallett*, is one, where the money has gone into a special fund. The drawers of a draft had deposited it for collection with a bank, which forwarded it to another bank, by which latter bank the collection was made, but no remittance was made before a receiver in insolvency of the former bank was appointed. It was held that the drawer of the draft could recover the money from the collecting bank. It was not a case where the money had been received by the insolvent bank, and mingled with its general funds. The insolvent bank had not received the money at all. The solvent bank had received it, and still was indebted for it to some one. The court very properly held that it was indebted for it to the true owners of the draft, the forwarding bank never having had any title to the draft, but having received it merely for collection.

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

(53 N. W. Rep. 175.)

FARGO & SOUTHWESTERN RY. CO. *vs.* BREWER.

Opinion filed Aug. 9th, 1892.

Railroad Companies—Taxation—Exemptions—"Gross Earnings Law."

Chapter 99, of the Laws of 1883, known as the "Gross Earnings Law," did not exempt from taxation property of a railroad company, not embraced in any land grant and not used for railroad purposes.

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

Action by the Fargo & Southwestern Railroad Company against William E. Brewer, as county treasurer of LaMoure County, to restrain certain tax proceedings. A demurrer to the complaint was sustained, and plaintiff appeals.

Affirmed.

Ball & Watson and *John C. Bullitt, Jr.*, for appellant.

L. C. Harris, for respondent.

CORLISS, C. J. The object of this litigation was the restraining of certain tax proceedings. A demurrer to the complaint was sustained, and from the judgment dismissing the action this appeal is taken. The land assessed was city property, situated in the city of LaMoure. The plaintiff urges that this land was exempt from taxation under the provisions of the gross earnings act of 1883. This statute provides that, "in lieu of any and all other taxes upon any railroad, except railroads operated by horse power, within this territory, or upon the equipments, appurtenances, or appendages thereof, or upon any other property situated in this territory belonging to the corporation owning or operating such railroads, or upon the capital stock or business transactions of such railroad, there shall hereafter be paid into the treasury of the territory a percentage of all the gross earnings of the corporation owning or operating such railroad, arising from the operation of such railroad as shall be situated within this territory, as hereinafter stated." The balance of the act fixes the percentage to be paid, and relates to matters of detail not

important to the point under consideration. If the real estate assessed had been a portion of a land grant to the plaintiff, there might have been force in the contention that the law did in fact exempt it from taxation. But there is no pretense that the land assessed was of that character, nor is it claimed that the land was purchased or used for railroad purposes. It consisted of lots in the city of LaMoure, and had no connection with the operation of plaintiff's road. Despite the broad language of the statute, we are of opinion that such property was not intended to be exempted from taxation. The authorities are unanimous on the point. The reasoning on which the cases rest is satisfactory to our minds. We will not state the reasons for the doctrine which these cases enunciate, but content ourselves with citing them in support of our decision that the lands, not being used for railroad purposes, were not exempted from taxation by the act referred to. *State* v. *Commissioners*, 23 N. J. Law 510; *Cook* v. *State*, 33 N. J. Law 474; *State* v. *Flavell*, 24 N. J. Law 370; *Bank* v. *State*, 104 U. S. 493; *State* v. *Fuller*, 40 N. J. Laws 328; *County of Todd* v. *Railroad Co.*, (Minn.) 36 N. W. Rep. 109; *Ford* v. *Land Co.*, 43 Fed. Rep. 181; *County of Ramsey* v. *Railroad Co.*, (Minn) 24 N. W. Rep, 313.

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

BARTHOLOMEW and WALLIN, J. J., having been of counsel, did not sit on the hearing of the above case, nor take any part in the decision; Judge Winchester, of the Sixth Judicial District, and Judge McConnell, of the Third Judicial District, sitting in their places by request.

(53 N. W. Rep. 177.)

STATE *vs.* HASLEDAHL.

Opinion filed Nov. 4th, 1892.

New Information Filed to Cure Defects Without New Preliminary Examination.

Where an information was adjudged defective by the Supreme Court because it did not state that the prosecution was in the name and under the authority of the state, and the case was reversed, *held*, it was not error for the trial court to make an order allowing the state's attorney to file a new information curing the defect, without a new preliminary examination of the accused.

Presence of Accused not Necessary.

The making of such an order is no part of the trial, within the meaning of § 7321, Comp. Laws, providing that the defendant must be personally present at the trial when the offense is felony, and it is therefore not necessary that defendant should be personally present when such order is made.

Harmless Error.

If notice to defendant or his counsel of application for such order was necessary, the error, if any, in failing to give such notice, was error without prejudice. For such an error there can be no reversal. Section 7588, Comp. Laws.

Weight and Sufficiency of Evidence.

Evidence examined, and *held* sufficient to warrant a conviction.

Error to District Court, Richland County; *Lauder*, J.

Martin O. Hasledahl was convicted of embezzlement and brings error.

Affirmed.

M. A Hildreth, for plaintiff in error.

C. A. M. Spencer, Attorney General; *S. H. Snyder*, State's Attorney, and *W. E. Purcell*, for the state.

CORLISS, C. J. The plaintiff in error has been twice convicted of embezzlement. The conviction on the former trial was reversed because of a defect in the information. *State* v. *Hasledahl*, 2 N. D. 521; 52 N. W. Rep. 315. It failed to show on its face that the prosecution was in the name and by the authority of the State of North Dakota. After the case was remanded, the District Court made and entered and order directing the state's attorney to file

a new information to obviate the technical defect in the former one. Such a new information was filed. It was in all respects practically the same as the former information, with the exception of a statement that it was filed in the name and by the authority of the State of North Dakota. It is urged that it was improper to allow this information to be filed as the basis of a criminal prosecution without a new preliminary examination. That there had been such an examination before the defective information was filed is undisputed. That this examination was sufficient in all respects to warrant the filing of an information for the offense charged in the new information filed is uncontroverted. Why it should be necessary to re-examine the accused before a committing magistrate, in order to correct a technical defect not in the proceedings on such examination, but in an information filed thereafter, it is difficult to understand. The language of the statute does not require it, nor does the spirit of the law demand it. The main purpose of the provision requiring such an examination before the state's attorney shall have power to file an information is to protect the citizen against the arbitrary action of that officer. The return of an indictment, only after an examination of evidence by a grand jury, guarantied the citizen, as a rule, against prosecutions without probable cause. This guaranty is perpetuated by the requirement that there shall be a preliminary examation before a committing magistrate. After such an examination has been had,—one sufficient to sustain an information,—it is idle to urge that the rights of the accused are in the least prejudiced by the filing, without a second preliminary examination, of another information to take the place of the former defective one,—to amend it wherein it was technically insufficient,—charging the same offense charged in the former information, and differing therefrom only by supplying a formal part omitted from the first information. No authority can be found to uphold such a contention. But we are referred to cases wherein it is held that, where an indictment is set aside as defective, the case must be resubmitted to the same or another grand jury; and in one case it

was held that the same grand jury could not return, without a re-examination of the witnesses, a second indictment, the former indictment having been quashed by the prosecuting attorney. These cases are not in point. In Ex parte Bain, 121 U. S. 1; 7. Sup. Ct. Rep. 781; the trial court, without the consent of the grand jury, amended the body of an indictment by expunging therefrom certain words, and it is apparent from the opinion in this case that the words were not regarded by the Supreme Court as mere surplusage. The words struck out by the trial court were, "The comptroller of the currency and." The gist of the charge was making a false report with intent to deceive the comptroller of the currency and others. The court said: "How can the court say that there may not have been more than one of the jurors who found this indictment who were satisfied that the false report was made to deceive the comptroller, but was not convinced that it was made to deceive anybody else?" It is elementary that the body of an indictment cannot be amended by the court without the consent of the grand jury. Whenever the accused is arraigned on such an amended indictment, he can plead that the grand jury have found no such indictment against him. The body that found the indictment has not amended it. But when an information is amended, as it may be, this objection cannot be urged against the amended information. The officer that presented the orignal information has amended it by either interpolating into the old one the amendment, or by filing a new one containiag such amendment. It has always been the rule that an information could be amended with leave of court, by the prosecuting attorney. 10 Amer. & Eng. Enc. Law, 709, note 1; Whart Crim. Pl. § 87. The decision in *State* v. *Ivey*, (N. C.) 5 S. E. Rep. 407, is confidently relied on by counsel for the plaintiff in error. In that case a bill of indictment was sent to the grand jury, and, upon examination of witnesses, it was returned a true bill. The solicitor of the state considering that it did not charge the offense committed, it was, on his motion, quashed; whereupon another bill was sent the grand jury, which was returned a true bill, without

any further examination of witnesses. It was held that the second indictment must be squashed. It will be noticed that in this case the first indictment was quashed. It was utterly annihilated. There was nothing to amend. Its destruction carried down with it the examination of witnesses before the grand jury. Such examination could have no separate existence apart from the indictment. No record of such examination is required to be, nor is it ever, kept. But the record of a preliminary examination is entirely distinct from the information, and can and does exist after the information is destroyed. But in the case at bar the information was not set aside. A demurrer was interposed to it. The demurrer was overruled. On writ of error, this court held that the demurrer should have been sustained because of the omission from the caption of words showing that it was filed in the name and under the authority of the state. The conviction was reversed. The case then stood as though the trial court had sustained the demurrer. That court made an order directing the filing of a new information to remedy the defect in the former one. This was equivalent to an amendment, and, as an information must be verified, it is perhaps the better practice to make an amendment in this manner; otherwise it can be said that the verification to the old information does not embrace the new matter interpolated into the information by amendment. As the information was not quashed, the preliminary examination was unaffected. It continued to stand, and it was therefore true that there had been a preliminary examination as a foundation for the filing of the amended information. The same conclusion is inevitable, if we regard the old information as set aside, and consider that an entirely new information was filed. Setting aside an information does not touch the preliminary examination. The foundation remains. Setting aside or quashing an indictment destroys the whole proceeding. There must be a new indictment found by the grand jury, and this necessitates a judicial investigation by that body. As the law contemplates no record of the examintion, as it does of a preliminary examination, the grand jury cannot refer

to such a record in finding the new indictment, but must begin the investigation as though no prior indictment had been found. It is on this principle that the Ivey case stands. No such principle is applicable to the case at bar. The Ivey case is not in point for another reason. In that case there was a radical change in the indictment, and not, as in the case at bar, a mere amendment of the caption. In the Ivey case, had there been a defect in the caption only, it is clear, upon authority, that the indictment could have been amended in that respect, not only by the grand jury, under the order of the court, but by the court without the presence, consent or knowledge of the grand jury. *McGuire* v. *State*, 72 Am. Dec. 124; *State* v. *McCarty*, 54 Am. Dec. 150; *State* v. *Creight*, 2 Am. Dec. 656; *State* v. *Jones*, 17 Am. Dec. 483; 10 Am. & Eng. Enc. Law, p. 536, note 3; 1 Bish. Crim. Proc. §§ 661, 662. Indeed, there is authority for the proposition that an indictment may be withdrawn from the files, and recommitted to the same grand jury, who may amend it without a re-examination of witnesses. *State* v. *Davidson*, 2 Cold. 184. In the Ivey case this was not done. The old indictment was quashed on the motion of the prosecuting officer. There was nothing left to send back to the grand jury for amendment. The Ivey case does not decide that an indictment may not, on order of the court, be returned to the same grand jury, and be by them amended without further examination. But in the case at bar the body of the information has not been changed. There was a mere alteration in the caption. But, construing the information as a new one, there can be no question about the right of the state's attorney to file it under the order of the court, without another preliminary examination. It would, indeed, be singular if, when a demurrer to an information had been sustained for defects therein, no amendment thereof could be made, or the old one could not be supplanted by a new one correcting the error, without an entirely new preliminary examination. The quashing of the old information does not carry with it the preliminary examination. The preliminary examination is complete in itself, and entirely independent

of the subsequent proceedings. Irregularity in such proceedings cannot affect these anterior disconnected proceedings. The grand jury act judicially in making the investigation and in finding the indictment. The state's attorney, in filing an information, is governed by the record of a prior complete, independent judicial investigation similar to that made by a grand jury. When the trouble is not with this precedent examination, how can it be affected by a defect in subsequent proceedings? What error the state's attorney has made in proceedings subsequent to the preliminary examination, *i. e.*, the information, can no more touch the soundness of that examination than the former's subsequent error can affect a valid indictment based on a proper investigation. To make the authorities sustaining the necessity of a new examintion to warrant a new indictment analogous, we must have a case presenting a defect in the proceedings before the committing magistrate, and not merely in the information. Is the power to file an information gone because an hour before a defective one has been filed and quashed on demurrer? Notwithstanding the fact that the valid information might have been originally filed an hour previous, must all proceedings be regarded as annihilated, and, in order to correct the error by filing such valid information, must it be deemed necessary to rearrest the accused, to conduct a new examination, and have him held a second time for the same offense, burdening him and the public with additional trouble and expense, and necessitating his giving a new bond, merely because the first information was technically defective? The duty of the state's attorney is to file such valid information as is warranted by the record of the preliminary examination, and, whenever a prisoner is arrainged under a new or an amended information, the only inquiry is whether it is a proper information, in view of the preliminary examination. It is strictly true, in such a case, that there has been and is a preliminary examination to support such an information.

It is urged that the evidence is insufficient to warrant a conviction. The plaintiff in error was charged with embezzling a sum

of money while in the employ of the National Elevator Company. As such agent, he was authorized to purchase and sell grain for such company, to collect the moneys due on sales, and to remit the same to such company, or to use the same in making purchases of grain for such company. It was proved that in the month of July, 1890, a car load of oats was shipped to him, and that thereafter he sold oats to various farmers, and received from them pay, partly in cash and partly in grain. The books kept by him disclosed no sale of oats after July 1st, 1890, although it was his duty to keep a daily account of sales, purchases, etc. Here was evidence that he had been selling oats belonging to his employer for cash, and had not accounted for the cash. This was sufficient to warrant his conviction for embezzling money of his employer. It is true that the accused testified that he used the cash paid to him in the purchase of grain for the company; but the jury were not bound to believe his testimony, for it appeared that he was short in his accounts some 1,400 bushels of wheat, on the theory of his making such purchases, and there was no attempt on his part to explain why he failed to observe as to the oats sold the usual mode of bookkeeping, *i. e.*, charge himself with the cash received for the oats sold. It was his duty, under his employment, to keep his accounts in this manner, and there is no pretense that he failed to do so as to other items. The objection as to the admission of evidence showing that the accused was short a large number of bushels of wheat and that he had no oats on hand, was without merit, and was properly overruled. It was necessary to prove these facts in order to make out the offense of embezzlement. For that purpose the evidence was competent. It was not offered to prove that he had embezzled wheat or oats, but to prove that he had not accounted for the proceeds of grain sold. It is proper to treat the money received as the money of the employer, and to charge the agent with the embezzlement of the money, and not of the property. The order allowing the filing of the new information was made without notice to the accused or his counsel, and in their absence. In this we see no error. The

making of such an order was no part of the trial, within the meaning of § 7321, Comp. Laws, which provides that, where the offense is a felony, the defendant must be personally present at the trial. *Epps* v. *State*, (Ind.) 1 N. E. Rep. 491, 493; *Boswell* v. *Com.*, 20 Grat. 860. The failure to give either the accused or his counsel notice of the application for this order, if notice was necessary, was without prejudicial effect upon the defendant. All objections which could have been interposed on the application for the order were raised and argued before both the trial court and this court, and both courts have heard him as fully on these points as if he had made the objections before the order was granted. If error, it was without prejudice, and for such an error there can be no reversal. Section 7588, Comp. Laws.

Certain requests to charge were made by counsel for the accused. Error is assigned because of the refusal of the court to give them. Without examining them in detail, it is sufficient to say that we have carefully considered the points, and are clear that no error was committed by the refusal to charge the jury as requested, nor was the exception to the charge well taken.

The judgment is affirmed. All concur.

(53 N. W. Rep. 430.)

STATE *ex rel.* R. R. CO. *vs.* JUDGE OF DISTRICT COURT OF STUTSMAN COUNTY.

Opinion filed Oct. 31st, 1892.

Mandamus to District Judge—Refusal to Decide Motion for New Trial.

Alternative writ of *mandamus* quashed, because it appeared that the motion for a new trial, which it directed the District Judge to decide, was not pending before him for decision.

Application by the state on relation of the Northern Pacific Railroad Company for a writ of *mandamus* to compel the judge of the District Court of Stutsman County, to take up and decide a motion

for a new trial, which was alleged to be pending before him for decision. The alternative writ was quashed, and proceedings dismissed.

Ball & Watson and *John C. Bullitt, Jr.*, for plaintiff.

S. L. Glaspell and *E. W. Camp*, for defendant.

CORLISS, C. J. On petition of the relator, an alternative writ of *mandamus* was issued directing the defendant to take up and decide a motion for a new trial, which it was alleged in the petition was before him for decision, but which it was averred he refused to determine. On the hearing in this court, the defendant filed his answer to the alternative writ, and, an issue thus being formed, it was stipulated in open court that the court might treat the petition, answer, and affidavit as evidence, and determine the questions upon this record without further proof. It lies wholly beyond our province to govern by the writ of *mandamus* the exercise of judicial discretion, nor can we use it as a procedure to correct errors in a case in which the judge or court has not refused to act, but has committed some mistake. Nonaction is the basis of the writ, provided a duty to act is established. It is urged in this case that the defendant has not refused to entertain and decide a motion for a new trial, for the reason that there is not pending before him any such motion for decision. If this fact be true, the alternative writ must be quashed. We are satisfied it is true. It appears to be undisputed that a notice of motion for a new trial was duly served upon the counsel for the plaintiff in the action by council for the defendant in such action. The defendant therein is relator in this proceeding. It further appears that on the day and at the place specified in the notice, counsel for defendant in the action appeared before the District Judge, but that no one appeared for the plaintiff. On that day the motion was not argued, and the judge indorsed upon the papers a statement that the hearing of the motion was continued from that day (September 12th, 1889,) to September 21st, 1889. On the last named day no one representing either party appeared before the judge, nor does anything appear to have been done thereafter

by either party with reference to the motion. It was urged that these facts established a submission of the motion to the court on the part of the relator herein as a matter of law. We cannot agree to this proposition. The action taken by the court in continuing the hearing of the motion to a later day, no argument having been made by counsel for the relator, would strongly indicate that the whole matter was left open, not only as to the plaintiff in the action, but also as to the defendant, the relator in this proceeding. If these facts conclusively established that the counsel for the relator on the 12th of September, informed the court that, while it might be disposed to continue the hearing of the motions so far as plaintiff was concerned, he desired then and there, on his part, to submit the motion on behalf of the defendant, then it might well be claimed that the motion was in fact submitted by the defendant, and that, therefore, the court was bound to decide it whether the plaintiff ever appeared or not, as he was in default in failing to appear at the time specified in the notice of motion. But what took place is entirely consistent with the whole matter being left in the same condition as though the adjourned day (September 21st) was the first day set for the hearing, and as though nothing was done with respect to the motion except to postpone the argument and submission of it, as is frequently the case. It is true that the counsel for the relator asserts that the motion was submitted on September 12th, but this may be his conclusion from the facts already referred to. We feel constrained to put this construction on his statement because he nowhere details any additional facts which would tend to show an actual submission on his part. Probably, in the absence of any positive evidence that there was no submission of the motion, we would regard his statement as one of fact, and not as a mere statement of his inference from other facts. But the learned judge to whom it is insisted that this motion was submitted distinctly and positively asserts that the motion was never at any time submitted to him for decision, and that the papers were never left with him for decision. Whether they were left with him

at all is in doubt. Unless the motion was submitted to him for decision on September 12th, or September 21st, it could not be submitted at all. After September 21st, no continuance of the motion having been made, and it not having been then or at any previous time submitted, it ceased to be a pending motion. There being no motion before the judge, he has no duty to perform with respect to it, and the alternative writ should therefore be quashed.

Many interesting and difficult questions were discussed on the argument, but the conclusion we have reached renders any decision upon them unnecessary. Under the circumstances, whatever we might say touching them would be only *obiter*. The writ was issued under §§ 86, 87, of the state constitution, vesting in this court superintending control over all inferior courts, and giving it power to issue such original and remedial writs as may be necessary to the proper exercise of its jurisdiction. The alternative writ must be quashed, and the proceeding dismissed. All concur.

(53 N. W. Rep. 433.)

WILLIAM O'NEIL *vs.* R. S. TYLER.

Opinion filed Nov. 7th, 1892.

Sale for Taxes—Adjoining Lots Assessed as One.

Where adjoining lots in a town plat were assessed together as an entirety, and valued at one lump sum, a subsequent sale of such lots for the taxes based upon such assessment must follow the description in the assessment. The lots cannot legally be sold separately, each for moiety of the tax arising from the lump valuation.

Where Tax Deed Vacated—Judgment for Taxes.

Where, on account of irregularities connected with the tax sale, a tax deed is set aside by the court, such deed no longer possesses any evidential force, and, in order to show that the tax for which the sale was made, or any subsequent tax, was a lawful tax, the party alleging the fact must show, by common-law proof, that the steps essential to a valid tax have been taken by the officials. A regular assessment and levy must be alleged and proved in order to recover judgment, under § 1643, Comp. Laws.

City Ordinance—Mayor Must Approve Tax Levy.

The charter of the City of Fargo, as amended in 1881, gave the mayor a veto power as to ordinances and resolutions passed by the council, and also conferred upon the "mayor and council" the power to "levy and collect taxes." An ordinance also provided that the "mayor and council" should "levy" the annual city taxes. The validity of a tax levy being in issue, the record of the proceedings of the city council showed that the council by resolution levied a tax, but no evidence was offered to show that the mayor approved of such resolution, or that he in any manner participated in or knew of the action of the council. *Held*, that the proof failed to show a valid levy. *Held*, further, that no valid levy could be made by the independent action of the council.

Assessment Roll—Description.

A description of real estate as it appeared in the assessment roll examined, and *held* to be sufficient.

Board of Equalization—Adjournment.

Where a board of county commissioners meets as a board of equalization on the day appointed by law, and, after organization, adjourns until the next day, subsequent adjournments from day to day by less than a quorum of such board will preserve the duration of such session.

Assessment Roll Filed During Session of Equalizing Board.

The assessor failed to deliver the assessment roll to the auditor on the day required by law, but the board of equalization was in session upon that day, and, by adjournments from day to day, entered in the minutes, continued in session until such roll was filed, and thereafter a majority of said board

remained in session for two days, engaged in equalizing the taxes for that year. *Held*, that the taxpayers, had sufficient notice of the time of meeting of the board of equalization, and sufficient opportunity to be heard upon their assessments, notwithstanding the irregularity in filing the assessment roll.

Yeas and Nays on Passage of City Ordinance.

Section 13 of the charter of the City of Fargo, as amended in 1881, provides "that upon the passage of all ordinances the yeas and nays shall be entered upon the record of the city council." This provision is mandatory, and it appearing that an ordinance (title 1, c. 6, of the ordinances of the City of Fargo,) was adopted in violation of said provision, and that upon its passage by the council the yeas and nays were not entered upon the record, *held*, that said ordinance was not legally adopted, and hence never became a valid ordinance. *Held*, further, that an ordinance subsequently adopted, purporting to amend a single section of such ordinance, and which could not be enforced when standing alone, is likewise null and void.

Statutes Construed.

The territorial statutes embraced in §§ 1640, 1643, Comp. Laws, undertook to modify and regulate the practice in a variety of tax cases, including actions to "cancel" or "avoid" tax deeds. These statutes cannot be completely reconciled with each other, but the court is not at liberty to wholly ignore them, and render its decisions in such cases upon general principles only. With a view to giving the two sections some effect, § 1640 is limited to cases where the validity of the tax, in whole or in part, is conceded, and § 1643 is applied to other cases arising under the territorial tax laws.

Bartholomew, J., dissenting.

Equitable Action to Quiet Title.

The object of this action is to quiet plaintiff's title to real estate, and to annul defendant's adverse title, and it is brought under §§ 5449, 5450, Comp. Laws. *Held* that, within the meaning of § 1643, *supra*, it is an action to "cancel" a tax deed. The plaintiff invoked the equity powers of the district court by praying for equitable relief, and that court gave such relief by its judgment annulling certain tax deeds as clouds on plaintiff's title. The action was therefore in equity, and none the less so because the plaintiff used a short form of complaint, and did not set out the nature of the cloud he was seeking to remove.

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

Statutory action by William O'Neil against R. S. Tyler to quiet an adverse title to real estate, which defendant claims by virtue of certain tax deeds. Judgment for plaintiff. Defendant appeals. Judgment setting aside the tax deeds is affirmed, and case remanded for further proceedings consistent with the opinion.

Newman & Resser, for appellant.

This is in the nature of a suit in equity and governed by the rules applicable to equitable actions, because it seeks to remove a cloud from the title and also seeks an injunction. *Clark* v. *Smith*, 13 Peters 195; *Holland* v. *Challen*, 110 U. S. 15; *Farrington* v. *N. E. Inv. Co.* 47 N. W. Rep. 191; *Lamb* v. *Farrell*, 21 Fed. Rep. 5. The fact that the statute authorizes a short form of complaint, cannot change the nature of the action. *Curtis* v. *Sutter*, 15 Cal. 260; *Brant* v. *Whèaton*, 52 Cal. 430. Plaintiff should tender amount of tax as condition precedent to suit.

State R. R. Tax Cases, 92 U. S. 575; *Nat. Bank* v. *Kimball*, 103 U. S. 732; *Pelton* v. *Bank*, 101 U. S. 143; *Cal. & O. Land Co.* v. *Gowen*, 48 Fed. Rep. 771; *Palmer* v. *Town*, 16 Mich. 176; *Merrill* v. *Humphrey*, 24 Mich. 170; *Hersey* v. *Supervisors*, 16 Wis. 198; *Hersey* v. *Supervisors*, 37 Wis. 75; *Schittler* v. *City*, 43 Wis. 48. The description must be such as to inform respondent that the land assessed is his. Blackwell on tax titles, 124, 2 Desty 56; *Hopkins* v. *Young*, 22 At. Rep. 926; *St. Peter's Church* v. *Scott County*, 12 Minn. 395; *Auguste* v. *Lawless*, 10 So. Rep. 171; *Greenwood* v. *LaSelle*, 26 N. E. Rep. 1089; *Beems* v. *Caldwell*, 9 N. E. Rep. 623; *Smith* v. *Shattuck*, 7. Pac. Rep. 335; *Taylor* v. *Wright*, 13 N. E. Rep. 529; *Jenkins* v. *McTigue*, 22 Fed. Rep. 148; *Griffin* v. *Tuttle*, 37 N. W. Rep. 167.

J. E. Robinson, for respondent.

Each deed shows that separate town lots were sold *en masse* for a gross sum, hence it is void on its face. 2 Desty 869, 973. *Walker* v. *Moore*, 2 Dillion 256; *Ryan* v. *Cook*, 21 Ia. 439; *Ware* v. *Thompson*, 29 Ia. 65; *Crane* v. *Randolph*, 30 Ark. 584; *Bouldin* v. *Ewert*, 63 Mo. 330. Where a city charter requires the votes to be taken by yeas and nays and to be entered on the record, and ordinance voted without that requirement is invalid. *Pontiac* v. *Oxford*, 49 Mich. 69; *Sticker* v. *Saginaw*, 22 Mich. 104, 206. In the enactment of ordinances the requirements of the statute must be strictly observed. *Blanchard* v. *Bissell*, 11 Ohio St. 301; *Elizabethtown* v. *Lefler*, 23 Ill. 90; *Barnett* v. *Newark*, 28 Ill. 62; *Herzo* v. *San Francisco*, 33 Cal. 134; *Fuller* v. *Heath*, 89 Ill. 296; *Tracy* v. *Peo*, 6 Col.

151. When by statute the mayor is a part of the law making power, his concurrence in legislative action is essential to its validity. Dillon on Municipal Corps., § 309. *Sexton* v. *Beach*, 50 Mo. 488; *Sexton* v. *St. Joseph*, 60 Mo. 153; *Irving* v. *DeVors*, 60 Mo. 625. By force of statute a county tax deed—not void on its face—is *prima facie* evidence of title. But when any material irregularity is shown then the presumption of the statute is rebutted. Then step by step the claimant must prove everything essential to the validity of his title. *Lacy* v. *Davis*, 4 Mich. 157; *Case* v. *Dean*, 16 Mich. 12; *Thompson* v. *Ware*, 43 Ia. 433; *Butler* v. *Delano*, 42 Ia. 350; *Beddleman* v. *Brook*, 28 Cal. 75; *Johnson* v. *Elwood*, 53 N. Y. 431; 2 Desty 961, 969.

WALLIN, J. This is a statutory action to quiet an adverse title to real estate. The grounds of the action are not alleged in the complaint further than to state that plaintiff is the owner of lots 12 and 13 of block 9, in Keeney & Dewitt's addition to the City of Fargo, in Cass County; that defendant wrongfully claims an estate or title to the lots adversely to the plaintiff; that the action is brought to determine such adverse claim. The prayer of the complaint is, in effect, that defendant shall quitclaim his interest in the lots to the plaintiff, or set forth by answer the nature of his adverse claim, that it may be adjudged to be void, and that defendant be restrained from asserting any claim to the lots. Defendant answered the complaint, denying each and every allegation thereof, and further set out title to the lots in himself by virtue of two certain tax deeds annexed to and made a part of the answer. One of the deeds is based upon a tax sale of the lots for taxes claimed to have been assessed against them by the taxing officials of the City of Fargo, in the year 1884, such tax deed being executed by the city treasurer pursuant to a tax sale made by him in 1885. The answer further alleges that, subsequent to such tax sale, defendant paid certain sums assessed against said lots by the city authorities as and for taxes. Referring to the other tax deed, the answer avers, in substance, that such deed was made and delivered to defendant by the county treasurer of

Cass County as the culmination of a tax sale of the lots made by the county treasurer to the defendant in October, 1887, for taxes claimed to have been assessed against the lots by the county officials of Cass County in the year 1886. The answer further states that after such sale defendant paid certain other sums as and for taxes upon the lots, which were claimed to have been assessed by the county authorities subsequent to the year 1886. Defendant further alleges that said deeds were not only regular in themselves, but were given pursuant to valid tax sales made for delinquent taxes; that the taxes for which the lots were sold were properly assessed, equalized, and levied by the proper officers of the city and county, respectively, at the proper time and in the proper manner. The affirmative matter contained in the answer was pleaded as a counterclaim, and plaintiff replied thereto, denying the whole thereof, except that the tax sales and deeds were made and delivered, and the sums alleged were paid by defendant as subsequent taxes; also that plaintiff neither paid nor tendered any of the taxes before instituting the action. The trial was had before the court, and, after findings were filed in plaintiff's favor, judgment was entered adjudging the plaintiff to be the owner of the lots, annulling the tax deeds as void, and for costs. It will suffice here to say that the trial court, for various reasons, set out in the findings, held that the alleged taxes for which the lots were sold were never lawfully assessed or levied against the lots, and for that reason the sales were illegal, and that, no taxes being lawfully assessed or levied, none need be paid or tendered preliminary to the action. A bill of exceptions was settled, and the evidence comes up with the record.

In deciding the case we shall not refer in detail to all the objections urged by plaintiff's counsel against the validity of the tax sales and tax deeds through and by which defendant claims to be the owner of the land. We are unanimously of the opinion that the tax sales were illegal sales, and that the deeds given in pursuance of such sales are invalid, and hence convey no title to the defendant. The facts upon which this conclusion rests are

undisputed, and are common to both the city and county sales. It appears by defendant's answer, and is admitted by the plaintiff's reply, and was conceded at the trial, that the lots were struck off to the defendant at both of the tax sales in question, one at a time, for a sum bid for each as a separate parcel. The uncontroverted testimony, consisting of the assessor's returns and tax lists, discloses the fact that in assessing the lots for the years in question both lots (11 and 12) were grouped together as an entirety, and were valued in the aggregate at one lump sum. The taxes were apportioned against the property upon such lump valuation. It appears affirmatively that no valuation was placed upon either lot separately, nor was a tax apportioned against either lot as a separate parcel of land. The evidence shows that the two lots constituted plaintiff's homestead; his house resting upon both lots. Conceding, without deciding the point, that the manner of occupying the property justified an aggregate valuation such as was made, it would follow that the sale must correspond to the valuation and the apportionment of the tax. It is well settled that, where distinct parcels of real estate are properly grouped as an entirety for valuation, and one tax is laid against the total value, the tax sale, if made, must correspond to the previous grouping and valuation of the property. No tax collector possesses the legal authority to arbitrarily divide the sum apportioned as a tax against such aggregate valuation, and sell a separate parcel for the whole tax, or any part of the tax. There being no tax against either lot as a separate parcel, there could lawfully be no separate tax sale of either lot. This rule is firmly established by the authorities. Black, Tax Titles, § 123; *Kregelo* v. *Flint*, 25 Kan. 695; *Wyman* v. *Baer*, 46 Mich. 418; 9 N. W. Rep. 455; *Allen* v. *Morse*, 72 Me. 502; *Willey* v. *Scoville*, 9 Ohio 43; Welty, Assessm. § 110, and notes 1*a*, 2; Cooley, Tax'n, pp. 493, 494, and notes; *Moulton* v. *Doran*, 10 Minn. 67, (Gil. 49;) 2 Desty, Tax'n, 871, and notes.

The tax deeds being invalid for an illegality which relates only to the sales, and which does not go to the ground work of the tax, defendant contends very properly that he has a right to show

that the taxes for which the sales were made were in all respects legal and valid taxes. But, the illegality of the deeds being shown, their evidential character is lost, and they cannot be used even as *prima facie* evidence of the regularity of the proceedings upon which the validity of the taxes depends. If the taxes are valid, their validity must be made to appear by common-law proof. Each essential step in the process of laying the tax must be established by competent testimony. The burden is upon the purchaser. Black, Tax Titles, § § 246, 247, 249. See numerous cases cited in note 1 to § 246, Id.

We will first consider the validity of the alleged tax of 1884, for which the city treasurer sold the property in 1885. At that time the amended charter of the City of Fargo, adopted in March, 1881, was in force. Among other provisions of the charter were the following: "Sec. 5. The powers hereby granted shall be exercised by the mayor and council of the City of Fargo as hereinafter set forth." "Sec. 8. The council of said City of Fargo shall consist of eight citizens of said city, being two from each ward, who shall be qualified electors of their respective wards, under the organic act of this territory, one of whom shall be elected president of the council at their first regular meeting after each annual election provided in § 9 of this act." "Sec. 13. All ordinances of the city shall be passed pursuant to such rules and regulations as the mayor and council may prescribe; *provided*, that upon the passage of all ordinances the yeas and nays shall be entered upon the record of the city council," etc. "Sec. 38. The mayor shall have power to sign or veto any ordinance or resolution passed by the city council. Any ordinance or resolution vetoed by the mayor may be passed over the veto by a vote of two-thirds of the whole number of alderman elected, notwithstanding the veto; and should the mayor neglect or refuse to sign any ordinance, or return the same with his objections in writing within ten days, the same shall take effect without his signature." Section 12 declares that the "mayor and council" of the City of Fargo "shall have power to levy and collect taxes for general

purposes." Section 4 of an ordinance not pleaded, but offered in evidence, also confines the power in express terms upon the "mayor and council" to "levy the necessary taxes" on the "first Monday of September." The answer expressly avers that the several acts pleaded by the defendant as constituting the assessment, equalization, and levy of the taxes of 1884, and embracing also the sale of plaintiff's property by the city treasurer in 1885, for such taxes, and the execution and delivery of the tax certificates and tax deed, were all and singular done and performed under and by virtue of "chapter 6 of the ordinances of the City of Fargo."

At the trial plaintiff claimed that no such ordinance existed, because the same was never legally enacted or adopted by the city council, for the reason that upon the passage of the ordinance by the council the "yeas and nays were not entered upon the record of the city council," as was required to be done by § 13 of the city charter. We think the evidence fully sustained plaintiff's contention on this point, and the trial court found it to be true, as a matter of fact, that the yeas and nays were not entered in the record of the city council upon the passage of the ordinance, and that "said record contains no entry of or concerning the passage of said ordinances, except as follows: "April 19th, 1881, council met pursuant to adjournment. Revised ordinances were accepted, and old ones repealed." Upon this record we are compelled to hold, under the authorities cited below, that the alleged ordinance was not legally passed or adopted, and hence never became a valid enactment. See 1 Dill. Mun. Corp. § 291, and cases cited in note 1. See analogous doctrine applied to legislation. Cooley, Const. Lim. (6th Ed.) 168; Suth. St. Const. § 48. Our attention is directed to the fact that an ordinance was adopted in 1884, which among other things, changes the date of selling real estate for city taxes, and fixes the rate of interest on city taxes after such taxes become delinquent at a rate specified by § 1 of the original ordinance. But this latter ordinance purports to be only an amendment of a single section of the original

ordinance, *i. e.*, § 3 of ch. 6, *supra*. Standing alone, the amendment is meaningless, and wholly incapable of enforcement. It is obvious that the amendment would not have been adopted as an independent law. Under such circumstances, the amendment must be held to be null and void. Cooley, Const. Lim. (6th Ed.) pp. 211, 212. As has been seen, the power to levy the city taxes for general purposes is, by the charter as well as by an ordinance of the city, conferred in express terms upon the "mayor and council."

The trial court found as a fact, upon sufficient evidence, that the mayor and council did not in 1884, levy any city taxes. The undisputed testimony discloses that the council met at the proper time, and that all members were present. The council by resolution in proper form then levied the taxes for 1884, as far as the council could make such levy by its separate action. But this evidence is fatally insufficient to establish the fact of a tax levy by the "mayor and council." The testimony offered, *i. e.*, the record of the proceedings of the council, refers only to the action of the council, and in no way relates to the action of the mayor. So far as the evidence discloses, the mayor never participated in the levy in any manner, and never assented to or became aware of the action of the council in the premises. Nor are we at liberty to indulge the presumption that a vital step in the tax levy was in fact taken when there was no evidence offered to show that such step was taken, and where the evidence put in to show the levy falls short of doing so. We cannot assume without proof that other and further proceedings were had. The burden to show a valid levy by the "mayor and council" was with the defendant, and he failed to show such levy. It is elementary in tax law that essential steps in laying a tax must appear by some record. Such steps cannot be shown by parol. In this case no parol evidence of the fact was offered. *Powers* v. *Larabee*, 2 N. D. 141; 49 N. W. Rep. 724. The proof offered wholly fails to show a valid levy of the city tax in question, and we therefore rule that the alleged city tax for which the lots were sold was void. A levy by the

proper officials is essential to a tax. Cooley, Tax'n, 339; 1 Desty, pp. 106, 515. Where the authority to levy is given, and the mode also prescribed, the mode must be pursued. 2 Dill. Mun. Corp. § 769.

Turning to the county tax, the respondent contends that such tax was wholly void, first, because the description of the property as found in the assessment roll for the year in question is insufficient to meet the requirements of the law. Certain pages of the roll were put in evidence, and, among others, the printed heading at the top of the page on which the lots are described, which heading is as follows: "Assessment Return of Taxable Property in Cass County, Dakota, for the year 1886. Real Property. Keeney & Dewitt's Add'n." Below this was a proper description of the lots as lots 12 and 13 of block 9. Respondent criticises the return, for the reason that it does not appear on the page where the lots are described in the return where they are located. It is true that such page does not disclose whether the lots are situated within the limits of Fargo or not, nor does this page indicate or state that Keeney & Dewitt's addition is an addition to Fargo. But another printed heading of a preceeding page of the same return was put in evidence by the appellant as follows: "Assessment Return of Taxable Property in Cass County, Dakota. Real Property. Fargo. Original Addition." This was the heading on page 3 of the return and descriptions of real estate continued under this head to page 11 of the return, and on page 12 the return was as follows: "Keeney & Dewitt's Addition;" and under the last mentioned heading the descriptions continued until page 19, and embraced the property in question. From all of these pages of the return, when read together and fairly construed, we are compelled to hold that the description of the property, though not to be commended, is yet a substantial description, and one which fulfills the requirements of the law. We arrive at this conclusion without reference to parol evidence, which showed that the only Keeney & Dewitt's addition in Cass County was an addition to Fargo. We therefore rule that the property was sufficiently

described and valued by the assessor in the year 1886. As to what constitutes a sufficient description of real estate in tax cases, see Cooley, Tax'n, 404, 408.

Respondent also claims that for certain reasons, not necessary to detail, the levy of taxes in in 1886 was irregular and void. We have carefully considered the points raised, and are clear that the taxes were levied in substantial conformity to law, and hence hold that the levy was sufficient.

The trial court found as follows: "That on or before the first Monday of July, in said year, the county assessor of Cass County did not make and deliver to the county clerk of said county an assessment roll; that no such roll was made and sworn to until the 12th day of July, 1886; that in the year 1886, for the purpose of equalizing and correcting the assessment roll, and as a board of equalization, the county commissioners of Cass County did not hold a session of two days, or at any time, commencing on the first Monday or the first Tuesday of July, in said year; that, as shown by the record of said commissioners, in the year 1886, they did not meet as a board of equalization until the Tuesday after the first Monday in July, and then that said board only met to adjourn, and that, without a quorum, the board adjourned from day to day until the 13th day of July, 1886; that on said day the board adjourned until the 14th day of July, at 10 o'clock A. M.; and that on the 14th day of July, 1886; the board of county commissioners of Cass County did not meet as a board of equalization, or otherwise, until 2 o'clock P. M." The undisputed testimoney shows that the board of equalization met on the Tuesday next after the first Monday of July, Monday being the 4th, and a legal holiday. The board was composed of five members, and a quorum was present. The board organized, and at once adjourned until the next day, Wednesday, at 10 A. M. On Wednesday the journal entry was as follows: "Wednesday, July 7th, 1886. Board of equalization met at 10 o'clock A. M. Present, Messrs. Gill and Kissner. No quorum being present, board adjourned till 10 o'clock A. M. tomorrow." No quorum being present on the

following Thursday, Friday, Saturday and Monday, an entry was made in the journal substantially like that made for Wednesday, as above quoted. On Tuesday and Wednesday, July, 13th and 14th, a quorum was present, and on each of the last mentioned days the board was engaged in equalizing the taxes of 1886, a verified tax roll having been completed on the 12th of July, and delivered to the auditor.

The questions of law arising upon the findings and the undisputed evidence and facts are of serious importance, whether considered with reference to the collection of the public revenues or with reference to the constitutional and statutory rights of individual taxpayers; nor do the discordant decisions and apparently endless discussions of elementary writers afford much assistance to the court in its investigations of the different points presented. The principal questions connected with the meeting of the board are two in number, and are as follows: *First.* Did the board of equalization in Cass County in the year in question meet upon the proper day, and hold a session of not less than two days, as the statute in force at the time required it to do? *Second.* When the authenticated assessment roll is not delivered to the auditor on or before the first Monday in July, as the statute directed shall be done, but is delivered before the board of equalization adjourns, and after its delivery the board remains in session for a period of two days, and while in session actually equalizes the taxes, is such delay in the delivery of the roll an irregularity in the process of assessing and equalizing the taxes that will render the taxes of that year void?

Taking up the questions in their order, it is manifestly true that the board of equalization did meet on the day designated by law for their first meeting. The statute names the first Monday of July, but that year it happened that Monday was July 4th. This day being a legal holiday, the statute expressly authorizes the postponement of secular business to be done on such day until the next business day. Comp. Laws, § 4752. The board met for the first time on the Tuesday next following the first Monday of

July, and this, as we have seen, was strictly regular, under the statute. There was a quorum present at the first meeting, and hence the adjournment until 10 A. M. the next day was also strictly regular. But the successive adjournments from day to day, which were made by only two members,—less than a quorum,—are challenged as illegal and void. If such adjournments had no validity, it follows, logically and legally, that the board was not lawfully assembled when it did actually meet and discharge its functions on Tuesday and Wednesday, July 13th and 14th, and hence, on this supposition, there was no session of "not less than two days" that year, as the statute required. Comp. Laws, § 1584.

We have been unable to find a decided case in point upon the question presented, *i. e.*, as to the validity of no quorum adjournments when such adjournments are made from day to day as a means of preserving the life of meetings required by law to be held by the governing officials of public corporations. But this court will take notice judicially that the practice of making such adjournments extensively pervades in the United States, and that it is not limited to such bodies as congress and state legislatures, where it has the express sanction of organic law but obtains in city councils and in town, county, and school district boards, where there is no express provision of law authorizing it. Cush. Leg. Law & Pr. Assem. (2d Ed.) §§ 254, 255. We think so valuable a rule, as applied to public corporations, at least should be preserved, particularly as its denial would operate disastrously to the public interests in many cases, as would be true with respect to meetings of the only board before which the taxpayer can be heard upon the matter of the valuation of his property for taxation. Our conclusion is that the board met at the proper time, and held a session of not less than two days in the year 1886.

This brings us to another question. The statute in force, (Comp. Laws, § 1582,) required the assessors to return their assessment rolls to the county clerks on or before the first Monday of July of each year. In 1886 the return was not

made in Cass County until July 12th, or more than one week after the day fixed by statute. Is this a fatal irregularity? If the board had adjourned without day prior to the return of the roll, a very different question would arise. In such a case there could be no equalization or adjustment of the taxes, and no opportunity would be given to the taxpayer to present any grievances which might arise upon the return to the only tribunal provided by law to hear and dermine such grievances. In the supposed case a majority of this court would hold, for reasons fully stated in *Powers* v. *Larabee*, 2 N. D. 141, 49 N. W. Rep. 724, that the taxes levied in that year would be invalid for any purpose. But the record before us presents no such facts. Here the roll was delivered to the clerk prior to the adjournment of the board, and after the roll was returned the board remained in session for two days, and discharged its functions as a board of equalization. This shows that the taxpayer was not deprived of his opportunity to be heard upon matters arising upon the return. Authorities can be found which announce the broad doctrine that in a case where the assessment roll has not been returned to the proper office on or before the date designated by statute for its return that the taxpayers have no legal notice or knowledge when the return will be delivered to the proper official, and hence are not bound to give the matter further attention. But, while we should not hesitate to apply this doctrine in a proper case, we are of opinion that it should not be applied to a case where the tribunal of review and equalization is still sitting at the time the roll is returned, and had, by adjournments, kept alive a session which was initiated by a meeting upon the date designated for its first meeting. The fact that the board was still in session when the roll was returned, and had by lawful adjournments continued its session from the first day of its meeting,—the day stated in the law for such meeting,—was a fact which was advertised to the public by entries made in the official journal of its proceedings, to which taxpayers have access. Such board has no lawful business other than such business as is vitally connected with the assessor's return, and hence,

so long as the board continued in session, it was notice to the public that its duties would be performed when and as soon as the return should come before them. Under such circumstances, we are quite clear that the public had practically notice and an opportunity to be heard before the board in 1886 despite the fact that the roll was not returned upon or before the date required by statute for its return to the county clerk. We conclude that the tax of 1886 was valid as a tax, and none the less so because the sales and deeds were illegal and void on account of certain irregularities which do not go to the ground work of the tax.

We here encounter a point arising under our very peculiar and very confusing statutes inherited from territorial times. Apellant contends that the action was not lawfully commenced, and must be dismissed because the taxes and interest were neither paid nor tendered before the suit was brought; citing § 1640 of the Comp. Laws in support of this position. This section, among other things provides: "No action shall be commenced by the former owner or owners of lands * * * to recover possession of lands which have been sold and conveyed by deed for nonpayment of taxes, or to avoid such deed, * * * until all taxes, interest and penalties, costs, and expenses shall be paid or tendered by the parties commencing such action." A liberal construction of this section alone would oblige us to dismiss this action, for the reason that the tax of 1886 was neither paid nor tendered before suit; but we do not feel justified in putting such a construction upon the section, in view of the fact, especially, that § 1643 of the same statutes contains provisions in direct conflict with those quoted above, and the latter statute leads to a widely different result. Section 1643 provides, among other things, that in an action "to recover the possession or title of any property, real or personal, sold for taxes, or to invalidate or cancel any deed or grant thereof for taxes, * * * the true and just amount of taxes due upon such property or by such person must be ascertained, and judgment must be rendered and given therefor against the taxpayer." A comparison shows that the provisions of the statute above

quoted are in part contradictory of each other. The former requires payment or tender of taxes as a condition precedent to an action to "avoid" a tax deed; the latter provides that in an action "to invalidate or cancel" such deed a judgment shall be rendered for "the true and just amount of taxes due upon such property." These provisions cannot be harmonized entirely, and we are convinced that it would be a harsh and unreasonable interpretation of the language used to hold that § 1640 alone must govern. To do so would not only compel the plaintiff, who has a just cause of action upon the merits, to go out of court without the relief he is seeking, but would likewise imply that § 1643 is meaningless, and must be ignored. We are convinced that a less rigid construction would be, on the whole, more conducive to justice, and more in accord with sound legal principles. We therefore conclude that the terms of § 1640 of the statute above quoted must be confined to cases where the plaintiff concedes the validity of the tax, or a part thereof, and that neither tender nor payment will be required in suits where the legality of the entire tax is controverted in good faith. The powers of the court, trammeled as they are by crude and self-contradictory legislation, cannot be put forth as fully as they might be done by a court of equity when unfettered by legislation. The most that can be done, while aiming to do justice, is to give such a construction to discordant statutes as will tend to give some effect to their provisions, and not to annul them entirely. With these objects in view, we must overrule this point, and refuse to dismiss the action.

Respondent's counsel contends, however, that neither of the sections above quoted have any application to this case, because, as he argues, the action is not in strictness an action to either "cancel" or "avoid" a tax deed, and contends that the action is statutory in its nature and origin, and is nothing more than a challenge to the defendant to bring forward his claim, or be debarred from any interest or title to the lots in question. This suggests a wide field for discussion, upon which we do not deem

it necessary to enter further than to cite the cases below, and say that in our judgement this action is essentially equitable in character; and, while the facts are not set out in the complaint which show a cloud upon plaintiff's title, yet it is still true that the record shows such a cloud, and the judgement below removes the cloud. Plaintiff being in possession, and a cloud being cast upon his title by the tax deeds, an action would lie in equity to remove the cloud, and no court other than a court of equity could remove the cloud by a decree. We think that the fact that plaintiff has availed himself of the practice in other states, and has not set out in the complaint the facts showing a cloud upon his title, does not alter the essential objects of the suit. Plaintiff cannot, on the one hand, invoke equitable relief, and avail himself of the powers of a court of equity, and, on the other hand, escape the consequences of being in a court of equity. Besides, the two sections of the statute above quoted apply alike to actions at law and suits in equity. The peculiar nature of the so-called statutory action is fully considered in the cases cited below. *More* v. *Steinbach*, 127 U. S. 70; 8 Sup. Ct. Rep. 1067; *Whitehead* v. *Shattuck*, 138 U. S. 146; 11 Sup. Ct. Rep. 276; *Holland* v. *Challen*, 110 U. S. 15; 3 Sup. Ct. Rep. 495.

Appellant's counsel further contends that plaintiff cannot invoke the powers of a court of equity in his behalf, becase, as counsel argues, he has not done equity by offering to pay his proportional share of the public burdens. Counsel claims that, if no valid taxes have been assessed or levied against the lots, still a court of equity would, as a matter of conscience, refuse to remove the cloud until plaintiff had first tendered payment of his proportional share of the public burdens, which should have been assessed as taxes, but which where not assessed. This rule seems to have the sanction of some courts, while other courts have refused to apply it. We cannot adopt the doctrine, not only because we are governed by statutes which are designed to regulate the practice in tax cases, but, on principle, this court is opposed to the theory that a taxpayer should, especially where the collection of the

revenue is not involved, as a condition of relief, be forced to have his taxes assessed and levied by a court in lieu of having them assessed and levied by other officers, who are familiar with the subject matter, and who are especially appointed by law to assess and levy the taxes of all citizens. We adhere to the language used in the opinion in *Powers* v. *Larabee*, *supra*: "It is, in a broad sense, a moral obligation, resting upon every taxpayer, to pay a fair and equal tax upon his property. Such obligation, however, does not become legal and enforceable in the courts unless the tax is a substantially legal one;" and also quote with approval what is said by the Supreme Court of Minnesota, in *Barber* v. *Evans*, 27 Minn. 92; 6 N. W. Rep. 445; wherein the court says, at p. 96, 27 Minn., and at p. 448, 6 N. W. Rep.: "In respect to the suggestion that the taxes in this case, though not legal, were such as the owner ought equitably to have paid to the state, it is sufficient to say that no legal or equitable liability can arise in respect to the payment of any tax not founded upon a fair, valid assessment and levy, made in the manner provided by law. In the absence of any such assessment and levy, the owner has no means of ascertaining what sum he ought to pay in respect of any piece of property, and his just share of the public burden; and, under the laws in force governing this case, the courts have no power to make the requisite assessment and apportionment of the tax." See, also, *Plumer* v. *Board*, 46 Wis. 164; 50 N. W. Rep. 416. It follows, from what has been said, that the judgment of the court below setting aside the tax deeds, and for costs, was proper as far as it went, and to that extent it must be affirmed.

But defendant now claims that the judgment falls short of meeting the requirements of § 1643 of the statutes, and should be modified, so as to give judgment in favor of defendant for the "true and just amount of taxes against the property." The principle contention in the court below and in this court turned upon the title, both parties claiming ownership, and defendant demanding that the action should be dismissed, and that the title be confirmed in him. A rehearing being granted, the attention of the

court is directed more particularly to the state of the pleadings with reference to defendant's claim for judgment against the plaintiff for the "true and just amount of taxes," under § 1643, *supra*. The answer alleges, in substance, that, in addition to the amounts paid by defendant at the tax sales for the taxes of 1884 and 1886, respectively, (and concerning the regularity of which taxes issue is fully tendered by the answer,) defendant has paid taxes on the lots as follows: That defendant paid the taxes, stating the amounts, to the county treasurer for the year 1887, and paid the taxes to the city treasurer, stating the amounts, for the years 1885 and 1886. At the trial plaintiff admitted "that the defendant paid taxes on the premises described in the complaint, subsequent to the sale of said premises to him, the following sums, to-wit." Then follow the amounts as alleged in the answer. Upon these averments of the answer and the plaintiff's admissions at the trial the question arises whether the court below should, without proof, have given judgment for such amounts paid, or for any amounts. A majority of this court is of the opinion that this question must be answered in the negative. The averments of the answer amount to this, *i. e.*, the defendant paid the subsequent taxes for certain years, and plaintiff admits that the sums were paid as taxes. But the District Court is directed by § 1643 to "ascertain the true and just amount of taxes." This language compels the examination of the tax records with a view of ascertaining whether an alleged tax was assessed and levied. The mere payment—and no more is alleged or admitted here—does not suffice to establish the validity of the tax. *Miller* v. *Hurford*, (Neb.) 12 N. W. Rep. 832; *Brown* v. *Corbin*, 40 Minn. 508; 42 N. W. Rep. 481; *Weimer* v. *Porter*, 42 Mich. 569; 4 N. W. Rep. 306.

Counsel calls attention to the Farrington case, 1 N. D. 102, 45 N. W. Rep. 191, where a majority of this court say, at p. 120, 1 N. D., and p. 197, 45 N. W. Rep.: "Said section is mandatory upon the court, and it becomes its duty to enter up judgment for the amount of the legal tax, and such judgment in no manner

depends upon the request of either party to the action." A majority of this court is of the opinion that the language quoted must be confined to the facts of the case in which it was used. In that case there were no subsequent taxes considered by the court, and the legal validity of all the taxes in question was put in issue by proper averments, and was fully litigated at the trial. The court say, on the same page of the opinion: "It was the duty of the trial court, under the evidence, to have entered judgment." The difference between the two cases is apparent. In the case at bar there is no averment alleging the validity of the subsequent taxes, or that the same were ever assessed or levied by any one. Nor was there any evidence at the trial tending to show that any subsequent tax paid by defendant was ever levied or assessed. This court is of the opinion that it would be a dangerous precedent and one subversive of established principles, to hold that the mere fact of payment will suffice to show that the sum paid represents the "true and just amount" of a tax, and hence will suffice to warrant a trial court in entering judgment for such amount. Under established rules of pleading and evidence, the party seeking judgment must allege and prove all facts essential to a recovery. In this case defendant is seeking a judgment. In California a statute allowed an action to be instituted to recover a delinquent tax. Under this statute the courts of that state uniformly have held that all facts essential to a tax, including assessment and ley, must be alleged in the complaint. In a recent case brought under the statute, *People* v. *Railroad Co.*, (Cal.) 23 Pac. Rep. 303, a demurrer to the complaint was sustained, because material facts were omitted. Among other points made is the following: "An averment of indebtedness for taxes, without an avernant that any taxes were levied on defendent or his property, or, if levied, when, where, and by whom the levy was made, or whether the taxes were based on the assessment mentioned above, or that there are any taxes against defendant delinquent or unpaid, is insufficient." See, also, *People* v. *Cone*, 48 Cal. 427; 2 Desty, Tax'n, 712. The rule stated by these authorities is

clearly to the effect that in statutory actions to foreclose the lien of a tax, or to recover judgment for a delinquent tax, the complaint must be governed by the ordinary rules of pleading under the code. It must state the material facts, and, among such, is the fact of a valid assessment and levy. This court is wholly unable to discover any difference in principle between the case of a plaintiff who, under a statute brings an action to foreclose a tax lien, or to recover a judgment for a delinquent tax and the case of a defendant who seeks, under § 1643, to recover judgment for taxes in an action brought to avoid a tax deed. We think that the legislature did not intend in passing § 1643 to inaugurate any new rules of pleading, practice, or evidence to govern the cases brought under that section. Tested by ordinary rules, the answer is fatally defective. It alleges payment of subsequent taxes, but omits to allege that such taxes were ever assessed or levied. But, upon proper averments in the answer, issue was joined upon the legality of the taxes upon which the tax sales were made. We have held that the county tax of 1886, for which the sale was made, is a valid tax, for that the defendant is entitled to judgment for such tax, with interest and penalty, as provided by the statute. See Farrington case, *supra*. Also *Everett* v. *Beebee*, 37 Iowa, 452. Inasmuch as further proceedings in the court below have become necessary, we have concluded to direct that the defendant, at his election, may apply to the District Court for leave to amend his answer by inserting therein averments of fact necessary to show that since the county tax sale he has paid legal county taxes against the lots in question. We have already said that the city tax for 1884, on which the sale is made is a void tax. But leave is given to the defendant to allege, at his election, in his answer the facts necessary to show that since the sale defendant has paid valid city taxes on the lots. If, after a hearing had upon issues made by an amended answer, it shall appear to the District Court that, in addition to the tax, interest, and penalty due on the tax of 1886, other valid county or city taxes have been paid by the defendant, the same shall be included in the amount to be

recovered by defendant. We have held that title 1, ch. 6, of the city ordinances, and the attempted amendment of § 3 thereof, never became valid, and hence cannot be resorted to in computing interest on city taxes, if such are found to exist. If no valid ordinance is shown at the hearing fixing the rate of interest, then defendant shall recover 7 per cent. on amounts paid in discharge of valid city taxes assessed since the tax sale, and paid by the defendant to the city treasurer. Under § 5193, Comp. Laws, we have discretion in modifying the judgment of the court below with respect to the costs and disbursements incurred in this court, and in the present case we have decided to allow costs and disbursements to neither party and the court below will not give judgment for costs or disbursements incurred in this court. The court below will take further proceedings in harmony with the views expressed in this opinion.

CORLISS, C. J., concurs.

BARTHOLOMEW, J., (*dissenting.*) I am unable to assent to that portion of the foregoing opinion which limits the construction given to § 1643, Comp. Laws, in *Farrington* v. *Investment Co.*, 1 N. D. 102, 45 N. W. Rep. 191, and *Bode* v. *Same*, 1 N. D. 121, 42 N. W. Rep. 658, and 45 N. W. Rep. 197, to the particular facts of those cases. I am also of opinion that, under the pleadings and admissions in the case, and for the purpose of a money judgment for taxes under said section, the legality of the subsequent taxes stands admitted. In all other respects I concur in the opinion written by Justice WALLIN.

(53 N. W. Rep. 434.)

JOHN P. WAGNER *vs.* GUNDER OLSON.

Opinion filed Jan. 25th, 1893.

Attaching Exempt Property—Failure to File Schedule.

While § 5130, Comp. Laws, requires a debtor who desires to receive the benefit of the exemptions mentioned in § 5128, Id., to serve upon the officer who has seized his property under execution or attachment a verified schedule containing all his personal property, yet the failure of the debtor to include in such schedule all of such property, when done with no fraudulent intent, and when the officer is in no manner misled thereby as to the amount of the debtor's property, will not deprive the debtor of such exemptions, but only debars the debtor from selecting any property as exempt which does not appear in the schedule.

Mingling of Goods—Purchase Money—Execution.

Where a merchant purchases goods of the same class and quality from different parties, and in the ordinary course of business so mingles the goods upon his shelves that it becomes impossible to designate the goods purchased from any one party, yet such fact will not render the entire stock liable to seizure at the suit of one of such parties to recover the purchase price of goods sold to such merchant, notwithstanding § 5137, Comp. Laws, provides that no exemption shall be allowed against an execution issued for the purchase money of property that has been seized under the execution.

Claim and Delivery for Exempt Property.

When, in such a case, the owner brings the action of claim and delivery against the officer holding such property, on the ground that the same was exempt from such seizure, the burden is upon the officer to show what specific property so held by him was liable to seizure for the purchase price thereof under the process in his hands.

Affidavit that Property is Exempt.

The action of claim and delivery will lie at the suit of the defendant in attachment to recover property seized under a writ of attachment, when it is stated in the affidavit that such property was exempt from such seizure.

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

Action in claim and delivery by John P. Wagner against Gunder Olson, sheriff. Plaintiff had judgment, and defendant appeals. Affirmed.

Bosard & Van Wormer, for appellant.

C. A. M. Spencer, for respondent.

BARTHOLOMEW, J. This controversy arises under the exemption laws of this state. The defendant, and appellant herein, was sheriff of Walsh County, and as such received a writ of attachment in an action brought by the firm of Dodson, Fisher & Brockman against John P. Wager, the plaintiff and respondent herein. The sheriff at once laid the writ upon a stock of merchandise consisting of harness, harness leather, harness hardware, blankets, robes, etc., belonging to the respondent. Respondent made an effort to claim his exemptions under the statute, but his claim was not recognized by the officer, whereupon he brought this action in claim and delivery, resulting in a verdict and judgment in his favor.

Our statute (§ 5128, Comp. Laws) gives the debtor, in addition to certain absolute exemptions, other personal property, not to exceed in the aggregate $1,500 in value. Section 5130 provides that, when the debtor desires to avail himself of the additional exemptions, he must make and deliver to the officer who has levied process upon his property a verified schedule of all his personal property, and provides that any property owned by the debtor, and not included in the schedule, shall not be exempt. Other provisions provide for an appraisement, and that from the appraisement so made, if over the limitation in value, the debtor may select the amount of his additional exemptions. The claim for the benefit of these exemptions must be made within three days after the notice of the levy. Within the time limited, the respondent (defendant in the attachment action) served upon the officer the following notice, (omitting title:) "To the sheriff of said County of Walsh: Take notice that the above named defendant hereby claims the following personal property owned by him as exempt from attachment and execution in the above entitled action, that is to say, viz: the personal property, book accounts, and notes mentioned in the schedule hereunto annexed, and made a part of this notice; and you are further notified that I choose M. F. O'Brien, a disinterested citizen of said county, not related to either party, to act as my appraiser in fixing the

value upon all the personal property levied upon by you, in order that I may select the exemptions of fifteen hundred dollars given me by law. Dated, May 13th, 1889. John P. Wagner." To this was attached an itemized list of property, being the same property described in the complaint, and a verification by Mr. Wagner, in which he says "that the foregoing list of personal property is a complete schedule of all his personal property, of every kind and character, including money on hand, and debts due and owing deponent, claimed by him as exempt under the laws of the Territory of Dakota." No other schedule of personal property was made by respondent. It is reasonably certain from the evidence that another demand for this same property was made after the appraisement.

The appellant requested certain instructions, involving the following points: *First*, that the schedule was insufficient for the reason that it did not cover all of respondent's property; *second*, the demand for exemptions was insufficient in that it did not appear that the articles demanded were selected from the appraisement; *third*, that there was no evidence of the value of the property; and, *fourth*, that the property purchased from Dodson, Fisher & Brockman, and for the purchase price of which the attachment action was brought, was so intermingled and combined with the property claimed as exempt that they could not be identified and separated. These requests were all refused, and the court, in its charge to the jury, said: "I say, as a matter of law, that all the proceedings of the plaintiff leading up to his demand for exemptions in this case were had within the time and in the manner prescribed by law." On argument, in addition to the points made in his requests, appellant urges that the instruction quoted was error, because it appears by the evidence that the property demanded covered the entire appraisement, which exceeded the exemption limitation in value; or, if this be not true, that there was no evidence in the case showing the appraised value of the property claimed. It is far from clear upon the record that these last points were ever called to the attention of

the trial court, but as, under the instruction, they might have been made on the motion for a new trial, and as we are not sure they were not, we shall consider them.

We call attention, first, to the fact that the schedule served did not cover all of respondent's property, but only such as he claimed as exempt. The statute requires the debtor to serve a schedule covering all his personal property, but it does not say that his failure to include all such property shall deprive him of his exemptions. It fixes the consequence of such omission when it declares that any property not so included shall not be exempt. Courts cannot declare a more serious consequence. Respondent seems to have understood and intended that all of his personal property not embraced in the schedule should be applied on his debt; and, while it is true that his schedule was not a literal compliance with the statute, yet, under the liberal construction always applied in the matter of exemptions, we think it sufficient in this case. *Paddock* v. *Balgord*, (S. D.) 48 N. W. Rep. 840. The officer had already seized, and had in his possession, all of respondent's personal property. Had the schedule misled the officer as to the amount of respondent's property, and particularly if it had been made with intent to mislead him, an entirely different question would be presented. The demand for exemptions contained in the schedule was a nullity, because at that time there had been no appraisement, and the law requires the selection to be made from the appraisement where it exceeds $1,500 in value. Section 5132, Comp. Laws. But it is undisputed, under the testimony, that the list of property contained in that schedule was taken from the inventory which the sheriff (appellant) had served upon the defendant in the attachment case, (respondent herein.) The appraisement, of course, covered the same property that was in the inventory, and all of it. It might have covered more, but that is immaterial now. Another demand for the same property was made after the appraisement. As we have just said, this property must have been upon the appraisement, and the demand was a sufficient selection from such appraisement. In this connection

it will be most convenient to notice the points that this second demand was for all the goods appraised, or, if not, that there is no evidence of the appraised value of such as were demanded. Respondent, as a witness for himself, in speaking of the second demand, says: "I demanded the property from defendant after this appraisement was made, and he refused." Because this witness had just been speaking of the entire appraisement, appellant assumes that "the property" refers to all the property. This is certainly unwarranted. Respondent had brought his action to recover certain specific property. He had already shown that at one time he demanded the identical property for which suit was brought. Then, after speaking of the appraisement, he says he demanded the property after such appraisement. But there is no intimation that this demand differed in any respect, as to the property covered, from the first; and that the first demand did not include all the property appraised is perfectly clear from the record. The schedule of property claimed as exempt is in the abstract. The appraisement was introduced in evidence, but is not embodied in the abstract. The amount of the appraisement is given as $1,526.03 in merchandise, and $708.80 in notes and accounts. An examination of the list of property claimed as exempt shows that it contains a list of merchandise, and notes and accounts. One Shepperd, salesman for Dodson, Fisher & Brockman, and a witness for appellant, testified that at the time of the levy two-thirds of the stock were goods that he had sold to respondent as agent of Dodson, Fisher & Brockman; in other words, goods of the value of more than $1,000 belonged to that class. But the witness also testified that of the goods claimed as exempt about $200 were purchased from his firm. From this it follows that goods of the value of $800, at least were appraised which were not claimed as exempt. Nor is there any support for the claim that there was nothing before the trial court to show what value the appraisers placed upon the property claimed as exempt. True, there is nothing before this court from which the amount can be ascertained, because the appraisement was not

incorporated in the abstract; but the appraisement was before the trial court, and we must presume that it showed the value placed by the appraisers upon each article, or lot of property claimed as exempt. With this appraisement before it, the trial court told the jury, in effect, that the appraised value of the property claimed did not exceed the sum of $1,500. We cannot say that the trial court erred, because the incomplete abstract before us does not conclusively establish the correctness of the instruction. Error must affirmatively appear.

The action of Dodson, Fisher & Brockman, was on account for goods sold and delivered. Section 5137, Comp. laws, provides that no property shall be exempt from siezure on execution issued for the purchase price thereof. The trial court charged that the burden was upon appellant to show what property, if any, that was claimed by respondent as exempt, had been purchased from Dodson, Fisher & Brockman, and the purchase price of which was included in the account sued upon. In this there was no error. When respondent established that he was the owner of the property, and that its value did not exceed $1,500, and that he had made a proper demand therefore, he showed a *prima facie* case of exemption. If it was not exempt, it was by reason of some exception to the general law, and the party who claims the benefit of such an exception must bring himself within its terms. *Paddock* v. *Balgord, supra.*

It appears that respondent had been in the habit of purchasing goods from different parties, and, when received, he placed them upon his shelves indiscriminately; so that, when the same character and quality of goods were purchased from different parties, and placed upon the shelves, it became impossible to say what articles were purchased from one party, and what from another. As the goods purchased from Dodson, Fisher & Brockman, were liable to seizure in an action for the purchase price thereof, and as such goods could not certainly be identified by reason of the mixture made by respondent, it is claimed that thereby the whole stock became liable to seizure. We cannot assent to this proposition.

This is not a case calling for the application of the rules that obtain in cases of fraudulent admixture of goods. If appellant's position be correct, then a merchant would be entitled to no exemptions whatever as against the claims of parties from whom he purchased goods unless he kept his stock so arranged and classified that he could tell at any moment from exactly what source he received every article in his stock.

Lastly, the old common law rule is invoked that, the goods being in *custodia legis*, replevin would not lie. The rule is not of universal application in this state. Section 4973, Comp. Laws, prescribes what the affidavit in claim and delivery of personal property shall state, and, among other things, it must state that the property was not "seized under an execution or attachment against the property of the plaintiff, or, if so seized, that it is by statute exempt from such seizure." Clearly this statute authorizes the action where the property is claimed as exempt, as in this case. *Cooley* v. *Davis*, 34 Ia. 128; *Whitney* v. *Swensen*, (Minn.) 45 N. W. Rep. 609.

Judgment affirmed.

WALLIN, J., concurs.

CORLISS, C. J., having been of counsel, took no part in the above decision.

(54 N. W. Rep. 286.)

JAMES MORRISON *vs.* THOS. N. OIUM.

Opinion filed Nov. 17th, 1892.

Sale—Transfer of Possession.

When, at or prior to the time of the execution of a bill of sale of personal property, the vendor, with intent to transfer the title and possession of the same, pointed it out to the agent of the vendee, where it was contained in boxes and crates, and stood in a warehouse, and subsequently locked the building, and delivered the key to such agent, who thereafter retained it, there was such an immediate delivery and actual and continued change of possession as fulfills the requirements of § 4657, Comp. Laws.

Joint Possession of Building Where Stored.

Such delivery is not impaired by the fact that a third party may also have had property in the same warehouse, and held a key thereto; nor by the further fact that the vendor may have agreed with such third party that his possession should be exclusive.

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

Action for the possession of personal property by James Morrison against Thomas Oium, sheriff. Plaintiff had judgment, and defendant appeals.

Affirmed.

Goodwin, Van Pelt and *Gammons*, for appellant.

A transfer of personal property, if not accompanied by an immediate delivery, and followed by an actual and continued change of possession is conclusively presumed to be fraudulent, § 2024 Civil Code, *Conrad* v. *Smith*, (N. D.) 51 N. W. Rep. 720; *Longley* v. *Daly*, (S. D.) 46 N. W. Rep. 247; *Cook* v. *Rochford*, 12 Pac. Rep. 568; *Young* v. *Poole*, 13 Pac. Rep. 492; *Comatia* v. *Kyle*, 5 Pac. Rep. 666; *Stull* v. *Weigle*, 8 At. Rep. 578; *Batcher* v. *Berry* 13 Pac. Rep. 45; *Sweeney* v. *Coe*, 21 Pac. Rep. 705; *Murch* v. *Swenson*, 42 N. W. Rep. 290. If there is a doubt as to the sufficiency of the delivery the benefit of the doubt must be given to the creditor. *Anderson* v. *Brennerman* 6 N. W. Rep. 222; *Smith* v. *Greenop*, 26 N. W. Rep. 332.

C. W. Buttz, for respondent.

The delivery of a bill of sale and of the key to a warehouse in which the goods are stored is an immediate delivery of the goods. Teidman on Sales, 106; *Bruns* v. *Hatch*, 19 Pac. Rep. 482; *Pearson* v. *Quist*, 44 N. W. Rep. 217; *Ross* v. *Sedgwick*, 69 Cal. 247; *Pope* v. *Cheney*, 68 Ia. 363; *Hart* v. *Mead*, 84 Cal. 244. Slight evidence of actual delivery has been allowed to protect the rights of the purchaser, 8 Am. and Eng. Enc. Law 885, *Russel* v. *O'Brien*, 127 Mass. 349; *Thomdye* v. *Bush*, 114 Mass. 116; *Ingalls* v. *Herrick*, 108 Mass. 351.

BARTHOLOMEW, J. Plaintiff and respondent claims certain personal property as vendee. Defendant and appellant, as sheriff, claims possession of the same by virtue of an attachment against the property of respondent's vendor's. Respondent, in his complaint, claimed title through a bill of sale executed and delivered on November 9th, 1887. At the hearing, against appellant's objections, respondent was permitted to give evidence of an oral contract of sale made at an earlier date, and delivery of possession thereunder. This is assigned as error. If so, it is without prejudice. It is undisputed that a bill of sale was executed and delivered on November 9th, and that the attachment was not served until November 10th, and the same delivery of the property that was made under the oral contract of sale continued under the written bill of sale. If the prior delivery was good, no further delivery was required. *Shurtleff* v. *Willard*, 19 Pick. 210; *Lake* v. *Morris*, 30 Conn. 201. At the close of the testimony, appellant requested the court to take the case from the jury, and direct a verdict in his favor. This the court refused to do, but directed a verdict in respondent's favor. The case turned upon the question of delivery, and the court ruled that, under the undisputed facts, there was a legal delivery. This is alleged as error, and to that point appellant's main argument is directed. The property in controversy consisted of buggies in what the witnesses call a "knock down" condition, meaning that the various parts were in the boxes and crates in which such property is usually shipped. The delivery consisted in taking respondent's

agent into the warehouse where the property was stored, showing it to him, and locking the warehouse, and giving him the key. A question of evidence arises at this point also. In the warehouse where the buggies were stored was a large amount of other property, (farm machinery principally,) which had formerly belonged to respondent's vendors, and which they had, a few days prior, transferred to one of their creditors, and had also given to such creditor a key to the warehouse. Appellant offered to prove that, by agreement between the vendors and such creditor, the creditor was to have exclusive control of the warehouse after the key was delivered to him. This evidence the court excluded, and, we think, properly. If such agreement had in fact been made and carried out, and if such creditor had exclusive control of and access to said warehouse, holding the property therein that had not been conveyed to him simply as a gratuitous bailee for the owners, it may be that upon a subsequent sale of such property by the owners, no delivery that would be good as against existing creditors could be made without notice to such bailee, and his consent either to relinquish to the purchaser or to hold as his bailee. Some of the cases would seem to so hold. See *Hildreth* v. *Fitts*, 53 Vt. 684; *Hallgarten* v. *Oldham*, 135 Mass. 1; *Campbell* v. *Hamilton*, 68 Iowa, 293, 19 N. W. Rep. 220. But it is unquestioned in this case that respondent's vendors did have access to the warehouse, and had possession of a key thereto, and unlocked the warehouse, and pointed out the property in controversy to respondent's agent, and subsequently locked the building, and gave such agent the key. Nor is it questioned that at the same time the agent of the party to whom the farm machinery had been sold held a key to the building, and had access thereto. If respondent's vendor were violating any agreement in not allowing said party exclusive possession, that fact cannot affect appellant's legal rights. If under the circumstances, the acts of respondent's vendors amounted to a legal delivery, they were none the less a delivery because such vendors, at a prior time, had made an agreement, which they had failed to perform, that

another party might have exclusive control of the building; hence the existence or nonexistence of such an agreement was entirely immaterial in the case, and the offered evidence was properly excluded.

Section 4657, Comp. Laws, reads as follows: "Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any person on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrancers in good faith subsequent to the transfer." It is claimed that there was no such immediate delivery and actual and continued change of possession in this case as the statute contemplates. It will be noticed that under our statue the failure to comply with its terms raises a conclusive presumption of fraud. Under statutes of this character it is perhaps true that somewhat higher evidence of delivery is required than under statutes where the fraudulent presumption raised by the law may be rebutted. *Ludwig* v. *Fuller*, 17 Me. 162. The delivery in this case was symbolical, as distinguished from actual, (which takes place when there is manual tradition of the property from vendor to vendee,) or constructive, (which is effected by bill of sale when the property is not present, as a ship at sea, or by the parties approaching within view of the property, and the vendor proclaiming delivery to the vendee when the property is ponderous to a degree that precludes actual delivery.) But the symbolical delivery that is manifested when the vendor delivers to the vendee the key to the building where the property is stored has long been regarded

by the law as equally effective in transferring the title and possession from the vendor to the vendee with actual tradition. What the law requires, and all that the law requires, is that the conduct of the parties should clearly show a relinquishment of ownership and possession, and all rights of control on the part of the vendor, and an assumption of ownership and possession and control on the part of the vendee. We think these requirements were fully met by the conduct of the parties in this case, as shown by the undisputed testimony. There is not even a suspicion in the testimony that respondent's vendors, after delivery of the key of the warehouse to respondent's agent, ever exercised any control whatever, real or apparent, over the property. Nor is there any indication that there was aught about the warehouse that would lead any one to suppose that it was in the possession of such vendors, or that they were in any manner carrying on their business therein. Nor does any reason occur to us why this delivery should be defeated because a third party had property in the same warehouse, and held a key thereto. After the delivery of the key to the agent, respondent's vendors ceased to have access to the building or control of any property therein. Prior to that time they did have access to and actual possession of the property sold to respondent. By their acts they transferred all their right of access, and their possession, to respondent. The vendors' rights and possession could not have been more completely terminated had they, therefore, been sole occupants of the building. We think the trial court rightly held as matter of law that the undisputed evidence showed an immediate delivery, and actual and continued change of possession, good as against existing creditors of the vendors. See, generally, *Packard* v. *Dunsmore*, 11 Cush. 282; *Russell* v. *O'Brien*, 127 Mass. 349; *Vining* v. *Gilbreth*, 39 Me. 496; *McKee* v. *Garcelon*, 60 Me. 165; *Benford* v. *Schell*, 55 Pa. St. 393.

What we have said virtually disposes of the error assigned upon the refusal of the court to grant a new trial on the ground of newly-discovered evidence. This proposed evidence is all directed

to the points which we have already ruled to be immaterial in this case.

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

(54 N. W. Rep. 288.)

THE MINNESOTA THRESHER MANUFACTURING CO. *vs.* ELIAS HANSON.

Opinion filed Nov. 23rd, 1892.

Sale—Warranty Construction.

Contract of warranty upon the sale of a steam threshing machine construed. This court will not limit such warranty to such defects only as are discovered when the machinery is first started, unless the wording clearly requires such restriction.

Action for Price—Defense—Estoppel.

Continued use of machinery purchased under a warranty, after knowledge of defects may destroy the buyer's right to rescind the contract, but will not destroy his right to plead a breach of warranty to defeat a recovery, in whole or in part, in an action brought by the seller to recover the purchase price.

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

Action by the Minnesota Threshing Manufacturing Company against Elias Hanson. Plaintiff had judgment, and defendant appeals.

Reversed.

Bangs & Fisk, for appellant.

A. J. O'Keefe, for respondent.

BARTHOLOMEW, J. This action was brought to forclose a mortgage given to secure the purchase price of a steam threshing outfit. The defense was breach of warranty, followed by a rescission of the contract and a return of the property. From a decree of foreclosure, with judgment for deficiency against him, defendant appeals. The findings of fact are not questioned, but the legal conclusions are challenged. The property purchased was second

hand machinery. The order for the same, given by appellant, was upon a written and printed form, and contained the warranty upon which the breach is assigned. The portions thereof material to this decision are as follows: "This engine and separator is the Fadden rig, and is warranted and represented to be in running order at time of delivery. * * * It is hereby understood that if any of the machinery ordered herein is second hand, and has been repaired and sold as such, it is warranted to be in good running order at the time of delivery to the buyer; and if, at the time of first starting, it is found by the buyer not to be as represented, immediate notice by telegraph or by mail shall be given to the seller at Stillwater, Minn., and the buyer shall wait until the seller gets a man there to right it, and shall give him necessary and friendly assistance, and then, at once, give the machinery a fair trial. The use of such machinery after said trial shall be conclusive evidence of satisfaction and fulfillment of the warranty." The findings show that the machinery was delivered in the latter part of August, 1890, and appellant commenced to use the same September 2nd, 1890, and continued to use it until October 7th, 1890, and that during said time the machinery did good work, but that at the time of the delivery the boiler was in an unsafe and dangerous condition, by reason of certain defects that were unknown to appellant, and also unknown to respondent and its agent, who believed it to be in good running order; that on October 7th, 1890, the state boiler inspector condemned said boiler as unsafe, and ordered appellant to stop using the same; that until said date appellant did not know that the boiler was in a dangerous condition; that the next day appellant, for the first time, gave respondent written notice, by letter directed to it at Stillwater, Minn., of the defects in the boiler, and notified respondent that he repudiated the contract, and requested the return of his notes. It does not appear from the findings that any attention was given to this letter, and on October 23rd, 1890, appellant returned the property to the City of Grand Forks, and offered to turn the same over to the general agent of respondent from whom he purchased

it, but the agent refused to receive it. On the same day appellant again notified respondent that he had returned the property, and left it near respondent's warehouse, subject to respondent's disposal. After said date neither party interfered with the property in any manner. Upon these facts the learned trial court found, as a conclusion of law, that appellent, by keeping and using said machine until October 7th, 1890, without notice to respondent of any defects, was precluded from setting up a breach of warranty as to the condition of the boiler at the time of the purchase. If this conclusion is correct, the judgement must be affirmed; otherwise, reversed.

No question is raised, it will be noticed, upon the right of the buyer to return the property unless such right had been waived. Appellant was precluded from the defense of breach of warranty solely by reason of his conduct in using the property for such length of time without notice of defects. Whether this conclusion was based upon the express terms of the warranty, or upon general principles of law pertaining to the subject, we are not definitely informed. The learned counsel for respondent, in his brief, puts his construction upon the warranty, and prints it as follows: "That if, at the time of first starting, it is found by the buyer, not to be as represented, immediate notice, by telegraph or mail, shall be given to the seller at Stillwater, Minn. * * * The use of the machinery after such trial shall be conclusive evidence of satisfaction and fulfillment of the warranty." Under that construction the law is undoubtedly with respondent, as we regard it well settled that where an express warranty is upon condition, or when some duty is devolved upon the purchaser by the terms of the warranty, such condition must be fulfilled, or such duty performed, before advantage can be taken of any breach of such warranty. *Nichols* v. *Knowles*, 31 Minn. 489; 18 N. W. Rep. 413; *King* v. *Towsley*, 64 Ia. 75; 19 N. W. Rep. 859; *Russell* v. *Murdock*, 79 Ia. 101; 44 N. W. Rep. 237; *Worden* v. *Harvester Co.*, 11 Neb. 116; 7 N. W. Rep. 756; *Threshing Machine Co.*, v. *Vennum*, (Dak.) 23 N. W. Rep. 563. But will the warranty bear that construction? We

think not. We have already quoted it, supplying the ellipsis found in respondent's quotation. We think the fair, reasonable construction of the langauge will lead to the conclusion that the use of the machinery which is declared to be conclusive against appellant upon the question of breach of warranty must occur after notice of defects; after a man has been sent to remedy such defects; after an effort has been made so to do, and the machinery then given a fair trial. It is the use of the machinery after said trial that becomes conclusive. This construction becomes irresistible by reference to other portions of the warranty, all of which is set forth in the findings. It is provided that, in case of purchase of machinery other than second hand machinery, the buyer shall have three days after it is first started to ascertain whether said machinery is or is not as warranted. If not, he shall at once give notice to the seller, and wait until a man gets there to right it, and, after the man is through, the buyer shall at once give the machinery a fair trial of two days, and the use of the machinery after the said two days shall be conclusive evidence that it is as warranted. Here is it expressly declared that the use of the machinery which shall be conclusive upon the question of warranty follows the second trial of the machinery,—the trial that comes after the efforts of the expert to correct the defects. Under the language used, it is not reasonable to conclude that it was the intention to establish a different rule upon sales of second hand machinery. In this case it does not appear, however, that any attention was ever given to the notice of defects sent on October 8th, 1890, or that any man was sent to remedy such defects, or that there ever was any subsequent trial of the machinery. Such being the case, that portion of the warranty which makes the use of the machinery after such subsequent trial conclusive against the buyer on the question of breach of warranty must be eliminated from further consideration.

But it is claimed that under the express terms of the warranty the buyer was bound, at his peril, to discover all the defects in the machinery "at the time of first starting," and that only the defects

thus discovered and reported were covered by the warranty. This construction would be very narrow, and we do not think the language requires it. It would convert a provision intended for the buyer's protection into a trap for his undoing. It would be difficult, often impossible, for the buyer, upon a trial of an hour's duration, or even in a half day, to inspect each portion of a steam engine, boiler and grain separator, sufficiently to discover whether or not it was perfect, and properly performed its functions. When next started, in different grain, and under less favorable circumstances, portions of the machinery might be found entirely inadequate. Yet, under the construction contended for, the buyer's mouth would be closed. We do not think the buyer understood, or that the seller intended him to understand, that he was receiving only this restricted and unsatisfactory protection. Independent of any conditions in the warranty, it was incumbent upon appellant to be ordinary dilligent to discover, and prompt to report, any defects in the machinery that would constituted a breach of the seller's warranty; and any continued use of the machinery, after knowledge of the defects, without notice thereof to the seller, would prevent a recission of the contract, and a return of the property. It would be an election upon the part of the buyer to affirm the contract. *Locke* v. *Williamson*, 40 Wis. 377; *Boothby* v. *Scales*, 27 Wis. 626; *Sparling* v. *Marks*, 86 Ill. 125; *Marshall* v. *Perry*, 67 Me. 78; *Cookingham* v. *Dusa*, 41 Kan. 229; 21 Pac. Rep. 95; *Polhemus* v. *Heiman*, 45 Cal. 573. But the retention and use of the property, without notice of defects, under the great preponderance of the later—and, as we think, better—authorities, affects only the right to rescind. The buyer may still rely upon the breach of warranty to defeat a recovery, in whole or in part, in an action brought by the seller to recover the purchase price. Continued use of the property, with knowledge of defects, and without notice or complaint of the seller, may be more or less persuasive as evidence of waiver of defects, but cannot establish such waiver as a matter of law. See, generally, *Kellogg* v. *Denslow*, 14 Conn. 411; *Aultman, Miller & Co.* v. *Thierer*, 34 Ia. 272; *Muller* v. *Eno*, 14 N. Y. 597;

Kent v. *Friedman*, 101 N. Y. 616; 3 N. E. Rep. 905; *Vincent* v. *Leland*, 100 Mass. 432; *Taylor* v. *Cole*, 111 Mass. 363; *Warder* v. *Fisher*, 48 Wis. 338; 4 N. W. Rep. 470; *Ferguson* v. *Hosier*, 58 Ind. 438; *Fennock* v. *Stygles*, 54 Vt. 229; *Smith* v. *Mayer*, 3 Col. 207. We are unable, under the findings of fact, to discover any legal reason, either in the express words of the warranty or otherwise, why appellant may not in this case take advantage of the breach of the warranty, if any such breach in fact exists.

An inspection of the record in this case discloses another reason why we should reach this conclusion. The original contract is partly printed and party written. The first warranty of the particular property involved, and which we have already quoted, is in writing, and is unconditional and absolute. The conditional warranty is printed. To give that conditional warranty the construction for which respondent contends would make it entirely inconsistent with the written warranty. A well settled rule of construction, in all such cases, makes the written portion of the contract controlling, as being that to which the attention of the parties was more directly and specifically called.

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

(54 N. W. Rep. 311.)

ALMON H. PARKER *vs.* THE FIRST NATIONAL BANK OF LISBON.

Opinion filed Dec. 14th, 1892.

Lien for Threshing—Notice—Description of Land.

In order to preserve a lien for threshing grain, under Ch. 88, Laws Dakota Territory, 1889, the statement which that statute directs shall be filed, must contain a description of the land whereon the grain upon which the lien is claimed was grown.

Owner and Operator of Machine.

No party is entitled to a lien, under the provisions of that chapter, unless he owns and operates the machine with which the threshing was done.

Who May Maintain Conversion.

An action for the conversion of personal property cannot be maintained unless plaintiff was in possession, or held a legal right to immediate possession of the property converted, at the time of the conversion.

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

Action by A. H. Parker against the First National Bank of Lisbon for the conversion of a quantity of wheat. A demurrer to the complaint was overruled, and defendant appeals.

Reversed.

Goodwin & Van Pelt for appellant.

Lockerby & Cady, for respondent.

BARTHOLOMEW, J. This is an action for conversion of certain wheat. There was a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and this appeal was brought by defendant solely upon such ruling. It will not be necessary to consume the space required to set out the complaint in full. Respondent claimed the wheat by virtue of a thesher's lien, under Ch. 88, Laws Dakota Territory, 1889. Section 1 of that chapter reads as follows: "Every person or persons owning and operating a threshing machine shall have a lien, from the date of threshing, upon all grain threshed by him with such machine, for the value of the services so rendered in doing such threshing."

The second section gives such lien, when filed within the time specified, priority over all liens or incumbrances upon the grain, created subsequent to the act. Section 3 provides for filing an account, and specifies what the account shall contain, including the number of bushels threshed, the price agreed upon for such work, the name of the person for whom such threshing was done, and a description of the land upon which the grain was grown. It also provides for filing the statement for record. Section 4 makes such filing notice to all purchasers and incumbrancers subsequent to the date of said filing; and § 5 provides for the foreclosure of the lien upon the notice, and in the manner, provided by law for the foreclosure of chattel mortgages. No copy of the statement required to be filed is incorporated in or annexed to the complaint. Appellant disclaims raising any question as to the constitutionality of the statute under which respondent claims, but contends that respondent has failed to bring himself within the provisions of the statute, in two particulars: *First*, that it does not appear from the complaint that respondent ever filed the statement required by the statute; and, *second*, that it does not appear from the complaint that respondent was the owner of the machine that did the threshing. The language used by Justice Wallin in construing the statutory seed grain lien in *Lavin* v. *Bradley*, 1 N. D. 291, 47 N. W. Rep. 384, is in all respects pertinent to this case: "In construing the seed lien statute the fact must not be overlooked that the lien given is wholly statutory in its nature and origin. It was unknown to the common law, and hence can neither be acquired nor enforced unless there has been a substantial compliance with the act of the legislature from which the lien arises." Relative to the statement filed, the complaint states: "Plaintiff further alleges that, for the purpose of securing his pay for said threshing and for the purpose of perfecting a lien on the grain so threshed, he caused to be made an itemized statement of his account for such threshing, containing his bill therefor, and after making oath thereto," etc. There is no other reference to the statement in the complaint.

The allegation is that it was "an itemized statement of his account." An itemized account, as those words are generally—and, so far as we know, universally—used, includes the names of the parties, debtor and creditor, the respective items for which the credit was given, with the dates and amounts charged for each item; and the total amount. In an itemized account for threshing, a description of the land on which the grain was grown would be entirely foreign. It would be no necessary or usual part of such an account. The pleader having alleged the character of the statement filed, under familiar rules of interpretation, we cannot presume that anything else was filed. Yet the statute is peremptory in requiring the statement to contain a description of the land on which the grain was grown, in order to entitle a party to the lien given by the statute. The necessity for such statement, particularly for the protection of subsequent purchasers and incumbrancers, is perfectly apparent. In this case it may be true that respondent performed all the acts alleged in the complaint, and yet if appellant subsequently came into possession of the wheat by purchase from the owner, or by way of security, its title would be perfect, as against respondent.

Again, under the statute, it is not the party owning a threshing machine who is entitled to the lien, nor yet the party operating such machine, but it is the person "owning and operating a threshing machine." The only allegation in the complaint upon that point is as follows: "That plaintiff was at all times hereinafter mentioned doing business of running and operating a threshing machine." That falls far short of an allegation of ownership in the machine. It is just as consistent with possession in any other capacity. An allegation much stronger than in this case was held to be an insufficient allegation of ownership in *Rugg* v. *Hoover*, 28 Minn. 407, 10 N. W. Rep. 473. We think the complaint was vulnerable to the demurrer on both these points.

Another insuperable objection is urged against the complaint, which we are compelled to notice, in view of what may hereafter appear by way of an amended complaint. Plaintiff does not

show that he was in possession, or had an immediate right of possession, of the grain at the time of the alleged conversion. The statute, at most, only gives a lien. This lien may be foreclosed upon the notice, and in the manner, provided by law for foreclosing chattel mortgages, but it carries with it no right of possession until the right to foreclosure is complete. The complaint fails to show that the credit extended to the party for whom the threshing was done had expired, or that the account was due. It is well settled that no action for conversion can be maintained unless the plaintiff shows a general or special ownership in the property converted, and possession or a legal right to immediate possession, at the time of the conversion. *Barton* v. *Dunning*, 6 Blackf. 209; *Grady* v. *Newby*, Id. 442; *Dungan* v. *Insurance Co.*, 38 Md. 242; *Owens* v. *Weedman*, 82 Ill. 409; *Fulton* v. *Fulton*, 48 Barb. 581; *Danley* v. *Rector*, 10 Ark. 211. The order of the District Court overruling the demurrer to the complaint is reversed, and that court is directed to enter an order sustaining the demurrer, and giving respondent 20 days after the entry of such order in which to amend his complaint, if he so desires. All concur.

(54 N. W. Rep. 313.)

GEORGE A. BENNETT *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

Opinion filed Dec. 17th, 1892.

Injury to Employee—Question of Negligence for Jury.

Plaintiff, a switchman, in the employ of defendant, was directed by the foreman of the switching crew to assist him in coupling an engine to a flat car. According to some of the evidence the drawhead of the car sank flush with the end of the car when the engine struck the car, and plaintiff was caught between the car and engine, and injured. The evidence showed that the play of a drawbar was from 1 to 4 inches, and that this drawbar was 10 or 12 inches long. *Held*, sufficient evidence of defendant's negligence to require the submission of that question to a jury.

Contributory Negligence—What is Not.

The track on which the coupling was made was a curved one, and plaintiff was standing on the footboard of the engine, on the inside of the curve, at the time he was injured. There was no evidence as to the degree of the curve. *Held*, that he was not negligent, as a matter of law, in remaining there to help in making the coupling.

Evidence Applied.

Nor was he guilty of contributory negligence, as a matter of law, in standing in that place, notwithstanding the unusual shortness of the drawbar of the engine and of the drawbar of the car, the former projecting 6 inches beyond a rim on the rear of the engine, and the latter being, according to some of the evidence, 12 inches long, the evidence showing that the usual play to a drawbar is from 1 to 4 inches; there being no play to the drawbar on the engine, and it being undisputed that the engine approached the car slowly to make the coupling, so that the amount of slack taken up would be but little, if everything was in proper order.

Standing on Footboard of Engine.

Neither was it contributory negligence, as a matter of law, for him to remain on the footboard, instead of going ahead, and setting the pin, and then stepping outside the track before the engine and car came together.

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

Action for personal injuries by Geo. A. Bennett against the Northern Pacific Railroad Company. Defendant had judgment, and plaintiff appeals.

Reversed.

S. L. Glaspell, for appellant.

Ball & Watson, for respondent.

CORLISS, C. J. This is the second time this case has been before us. On the former appeal the opinion is reported in 2 N. D. 112; 49 N. W. Rep. 408. On the second trial the court directed the jury to find for the defendant. Judgment was entered on the verdict so directed. From that judgment this appeal is taken. Should the case have been submitted to the jury? It is necessary to review the evidence, as the facts seem to be somewhat different from those which appeared from the record on the former appeal. The plaintiff was injured while assisting in coupling an engine to a flat car, known as a "Union Tank Line Car.' The car was standing on a switch. Plaintiff was directed by Dennis Shields, the foreman of the switching crew of which plaintiff was a member, to go with him to couple onto this car, and to transfer it to another track. Plaintiff turned the switch, and stepped upon the end board of the engine where Shields was standing. The engine then started eastward to back down to this car, which was only a few rods distant,—about 60 or 70 feet. The switch was a curved one. How great was the curve is not disclosed by evidence on this record. Plaintiff appears to have offered to prove that the curve was slight, but this offer was objected to, and the objection sustained by the court. Shields stood on the end board on the outside of the curve, while plaintiff stood on the end board on the inside of the curve. According to plaintiff's testimony he was looking for a pin with which to make the coupling as the engine approached the car. Finding none lying on the drawhead of the car, he turned to the tool box in the rear end of the tank of the engine to look for one there. Discovering none there he next cast his eyes upon the ground to find one, and was still unsuccessful. Finally he espied one on the platform of the car near the end. The engine, he says, was at that time about twenty feet from the car, and moving slowly, about 2½ miles an hour. He leaned over and grasped the pin, and was just in the act of setting it when he was caught between the end of the car and the end of the engine, and one of his pelvic bones crushed. The injury appears to be permanent and quite serious.

There is a marked difference between the evidence on this and on the former trial so far as the length of the drawbar of this car and the circumstances immediately surrounding the accident are concerned. On the former appeal we held that plaintiff was guilty of contributory negligence, as a matter of law, because the evidence disclosed the fact that this drawbar projected less than five inches from the end of the car before the slack was taken up. We held that, as the plaintiff slowly approached the car, he could not have failed to have noticed that the drawbar was extremely short had he used proper care; but it now appears from some of the evidence that this drawbar projected 10 or 12 inches beyond the end of the car. We do not think that it can be said, under such evidence, that as a matter of law, the plaintiff was negligent in not apprehending peril; nor is it evident that plaintiff would have been injured at all had the play of this drawbar been only normal; *i. e.* from one to four inches. The engine was moving so slowly that its momentum when it struck the car must have been very slight. Shields, the foreman, says that the engine barely touched the car when they came together. The amount of slack taken up under these circumstances would be but little if everything was in proper condition. We think that the plaintiff had a right to assume that everything was all right, under the circumstances. It is true that, under the rule referred to in the opinion on the former appeal, and which was introduced in evidence on the second trial, the plaintiff was under obligation to look at the coupling apparatus to see if it was all right before making the coupling; but this does not involve a critical examination of the apparatus. The plaintiff testified that, as he approached the car, he looked at the drawbar, and did not see anything the matter with it. Indeed, it is undisputed that the drawbar and drawhead were apparently in good order; and if, there was anything the matter with them it is fair to assume that it was some obscure defect as in the spring, the follower plate, or some other similar place, the discovery of which would have required a very careful examination. It was for the jury to say whether plaintiff did all

the rule required of him under the evidence on this appeal. We are left in dark as to the precise difficulty with the drawbar, but, if the testimony of the plaintiff is entitled to credence,—and that is a question for the jury,—then there is evidence to warrant a finding that there was something wrong with some part of this coupling apparatus. The plaintiff swore that, when the engine struck the car, it pushed back the drawhead of the car almost, if not quite flush with the end sill. He said: "When the engine struck the draft iron it sunk in. It sunk in under the car. It might have been a foot. It could not have been more than flush with the end of the car, or what would be the car frame." That there should be such play to the drawbar from so slight an impact of the engine against it is certainly evidence from which the jury might have said that there was some defect, which a proper inspection of the car would have disclosed. It is urged that there is evidence that the car was inspected. Assuming this to be so, still it may be that the defendant had not discharged its full duty to plaintiff. It owed him the duty of making a careful inspection, and it was for the jury to say whether the sinking in of this drawhead flush with the end of the car, should they believe plaintiff's testimony in this particular, was not evidence that this inspection, if made at all, was not made in a proper manner. If plaintiff's testimony is true, the drawbar, instead of having a play of from 1 to 4 inches, had a play of 10 or 12 inches,—the full length it projected beyond the car. It seems to be conceded that the drawbar could not have sunk in so far had there been no defect in the apparatus. It is true that there was evidence tending to show that everything was in proper order, but this conflict it is the province of a jury to settle. On the former appeal we said: "To fail to discover, under this circumstances, that these drawbars [*i. e.* those of the engine and of the car] were only about one-third the usual length, must be negligence," etc. It now appears that the drawbar on the engine was 8 inches long, and that, that on the car was 10 or 12 inches long. We cannot, under these new facts, say, as a matter of law, that the plaintiff was negligent

in not knowing that there was danger of his being injured in making the coupling should he remain on the footboard; nor is there any evidence that he would have been hurt had there been no undue play to the drawbar of the car. The jury might, under the evidence, have found that this drawbar projected 12 inches beyond the end of the car; that the plaintiff was justified in assuming that only a little of the slack would be taken up in view of the very slow approach of the engine to the car; and it is undisputed that the drawbar of the engine projected at least 6 inches beyond the 2-inch rim around the rear end of the engine, and that there was no slack in this drawbar which could be taken up. This would have left a standing place of about 16 inches, assuming that the spring of the drawbar of the car yielded two inches. This would have afforded plaintiff ample space in which to stand with safety, under the evidence on this record. It is true that plaintiff was bound to know that this space would be diminished somewhat by reason of his being on the inside of the curve, but there is no evidence in this case showing the extent of the curve, or how much closer together the ends of the car and engine would come on the inside than on the outside of the curve. The curve may have been so slight as to make the difference barely appreciable, especially at the point where plaintiff must have stood, quite near the center, in order to secure the pin, and drop it into the opening in the drawhead of the car.

Whether plaintiff ought to have gone ahead and set the pin, and stepped to one side before the engine and car came together, is also a question for the jury. Negligence and contributory negligence are generally matters of fact, and we think that in this case, under the present record, they should have been both submitted to the jury, under proper instructions. Radical changes in testimony excite more or less suspicion, but it is not for this court to say whether the plaintiff swore falsely on the second trial; nor was it the province of the trial court to settle this matter of fact either for or against the plaintiff. The judgment is reversed, and a new trial ordered. All concur.

(54 N. W. Rep. 315.)

CHARLES H. GOULD *vs.* DULUTH AND DAKOTA ELEVATOR CO.

Opinion filed January 10th 1893.

Vacation of Judgment.

Defendant moved in the District Court to vacate certain judgments entered in plaintiff's favor, and pending defendant's motion plaintiff made a counter motion, asking, in the alternative, either that the judgments be confirmed, or, if vacated on defendant's motion, that a new judgment be entered on the verdict. Both motions were denied, by one and the same order. *Held*, that while the order, in terms, denied plaintiff's motion, as well as that of the defendant, its practical operation and legal effect were wholly favorable to the plaintiff and wholly unfavorable to the defendant.

Separate and Distinct Matters Not Disposed of in One Order.

The practice of mingling distinct and independent matters in one hearing, and disposing of the batch by one order, condemned.

Appeal Dismissed.

No appeal will lie in plaintiff's favor from such order, and hence plaintiff's appeal therefrom is dismissed.

Order for Judgment—Ex Parte Application.

An application to the District Court, or to a judge thereof, for an order directing the entry of a judgment, may be made *ex parte*. Notice of such application is not necessary, unless a stay exists, or the court or judge, for some special reason, directs that such notice be given.

Judge May Direct Entry of Judgment Outside His District.

Under the proviso contained § 4828 Comp. Laws, a Judge of the District Court of the district in which the action is pending has authority, by an *ex parte* order, made while outside of such district, and within the state, to direct the entry of a judgment in such action; and, where an outside judge has been requested to act in the place of the judge of the district where the action is pending, under Ch. 61, Laws 1890, such outside judge is, with respect to such cases or matters as come within the request to act, empowered to "do and perform all such acts as might have been done and performed by the judge of such district." Accordingly, *held*, that the Judge of the Fifth Judicial District, who had been duly requested to act, had authority to sign an *ex parte* order for judgment in this case while within the fifth district; the action being pending in the third district.

Presumption of Due Taxation of Costs.

On appeal from a judgment embracing costs, this court will presume, unless the contrary affimatively appears in the record, that the costs were duly taxed and inserted in the judgment. Where presumptions control, they will only be indulged in support of the judgment. Eliott, App. Proc. § § 710, 717, 718, 725.

Cross appeals from District Court, Cass County; *McConnell*, J.

Action by Charles H. Gould against the Duluth & Dakota Elevator Company for the conversion of a quantity of wheat. After the reversal of an order vacating a judgment for plaintiff, 50 N. W. Rep. 969, judgment was entered for plaintiff. Defendant moved to vacate such judgment, and pending such motion plaintiff moved for an order confirming the judgment, or, if vacated on defendants motion, for judgment on his original verdict. From the orders entered, denying both motions, both parties appeal.

Affirmed.

J. E. Robinson, for plaintiff.

Spalding & Phelps, for defendant.

WALLIN J. On a former appeal in this action to this court, 2 N. D. 216, 50 N. W. Rep. 969, an order of the District Court setting aside a verdict in plaintiff's favor, and granting a new trial, was reversed, and the trial court was directed to enter judgment in plaintiff's favor, reversing the order of the District Court, and for the costs and disbursements of this court. On filing the remittitur below, and on plaintiff's application therefor, judgment was entered in the District Court, reversing the said order of the District Court, and for plaintiff's costs and disbursements made and incurred in this court on said appeal, amounting to the sum $80.65. This judgment bears date January 30th, 1892, and the same was entered by the Clerk of the District Court for Cass County, in the Third Judicial District, where the action was pending. At the same time, and on plaintiff's motion therefor, another and separate judgment in this action was rendered and entered by the Clerk of said District Court, in favor of plaintiff and against defendant for the amount of the verdict, with interest, together with the costs and disbursements of said action in the District Court, aggregating $592.35. This judgment also bears date January 30th, 1892. Both judgments were rendered and entered without notice to defendant, or to its attorney in the action. It is conceded that both judgments were signed by the

Judge of the Fifth Judicial District while said judge was outside of the third district, and within his own district—the fifth. The judge of the fifth district signed and certified to both judgments as follows: "Roderick Rose, Judge, acting for and in place of Wm. B. McConnell, at his special request, and in his absence from the state." No question arises upon this record touching the accuracy of the several amounts entered in the judgments as costs or disbursements. After the entry of said judgments, defendant obtained an order of the District Court for the Third Judicial District, signed by the judge thereof, requiring plaintiff to show cause, why said judgments should not be vacated; and pending the hearing of said order to show cause, and before the same was determined, said District Court, at plaintiff's instance, granted another order, requiring defendant to show cause "why the judgments herein entered, and signed by Judge Rose should not be in all things confirmed, and stand as the judgments of this court, or why judgment should not be entered on the verdict for $484 and costs, as taxed and allowed by the court." Said orders, respectively, were based upon affidavits, but the contents thereof, except as hereinafter mentioned, are not now important to notice. The motions embodied in the two orders to show cause were heard at the same time, and after hearing counsel the District Court ordered as follows: "That each of said motions be, and the same is hereby, denied." This order bears date on March 29th, 1892. On April 2nd, 1892, the District Court made the following order: "The order requiring plaintiff to show cause why the two judgments herein, dated January 30th, 1892, signed by the Honorable Roderick Rose, Judge of the Fifth Judicial District, should not be set aside and vacated, coming on for a hearing, A. C. Davis, defendant's attorney, in support of said order, and J. E. Robinson, plaintiff's attorney, showing cause *contra*, and on due consideration, ordered, that said order to show cause be, and the same is hereby, discharged, and the application of defendant to set aside and vacate the judgment is hereby denied as to each of the same. This order is made as a partial substitute for order

dated March 29th, 1892; and, except as hereby suspended, said order stands. Wm. B. McConnell, Judge. April 2nd, 1892." It appears on the record that the last mentioned order "was made on motion of defendant's attorney, in order to free his appeal from the plaintiff's motion." From the last mentioned order defendant, on April 4th, 1892 perfected an appeal to this court; and thereafter, on April 23rd, 1892, the plaintiff appealed to this court from so much of the first order of the District Court (that of March 29th, 1892) as denied plaintiff's motion "that the judgments herein be in all things confirmed, or that plaintiff do have judgment on the verdict for the amount thereof, with interest and costs."

In this court, defendant assigns the following errors: *First*, "That Judge Rose had no authority to sign the judgments, or to order them to be entered by the clerk of this court, and especially had no authority to do so beyond the limits of the Third Judicial District." *Second*, "That the proceeding of the plaintiff in causing two judgments to be entered herein is irregular, and contrary to law and the practice of this court." *Third*, "That said judgments were rendered and entered without notice to the defendant or its attorney." Plaintiff's assignments of error in this court are briefly as follows: *First*, The District Court erred in refusing to grant plaintiff's motion, because the counter motion of plaintiff was justified by defendant's motion to vacate the judgments. *Second*, If the judgments were void, then the court erred in denying plaintiff's motion for another and valid judgment.

We can discover no merits in either of plaintiff's assignments of error. Plaintiff's motion was, under the circumstances, uncalled for, and premature. One branch of the relief sought by the motion was a confirmation of judgments already entered in plaintiff's favor. While plaintiff's judgments stood of record as entered, their confirmation would be superfluous and meaningless; and whether the judgments were to stand intact or not was the sole question to be determined by the motion previously made by defendant, and then pending. The other branch of plaintiff's

motion, viz: to enter a new judgment on the verdict, (upon the contingency that the existing judgments were first vacated,) was premature. The practice of mingling together in a single motion various matters which are distinct and severable in their character, and of disposing of the entire incongruous mass by one lump order, is not to be commended. Such a course tends to complicate and confuse issues which should be separated, and considered independently of each other. It is nevertheless quite clear that the order of the trial court denying both the motion of the plaintiff and the motion of defendant was, in its practical operation and legal effect, wholly favorable to the plaintiff. By such order the District Court refused to vacate plaintiff's judgments. The refusal to vacate was tantamount to saying that the judgments should stand as entered of record. Such an order could not prejudice any right of the plaintiff, and the same was not appealable.

Defendant's assignments of error present more serious questions. We will inquire first whether the trial court erred in refusing to vacate the judgments upon the ground that they were entered without notice to the defendant or its counsel. The practice of entering judgments in the District Courts in contested cases without notice, and in the absence of the defeated party, was extensively prevalent in those portions of the late territory which are now embraced within the boundaries of this state, and since the state has been admitted the practice still continues to be prevalent. The number of such *ex parte* judgments is very great, and, unless the most imperative reasons exist for so doing, we certainly ought not to establish a rule in this or in any case which could be used, or sought to be used, as a lever to upset the results of so much of the litigation which belongs to the past. But we know of no express statute or governing rule of practice that makes such holding necessary. Section 5095, Comp. Laws, provides that a judgment "may be entered by the clerk upon the order of the court, or the judge thereof." At the time this section was enacted the line dividing the duties of the court while in session from those of the judge at chambers was much more

distinctly marked than it has become under the operation of more recent statutes. The existing practice of entering judgments without notice probably grew up under the statute in consonance with the theory that only *ex parte* matters, followed by orders made as of course, could be entertained by a judge when not sitting as a court. The section cited confers upon the "judges" as well as the courts, authority to direct the entry of judgment. We think this implies that the legislature intended judgments to be entered, except in cases where the statute otherwise specially directed, without notice or other formalities than the simple direction of the court, or of the judge at chambers. There seems to be no necessity for such notice ordinarily. None is expressly required in cases tried by the court. Section 5067, Comp. Laws. On the other hand a motion is expressly required by the terms of a recent statute regulating the entry of judgments based upon the reports of referees. Laws 1889, p. 151. Applications for judgment in default of answer is specially regulated by § 5025, Id.; and in cases of a frivolous demurrer, answer, or reply, § 5026 expressly requires notice of the application to be given. What we say in this case has no application to cases arising under those sections. In the cases mentioned in § 5095, we see no danger, and see some practical advantages likely to result from the practice of entering judgment without notice. No judgment can be regularly entered without an application therefor to the court or judge, and if deemed expedient, an order for notice and a hearing before rendering judgment can be made in any case. Counsel for defendant cite § 5333, Comp. Laws, which requires that, in cases where defendant has appeared in an action, notice of the ordinary proceedings in the action shall be served on defendant or his attorney. But this general provision must, under a familiar rule of construction, yield to any statute framed expressly to control a particular subject. There is a corresponding section in the practice act of the State of Minnesota. See volume 1, § 72, Ch. 66, Gen. St. Minn. 1878. In *Leyde* v. *Martin*, 16 Minn. 38, Gil. 24, where judgment was entered without notice

upon the report of a referee, the court sustained the practice against the objection that no express statute conferred on the Clerk of the Court authority to enter judgment without notice in such cases, although the clerk could do so in jury cases under § 268 of Ch. 66. The court cited earlier decisions and refused to disturb the existing practice of entering judgment without notice. Much less we think, should the existing practice be disturbed in this state, where unlike Minnesota, no judgment can be entered without the direction of the court, or a judge thereof. While the point is not directly involved in the present case, we feel like saying, in the interest of a sound and uniform practice, that there is no statute in this state requiring the District Court, or judge thereof, to sign a judgment. An order directing the entry is all that is required. Section 5095, Comp. Laws. By the decided weight of authority, where a statute provides in terms for affixing the signature of the judge to a final judgment, such statute will be construed as directory, merely, and a failure to sign the judgment does not invalidate the same. 1 Freem. Judg. § 506e, and note. In this state, where an order for the entry of the judgment is given, it is the duty of the clerk, under § 5095, *supra*, to enter final judgment in the judgment book, and then place a copy of such judgment in the roll. Comp. Laws, § § 5101, 5103. On the coming in of a verdict, an order for judgment entered in the minutes, or subsequently written out, signed by the judge, and filed, will give the clerk authority to enter judgment pursuant to the order. Where the action is tried by the court, the findings should indicate clearly the character of the judgment to be entered; and such findings, without further direction from the court or judge, will authorize the entry of judgment. In no case should a judge be called upon to sign a judgment.

Another of defendant's assignments of error is predicted upon the entry of two judgments instead of one. The entry of a judgment based upon the verdict, and embracing the costs and disbursements in the District Court, was clearly regular—no stay having been granted—after the remittitur had been transmitted,

showing that the order vacating the verdict, and for a new trial, had been reversed by this court. After such refusal, it certainly was regular practice to apply for an order directing the entry of a judgment in conformity to the verdict; and in this case the judgment, as entered by the clerk upon the verdict, recited upon its face that the order of the District Court vacating the verdict, and granting a new trial, had been reversed. Under the circumstances we can discover no irregularity or error in applying for an order, and having the judgment entered upon the verdict.

Was it error to enter a separate judgment for the costs incurred in the Supreme Court on the former appeal? We think not. The decision and mandate of this court awarded such costs, in terms, to the plaintiff. Nor do any of defendant's assignments of error challenge the right of plaintiff to have judgment entered in the District Court for his costs and disbursements incurred on the appeal. Defendant's assignment of error upon this feature goes only to the fact that two judgments were entered, instead of one. Our own meager statutes upon the subject matter of costs and disbursements incurred in this court afford us little in the solution of the point raised. Nor do the precedents in other jurisdictions —which for the most part are based upon local statutes—afford us much help. There are numerous precedents in other states for the entry of separate judgments for the costs and disbursements incurred in a court of review. It might happen, indeed, that a party who had prevailed in a court of review upon an appeal based upon some interlocutory order as was the case here, may be defeated, and judgment go against him at the end. In such case we do not see how the party who was awarded his costs on the appeal could ever recover them, if he was not allowed to enter a separate judgment for such costs. True, some courts have awarded the costs incurred on appeal to the successful party, conditionally, *i. e.* upon the condition of ultimate success on the merits. In such case the right to enter judgment for costs could not be determined in advance of final judgment; but without deciding whether, under our statute, this court possesses the

power to direct that costs shall abide the final event of the suit, we will only say that in this case the costs on the former appeal were awarded to plaintiff absolutely. There is no question before us, upon this record, touching either the several items which go to make the totals of the costs or disbursements in either of the judgments, nor is there any point made that the aggregates are excessive. No hardship or injustice appearing in this respect, we see no considerations, either of law or justice, which require us to set aside the judgment for costs. Counsel for defendant cite § 5197, Comp. Laws, requiring notice of the adjustment of costs before the clerk to be given, and make the point that no notice was given, and hence that the judgments are vulnerable for that reason. The answer to this point is that it does not appear by the record that defendant has not received notice of the adjustment of the costs before the Clerk of the District Court. If such is the fact, it should be made to appear affirmatively, for the reason that courts of review will assume in support of a judgment, until the contrary is shown, that the same was regularly rendered and entered. *Gaar, Scott & Co.* v. *Spalding*, 2 N. D. 415, 51 N. W. Rep. 867. No such point appears to have been made before the District Court, nor is error assigned in this court, predicated upon any alleged failure to give notice of taxation of costs before the clerk. Under these circumstances, we cannot rule upon the point.

A single question remains for determination. The authority of the Judge of the Fifth Judicial District to order the entry of the judgments in question is broadly challenged. Counsel for defendant say in their brief: "It is not the physical fact of signing the order outside the Third Judicial District which the defendant contends is error, but the assumption of jurisdiction of the cause, and the rendering of judgment, outside of the proper district." We think the act of signing an *ex parte* order for judgment, if done within the state, but outside of the district where the action is pending, and the signing is done by the Judge of the District Court in which the action is pending, is not an irregularity in

practice, although such signing is not as likely to occur as it was during the territorial regime, when the judges were often called outside of their district to sit in *banc* as a Supreme Court. Such an order, when made *ex parte* by a judge would, under the terminology used in the earliar statutes, be denominated a "chambers order," and the act of 1887, § 4828, Comp. Laws expressly allows such orders to be made at any place within the territory, in any matter properly before him." See, also § 5324, Id. We think those provisions of the statute are not repugnant to any provision of the state constitution, and therefor are now in force. Under the terms of the statute the Judge of the Third Judicial District, where the action was pending, would have been authorized to direct the entry of judgment at any place within the state. Whether the Judge of the Fifth District, who actually made the order, had authority to make the same, depends upon whether such judge, when he signed the order, was lawfully empowered to discharge the official duties of the Judge of the Third District. We think the Judge of the Fifth District was legally empowered to make the order. The state legislature has, in terms, given authority to the District Judges, under the circumstances stated in the statute, *i. e.* where a District Judge is unable to act "for any reason," or is technically "disqualified," to request another of the District Judges either to hold a term of court, or to hear a motion or try a case or cases for the judge so unable to act, or so disqualified. The judge requested to act, when so called in, becomes empowered, under the statute, to "do and perform all such acts as might have been done and performed by the Judge of said District." Laws 1890, p. 176. The wording of this statute is so unfortunate that the meaning of some of its features is rendered obscure and dubious, but the general purposes of the act cannot be mistaken. The statute is stricily remedial in character, and should therefore receive a liberal interpretation, with a view of accomplishing the main purpose of the enactment, which clearly was to give a judge who was either technically disqualified or unable to act, "for any reason," to call in an outside judge, either

to preside at a term of court, or to hear and determine any motion, case or cases.

Thus construing the statute, we are next to inquire, whether as a matter of fact, the Judge of the Fifth District was requested to act in this matter for the Judge of the Third District. This question of fact, as already shown, is settled clearly upon the face of the judgment itself; but in the absence of such evidence, or of any written evidence of the request, we should assume, the contrary not being made to appear, that any Judge of a District Court who had signed an order in a case not pending in his own district had, under the statute, lawful authority to do so. Irregularities in the entry of judgments in courts of record will never be presumed. If any exist, they must be brought upon the record, and made to appear affirmatively. There is no showing and no pretense in this case that the Judge of the Third District did not request the Judge of the Fifth District to act. The entire scope of the assignment of error upon this feature is that Judge Rose could not assume jurisdiction to make the order while outside of his own district. This theory, as already shown, is untenable. Our conclusion must be, and is, that the appeal of the plaintiff should be dismissed, with costs, and that the order of the trial court, denying defendant's motion to vacate the judgment, should be in all things affirmed. Such will be the order. Judgment below will be entered accordingly. All concur.

(54 N. W. Rep. 316.)

JAMES B. POWER *vs.* A. M. BOWDLE.

Opinion filed January 19th, 1893.

Action to Determine Adverse Claims—Counterclaim.

In an action under § 5449, Comp. Laws, to determine adverse "estates and interests" in real estate, the defendant may by answer, in addition to a denial of plaintiff's title, allege facts which show title in himself, and ask that such title be quieted and confirmed by the court. Such new matter, when properly pleaded, constitutes a counterclaim, within the meaning of subdivision 1, § 4915, Comp. Laws. Such counterclaim constitutes a cause of action in favor of the defendant, and against the plaintiff, which is "connected with the subject of the action."

Reply—When Deemed Waived.

To such counterclaim, if not demurred to, the plaintiff must respond by a reply, and, if none is served, the defendant may move for judgment. Comp. Laws, § § 4918, 4919. But where both parties at the trial treat the new matter as traversed and at issue, and evidence upon the same is put in without objection, and the court, without objection, proceeds to litigate and determine the subject matter of the counterclaim, it will be too late, after judgment, to to raise the point that no reply was served. In such case the reply is waived by conduct.

Estates and Interest—Not Synonymous with Liens.

In said statuory action, "estates and interests" in lands are not synonymous in meaning with "liens." Mere "liens" are not primarily within the purview of the statute; but where a defendant sets out new matter as a counterclaim, which embraces a "lien" upon the land, and asks the court to pass upon the same, and such new matter is heard upon the merits, and is determined by the court, without objection, it will be too late, after judgment, for the defendant to raise the technical objection that "liens" cannot be litigated in such an action.

Assessment Roll—Sufficiency of Description.

The statute requires parcels of land listed in an assessment roll, which consists of parts of sections, to be particularly described. Sections 1544, 1582, Comp. Laws. Accordingly, *held*, that tracts of land in an assessment roll, consisting of parts of sections, described as follows, viz: Name of owner, ———; section ———; town ———; range ———, —followed by a statement of the number of acres, is insufficient, because the part of the section is not particularly described. The fact that such description may not mislead the owner is not alone enough to validate it.

Insufficient Descriptions.

Following the rule laid down in *Powers* v. *Larabee*, 49 N. W. Rep. 726, 2 N. D. 141, and *Keith* v. *Hayden*, 2 N. W. Rep. 495, 26 Minn. 212, *held*, that the combination of letters and figures given below, and all others of similar

character, in the assessment rolls in question, are insufficient and invalid as descriptions of parts of sections of land, viz: NW¼; NW¼ of NE¼; NE SW; W½ SW. Such symbol writing is not English as it is ordinarily used, and is without the sanction of any general usage among the masses of the people. Hence the symbol writing descriptions cannot be upheld as a basis of taxation, or as a means of building up and perpetuating title to real estate under the revenue laws.

Judicial Notice of Custom—Usage of Language.

Courts and judges rest under an official obligation to notice and recognize, without proof, such facts and matters as are so notorious as to be generally known. Among other things, courts must judicially notice the vernacular language, and such abbreviations and symbols of ideas as have, from immemorial use, been adopted by the people generally, and thereby have become a part of the common usage of the language. When this occurs, *i. e.* when a given usage of language ceases to be a mere special usage, limited in its sphere, and emerges into general use among the masses of the people, the state, either by its courts or its legislature, will adopt and legalize such usage, and thereby add the same to the body of the common or of the statute law, as the case may be. Thereafter the existence of such general usage of language is not to be left to the hazards of *nisi prius* trials, to be proved or disproved, as testimouy may preponderate one way or the other. Its existence is evidenced by the statute or by judicial precedents, as the case may be.

Amendment of Answer—New Matter.

The trial court, against objection, allowed defendant to serve an amended answer, embracing among others, the following averments: "That said abbreviations and combinations of letters and figures were in general use in Barnes County, North Dakota, and throughout the State of North Dakota, and throughout those parts of the United States where the government system of survey is used for the descriptions of parts of sections of lands, and were generally understood by the people and taxpayers of said Barnes County and the State of North Dakota, and in those portions of the United States where the government system of survey is used." *Held*, that the ruling was prejudicial error.

Assessor Responsible for Sufficient Description.

In valuing land for taxation, the assessor may refer to descriptions or lists of land furnished either by the county commissioners under § 1544, Comp. Laws, or by individuals under § 1554, Id., but the assessor is officially responsible for the legal sufficiency of the description of all parcels of real estate returned by him. Upon that official alone devolves the entire responsibility of making out and delivering the roll containing a list of taxable lands. Accordingly, *held*, where a parcel of land is attempted to be described in the assessor's return, but such description is inherently and fatally defective, the same cannot be rendered valid and sufficient by showing that it corresponds to a description furnished the assessor by the owner, or by any one else. The public and bidders at tax sales as well as owners, are interested in the descriptions of real estate in tax records and tax titles. Such descriptions, to be sufficient, must point out parcels of land clearly and distinctly by the use of terms commonly understood.

Cross appeals from District Court, Barnes County; *Rose*, J.

Action by James B. Power against A. M. Bowdle, to quiet title, under Comp. Laws, § 5449. From a judgment for defendant, both parties appeal.

Reversed.

J. E. Robinson and *C. A. Pollock*, for appellant.

When a custom has become so established as to become a part of the law, the court will act upon it, without requiring it to be proved. *Consegna* v. *Millings*, 1 Peters N. S. C. C. 225. Courts will take judicial notice of whatever is generally known or generally ascertainable within their jurisdictions. *Brown* v. *Piper*, 91 U. S. 37. But parole evidence is not admissable to prove as a custom a local usage changing the significance of the language. *Powers* v. *Larabee*, 49 N. W. Rep. 726, S. C. 2 N. D. 141.

Where land is sold for taxes it is essential that every fact necessary to give jurisdiction should appear on the face of the record. *Thatcher* v. *Powe*, 6 Wheat., 119; *McClung* v. *Ross*, 5 Wheat., 116. Every essential proceeding in the course of a levy of taxes, must appear of record in written and permanent form in the records of the bodies authorized to act upon them. Cooley on Taxation, 247, Desty on Taxation, 1087.

Newman & Resser, for respondent.

Defendant pleads title under his tax deed by way of counterclaim. He seeks to defeat plaintiff's title by an equitable cross action. His counterclaim is proper and well pleaded. Pomeroy's Remedies, § 746; *Jarvis* v. *Peck*, 19 Wis. 84.

The fact that the statute makes tax deeds *prima facie* evidence of the regularity of all proceedings and conclusive evidence of the facts recited does not relieve defendant from pleading such proceedings and facts. The statute furnishes a rule of evidence and not of pleading. *Russell* v. *Mann*, 22 Cal. 132; *Himmelman* v. *Danos*, 35 Cal. 441. Parole evidence is admissable for the purpose of applying the description to the land and identifying the land which is described, 1 Greenl. Ev. 286 and 301, n.; *Stewart*

v. *Carter*, 18 N. W. Rep. 98; *Ames* v. *Lowry*, 15 N. W. Rep. 247; *Judd* v. *Anderson*, 1 N. W. Rep. 677; *Knote* v. *Caldwell*, 23 Pac. Rep. 625; Welty on Assessments 170. Descriptions furnished by the United States surveys of the public lands may be used in making assessments. Welty on Assessments 173; *Jenkins* v. *McTigue*, 22 Fed. Rep. 148; *McQuade* v. *Jaffrey*, 50 N. W. Rep. 234; *Taylor* v. *Wright*, 13 N. E. Rep. 529; *Hodgson* v. *Burleigh*, 4 Fed. Rep. 111; *Gilfillan* v. *Hobart*, 24 N. W. Rep. 342; *Judd* v. *Anderson*, 1 N. W. Rep. 678; *Atkinson* v. *Hinman*, 7 Ill. 437. A description by which a competent svrveyor can identify the land is sufficient. *Law* v. *Peo.*, 80 Ill. 268; *Fowler* v. *Peo.*, 93 Ill. 116, *Peo.* v. *Stahl*, 101 Ill. 346.

WALLIN, J. Plaintiff was the owner of lands described in the complaint, and situated in Barnes County. Said lands were sold at tax sale in the years 1887, 1888, and 1889 for the alleged taxes of 1886, 1887, and 1888. Defendant was the purchaser of the lands at each and all of said sales, and tax certificates evidencing the sales, respectively, were delivered to him in due form. No redemption from either of the sales was ever made. The time for redemption from the first sale (1887) having expired, the county treasurer of said county made out in due form, and delivered to defendant, tax deeds of said lands, based on said tax sale of 1887. This action is brought to quiet title under § 5449, Comp. Laws. Defendant by his amended answer denies plaintiff's ownership of the land, and by way of counterclaim alleges title in himself by virtue of said tax deeds, and also sets up the sales to him of said lands for the taxes of 1887 and 1888, as already stated. Defendant demanded as his relief that the title of the lands be quieted and confirmed in himself, and further demanded that, in the event of the sale being declard void, plaintiff be required to pay all of said taxes with interest, as a condition of plaintiff's relief.

In view of the conclusion at which we have arrived, it will be unnecessary to consider all of the many points arising upon the record. We will, however, consider certain points of practice which are incidentally involved, and which effect the judgment

that must be entered below. No reply to the answer was served, nor did defendant move for judgment as for want of a reply. The trial was manifestly conducted upon the theory that all the allegations of the answer which were pleaded as a counterclaim were at issue. Testimony was offered, without objection; to prove and disprove the averments of the answer, and the court, without objection or protest, made its findings of facts and conclusions of law upon the subject-matter of the counterclaim. In this court the claim is made by defendant's counsel that, inasmuch as plaintiff did not reply to the counterclaim, he admitted all the facts stated therein; citing § § 4919, 4933, Comp. Laws. Counsel say: "The question to be determined on the appeal then is, do the facts stated in the defendant's counterclaim entitle him to the relief demanded?" We think the new matter pleaded in the answer constitutes a counterclaim, within the meaning of subdivision 1, § 4915, Comp. Laws. The new matter constitutes a cause of action in defendant's favor and against the plaintiff, and such new matter is "connected with the subject of the action." Bliss, Code Pl. § 374; *Jarvis* v. *Peck*, 19 Wis. 74; *Eastman* v. *Linn*, 20 Minn. 433, Gil. 387, and cases cited. A reply was requisite under the statute, but a reply may be waived, and we are of the opinion defendant waived a reply by proceeding at the trial to treat the new matter in the answer as being traversed and at issue without a reply. Bliss, Code Pl. § 397; *Netcott* v. *Porter*, 19 Kan. 131; *Matthews* v. *Torinus*, 22 Minn. 132.

Another point raised in this court, but which does not appear to have been suggested below, is this: Counsel for defendant claim that "all considerations as to the 1887 and 1888 taxes are eliminated." The position taken is that, the action being brought under § 5449, Comp. Laws, the court can determine only adverse "estates and interests" and that a mere "lien," such as is evidenced by the tax certificates, cannot be litigated. Defendant cites *Bidwell* v. *Webb*, 10 Minn. 59, Gil. 41, which sustains the point, and holds under a statute which, when the case was decided, was similiar to ours, that "liens cannot be determined in such an

action." But in later cases it has been held in Minnesota that where a defendant elects to have his own case determined in such action, and sets out the facts of his case and asks judgment upon such facts, and the court without objection, pronounces judgment thereon upon the merits, it will then be too late for the defendant to raise any technical objection based upon the form of the action. *Hooper* v. *Henry*, 31 Minn. 264, 17 N. W. Rep. 476; *Mitchell* v. *McFarland*, 47 Minn. 535, 50 N. W. Rep. 610. The reasoning of these later cases is, in our judgment, unassailable, and we therefore rule that all questions arising out of the tax sales and certificates of 1888 and 1889 were properly before the trial court, and are therefor before this court for review.

After a trial before the court, numerous findings of law and fact were filed. It was admitted at the trial, and the court found, that the assessment roll of Barnes County, as returned in each of the years, was in the "words, letters, figures, and form" as follows:

ASSESSOR'S BOOK.

EXHIBIT "A."

Return of Land Property in Barnes County, Dakota, Assessed for the Year 1886.

Owner's Name	Part of Section	Sec.	Twp.	Rng.	Acres		Acres Ex'mpt		Assessed Valuation		Equalized Valuation		No. of School Dist.	No. of Road Dist.	Remarks
					Acres	100ths	Acres	100ths	Dols.	Cts.	Dols.	Cts.			
James B. Power	E^2 NW^4	25	141	59	80				350		280		7		
James B. Power	NW^4, NW^4 of NE^4, NE SW, W^2 SW	3	142	58	337				1200		1010		39		
James B. Power	NE^4, E^2 SW^4, W^2 SE^4	9	142	58	320				1000		960		17		
James B. Power	NE^4, E^2 of SE	21	142	58	240				900		720		17		
James B. Power	NW^4 NE^4, E^2 NW^4, SW NW^4	35	143	58	160				600		480		39		
James B. Power	NW^4	25	143	58	160				600		480		39		
C. H. Davis	W^2 of SE^4	15	138	58	80				240		240		32		
A. Sargent	E^2 of SW^4	15	138	58	80				240		240		32		

Against the objection of plaintiff's counsel, who excepted to the ruling and assigns error upon it in this court, the defendant served an amended answer, which, among other allegations, contained the following: "That said abbreviations and combination of letters and figures were in general use in Barnes County, North Dakota, and throughout the State of North Dakota, and throughout those parts of the United States where the government system of survey is used, for the description of parts of sections of land, and were generally understood by the people and taxpayers of said Barnes County, and the State of North Dakota, and in those portions of the United States where the government system of survey of lands is used, and where, when applied to descriptions of lands, abbreviations of said descriptions of halves and quarters of sections and smaller subdivisions. That the said figure two placed at the right, and opposite the upper portion of the proper letter indication, east, west, north, or south, is generally used and generally understood throughout the State of North Dakota, and throughout those portions of the United States in which said government system of survey is used, as meaning 'one half' when applied to descriptions of land; and the said figure four placed at the right, and opposite the upper right-hand portions of the abbreviations N. E., S. E., S. W., or N. W., when applied to descriptions of land, is generally used and understood throughout the State of North Dakota, and those portions of the United States where the said government system of survey is used, as meaning 'one-quarter,' and the said figure "two" and the said figure "four" are so as aforesaid used and understood in place of the fractions one-half and one-fourth. That said abbreviations and combinations of letters and figures are uniformly used by this plaintiff in describing parts of sections of land, and were at the time of said assessment well understood by him. That said abbreviations and combinations of letters and figures are in general use in the general land offices of the United States, and in the land office in the district in which said Barnes County is situated, and in the offices of the various auditors, treasurers, and

registers of deeds throughout the State of North Dakota, and have been so used since the organization of said local land offices and since the organization of said county, and have been so used by the occupants of said lands in correspondence with reference to the same, and are more frequently used than any other abbreviations or combinations of letters and figures to indicate parts of sections of land."

The case was tried by the court, and at the trial defendant's witnesses upon the question of usage were not cross-examined, and plaintiff offered no rebutting evidence on that branch of the case. The court found for the defendant upon the question of usage, and made its findings of facts substantially in the language of the amended answer, as above set out. Plaintiff excepted to such findings as follows: The evidence does not show a uniform usage; it only tends to show that such characters are known and used for private convenience by a class of experts. The evidence upon the question of usage is in the record. The trial court held that said descriptions of the several tracts of land were sufficient, and that the taxes based thereon were regular and valid taxes; but also found that certain irregularities occurred as to the sales which rendered the sales illegal, and adjudged that all of the sales were illegal, and that the tax deeds and certificates fell with the sales upon which they were made. Judgment was entered accordingly. Both parties appeal from the judgment.

The pivotal question presented is this: Was it proper and allowable, under established principles of law, for the defendant to allege and attempt to show, by testimony offered in the trial court, that the symbol writing as used in the assessment rolls was and is "generally understood by the people and taxpayers of said Barnes County and the State of North Dakota, and in those portions of the United States where the government system of survey of land is used." We remark, *first*, that in a case recently decided (*Powers* v. *Larabee*, 2 N. D. 141, 49 N. W. Rep. 726) this court, after a very careful consideration, held that descriptions essentially the same as those appearing here were insufficient. In that

case we said: "We hold that the alleged description is wholly insufficient as a description of the lands in question, or of any lands, and that it cannot be sustained as a means of indentifying the lands for purposes of assessment for taxation, or for the ulterior purpose of transferring the title of the reality from the general owner to the tax-title holder and his successors in interest. The alleged description is neither written out in words, nor is the same expressed by charters or abbreviations commonly used by conveyancers, or generally understood and used by the people at large, in describing land. The description of realty placed in the assessment roll is the means of identifying or describing the land for all the subsequent steps in the process of taxation and sale, if a sale is made. The official who makes the tax list and duplicate and the official who collects the tax, or sells and conveys the land, or certifies to its redemption from sale, are governed by the original description in the roll, and are not authorized by law to change the same;" citing *Keith* v. *Hayden*, 26 Minn. 212, 2 N. W. Rep. 495. There has no case been cited, and we know of none, which directly passes upon the sufficiency of the particular descriptions in question aside from those we have mentioned. No authority can be shown, we think, which sustains such descriptions, and it is significant (in view of the claim made by defendant's counsel that such descriptions are in general and common use, not only in this state but in all states where the government system of land surveys exists) that the validity of such descriptions has never been drawn into review in the courts of last resort except in the two cases cited, and then only to be condemned as unauthorized by general usage. In the cases cited, no evidence was introduced tending to prove or disprove the existence of the alleged general usage in question, and yet both courts declared and held, distinctly and emphatically, that no such general usage did exist. In *Keith* v. *Hayden*, the court says: "There is no general usage of this kind; neither is this the import of the letters and figures employed, according to the common and ordinary usage of the English language, as the same is spoken or written

in this state, or in general, nor as it is used in the judgments of courts." In *Powers* v. *Larabee* this court used the following language: "The description is not expressed in common language; nor are the characters and abbreviations employed such as are used by conveyancers in describing real estate; nor do the people generally use such a combination of words, letters, and figures in referring to or describing land." It is elementary that courts will take judicial notice of the vernacular language of the people and of its mutations, and hence will take notice whether given words, letters, and figures which are brought to the notice of the court are or are not couched in the ordinary language in use by the court and people. In the cases cited the holding was in effect that the arbitrary combinations of letters and figures, as used in the respective assessment rolls, is not the language of the court or country, *i. e.* is not the English language as commonly used. An inspection of the symbol writing will at once show the correctness of this view. The figure 2, according to its established meaning, represents two units or whole numbers, and the figure 4 represents four units or whole numbers. As employed in the assessment rolls, 2 is made to signify one-half of one whole number, and 4 one-fourth of a whole number. Thus it appears that the symbols in question consist of a combination of letters and figures whereby such letters and figures are perverted from their established signification and use among the people, and made to signify something radically different when used to describe land. It is a matter of which this court will take notice, because a matter of common knowledge, that the government system of surveying land has been quite generally adopted in the western states, and that the system prevails in the States of North Dakota and Minnesota; and yet, as has been shown, the courts of last resort in the two states mentioned have taken judicial cognizance of the fact, and so held that the symbol writing in question, as a mode of describing land, has not the sanction of general usage in either of the said states. In view of these adjudications —that of *Powers* v. *Larabee*, being very recent, and made after

mature deliberation—we think it would be unwise to hold that evidence is admissable to prove only such facts as the court would be bound to judicially note without proof, if such facts really exist. If it be true that the symbol writing is, as alleged by the answer, used in describing land, and "generally understood" by the taxpayers and the people of North Dakota and throughout the western states, the judges and courts of such states are bound to judicially note the existence of such usage. To borrow the words of Chief Justice Caton, "courts will not pretend to be more ignorant than the rest of mankind." If evidence became necessary in this case to prove that the usage in question was generally understood and in common use by the taxpayers and people of this state and of the western states generally, then, and for the same reason, evidence would be needed to certify the same facts to any other trial court in the state in which the question might arise. *Vanada* v. *Hopkins*, (Ky.) 19 Amer. Dec. 92; *Bailey* v. *Publishing Co.*, 40 Mich. 251; 12 Am. & Eng. Enc. Law, p. 197, note 1.

The judges of the Supreme Courts of Minnesota and North Dakota alike rest under an official obligation to notice without proof such usages and customs as have become general among all classes of people in these states; yet in both states the courts have held squarely that the symbol writing, such as is found in the tax rolls in this case, has not the sanction of general usage in such states, respectively. When a usage becomes general, the courts will notice the same. Bish. Cont. § 445. It is true that many usages are not judcially noticed in the courts. Such usages are often shown to exist by testimony. "The leading distinctions between customs, considered as usage, and law, is that the former is restricted to a particular locality or class of persons, or business, while the latter is universal throughout the state." Section 446, Id. When a usage is special, *i, e.* limited to a particular locality or business or class of persons, the judges are not always supposed to be aware of its existence, and hence proof is sometimes resorted to, when the fact is disputed, to establish or disprove the existence of the usage. Section 450, Id. When it is shown that

a particular usage existed and was known to the parties to the contract, such usage may, and often does, modify the contract. Sections 449, 456, Id. Blackstone makes the same distinction, and defines the two classes of customs as follows: "General customs, which are the universal rule of the whole kingdom, and form the common law in its strict and more usual signification; particular customs, which for the most part affect only the inhabitants of particular districts." 1 Bl. Comm. 67. The books are replete with decisions illustrating and applying the general doctrine that special customs and the usages of trade may be shown by testimony produced in court for the purpose of modifying contracts. *Barnard* v. *Kellogg*, 10 Wall. 383; *Walls* v. *Bailey*, 49 N. Y. 464; *Collender* v. *Dinsmore*, 55 N. Y. 200. But, as we have seen, such customs as have ceased to be special *i. e.* local as to territory or limited as to classes, and have become generally known, used and understood by the people and taxpayers of the whole state, and of many other states, no longer need to be proved, because all courts and judges are bound to know such matters of fact and such usages and customs as are so notorious as to be commonly known. This general proposition is elementary. Stev. Dig. Ev. 124, and notes. The matters judicially noticed are very numerous, and need not be enumerated here. It will suffice to say that all authorities agree that the vernacular language, and such ordinary abbreviations as are in common use, are noticed without proof. Reyn. Ev. 68. To prove facts commonly known is regarded by the courts as a waste of time, and for that reason is not permitted. Id. p. 66. While authority abounds showing that special customs may be established by testimony, we have searched laboriously, but in vain, for a precedent which authorizes the introduction of evidence to establish the existence of a custom of language which is alleged to be generally known and understood by the taxpayers and people throughout an entire state or nation. It is in our view, obviously unsound to argue that the courts or judges of a state or nation may be considered as unaware of the existence of a custom of language which

is claimed to be so notorious that it is known and used generally by the taxpayers and people throughout the entire state or nation. At all events it is fundamental in the law that courts are bound to know such notorious facts, matters and usages of language as are generally known to other people. We are not regardless of the fact that the English language has reached its present state by processes of growth and development, and that new words, phrases, and abbreviations are from time to time ingrafted upon the body of the language. The process of growth and accretion will continue, and it is possible, though we do not expect the event, that the shorthand or symbol writing in question will cease to be what we now consider it, viz: a special clerical usage limited in its use, for the most part, to certain officials (United States land office officials and certain county officials) and their clerks and deputies, and emerge into common use. Should this transpire, courts and judges, under their oaths of office, will take judicial cognizance of the event, and will then uphold the validity of the symbol writing in assessment rolls as a basis of taxation, and of building up and transferring title to real estate. Should the symbol writing become general as a means of describing land, there would then be no more occasion to offer proof of the usage than there now is to establish any other common usage of the vernacular language. In the event supposed, the symbol writing, as a means of describing realty, would be quite as familiar to all who speak and write the language, including all well informed women and advanced pupils in the public schools, as the older methods are now familiar to them, *i. e.* descriptions by the use of English words or common fractions.

It is manifestly true that if the symbol writing can be established as a common custom, by a finding of fact based upon testimony, it must follow that its nonexistence as a common custom can be certified in the same manner. To illustrate our meaning, let us suppose that, instead of standing upon his objection to filing the amended answer, plaintiff's counsel has seen fit to appear and cross-examine defendant's witnesses, and then had

offered rebutting testimony sufficiently strong to have overcome defendant's testimony, as we think would not have been at all difficult to do. Then in the hypothetical case the finding of the trial court as to the usage must have been the exact opposite of that which is before us. But shall so important a matter as the existence or nonexistence of a general usage of language or symbol writing in describing land turn upon the varying financial abilities of suitors, or the uncertain vigilance and skill of counsel in arraying testimony, where the amount of testimony, from the nature of the case, is practically inexhaustable? There is, we think, practically no limit to the number of witnesses *pro* and *con* who will honestly testify to the result of their personal experiences and observations as to the prevalance and extent of the custom. In one case the affirmative side will preponderate, and in the other the negative. But to place the public revenues and titles to land upon such a shifting basis would be to rest them upon a foundation of quicksand. This argument has been anticipated, and to meet it counsel cite 2 Greenl. Ev. 249. We quote from the author a paragraph which counsel have italicized in their brief: "And after having been frequently proved in the course of successive legal investigations, * * * will take notice of it without further proof." According to this, the courts are not to take cognizance of a usage until it has been "frequently proved." When not proved at all, or when disproved, the holdings would, according to this, be different. But the learned commentator is here confining his observations to a particular class of special customs, *i. e.* "usages of trade." It would have been nearer the mark, we think, from the standpoint of defendant's counsel, to have cited the previous section,—248. There the author is treating of a still wider class of "special customs," viz: "local customs,"—"established by common consent and uniform practice from time immemorial." But in both sections of the treatise the learned commentator is confining his remarks to "special customs." As has been shown, such customs and usages are very frequently proven in court as a means of interpreting contracts, and sometimes to annex terms

to contracts. But reference to the averments of the amended answer shows that the idea of a special custom is distinctly negatived by the answer; nor would counsel contend that a mere special custom should receive judicial sanction as a means of building up title to land. A description in the tax roll, adjudged to be valid, in one county or locality in the state, must be held good in all parts of the state; otherwise, chaos in tax proceedings and in land titles would supervene.

The considerations already advanced have satisfied a majority of this court that the averments as to a general usage of language pleaded in the amended answer present a state of things which ought not to be left to the chances of *nisi prius* trials, and be permitted to be proved or disproved, as it might turn out. Hence we shall sustain plaintiff's assignment of error predicated upon the order of allowing the amended answer to be served and filed. The chief justice, (Judge Bartholomew,) while fully agreeing with the majority of the court in holding that the descriptions in question are without the sanctions of any general custom or law, and hence are insufficient as a basis of taxation, prefers to rest his concurrence on this branch of the case upon a somewhat different line of reasoning. I quote his language: "A description of realty in an assessment roll, to be sufficient, must be such a one as the law recognizes. It is not enough that it be such as may be, in fact, understood, or often or generally used. It must be such as must be understood in the sense that the law will not listen to the declaration that it is not understood. A defective or ambiguous description in a deed or contract may be cured by ascertaining the intention of the parties to the instrument, and giving effect to such intention. But this cannot apply to an assessment. Tax proceedings are in *invitum*, and there are no contracting parties. Primarily, the description must be such that it must be understood by, and will not mislead, the owner. It must also go further, and be such as must be understood by all persons desiring to purchase at tax sale. Theoretically this includes all persons capable of contracting.

A description that must be thus generally understood should have a more certain basis than a mere fact, because ignorance of fact can always be used as an excuse or defense. It must be based upon the law, and this may be upon an express statute authorizing the description, or it may be upon common law, or, what is the same thing, custom. Sir William Blackstone said, in substance, that was the pride of the English common law that it was but the customs of the people, adopted by themselves, and resting upon immemorial usage. 1 Bl. Comm. 73, 74. There is a clear distinction between usage, however general, and custom. Usage is local practice, and must be proved. Custom is general practice, judicially noticed without proof. Usage is the fact. Custom is the law. There may be usage without custom, but there can be no custom without usage to accompany or precede it. Usage consists of a repetition of acts. Custom arises out of this repetition. Usage is the evidence of custom. Usage is inductive, based on consent of persons in a locality. Custom is deductive, making established local usage a law. Whart. Ev. § 965; And. Dict. Law, 'Custom' and 'Usage.' From these definitions it would seem to follow that there may exist a usage that would affect or control a contract, and yet not reach the dignity of a custom or law; and it has been so ruled. *Carter* v. *Coal Co.*, 77 Pa. St. 290; *Morningstar* v. *Cunningham*, 110 Ind. 333, 11 N. E. Rep. 593. These distinctions between usage and custom have not always been observed. The words are often used interchangeably, and not a little confusion has followed this inadvertance. But if we give proper prominence to the thought that one is fact, and the other law, the intricate question in this case, arising upon an attempt to plead and prove usage, is, to my mind, resolved without difficulty. Law, speaking without reference to the exceptions, is not a subject of proof. In no branch of the law is certainty and uniformity more imperatively demanded than in that branch that deals with the transfer of title to real property. A description which is not good in every portion of the state can be good in no portion. From the very definition of usage it is

not within its province to fix this uniformity. That can only be done by law. I do not care to go as far as to hold that the nature and extent of a usage may not be shown in any case in order that the court may deduce therefrom a custom, although this would generally be unnecessary, as courts would recognize a usage that was so universal, ancient, and certain that it would support a custom without evidence. But from the nature of our circumstances, no usage can exist in this state that would support the custom that must obtain before descriptions such as were used in this case can be upheld. Vast portions of our area yet belong to the general government. Some of it is yet unsurveyed; some counties but recently organized; others yet unorganized. It is not possible that in such localities any 'usage' as to real-estate descriptions, in the proper sense of the word, can have an existence. It cannot be that persons who seek to occupy these lands are required to take notice of a usage of which they have no knowledge in fact, and which never obtained in their locality. If once we hold such descriptions good, we establish the custom, and make it the law of the state forever afterwards, unless annulled by the legislature. This we ought not to do until our conditions change. The trial court erred in holding the description good."

But counsel claim that the description of the tracts involved here is sufficient if the symbol writing be ignored and rejected. They say in their brief: "Part of section 25, in township 141, of range 59, containing 80 acres, owned by James B. Power," is sufficient, because, as they say, it would not mislead the owner. We think that whether such a description would mislead the owner or not might depend largely upon the number of 80-acre tracts belonging to him in the section; also upon the situation of the various tracts which he might own with reference to the quarter sections. Whether the 80 acres was or was not in a solid body would also be an important factor, we think. It is, in our judgment, important to keep in view the fact that others besides owners of land have a vital interest in descriptions of lands in

tax rolls. Delinquent lands are sold for taxes, and titles are to be built up and perpetuated on such sales. When lands are offered at tax sales, it is important to the public revenue, as well as to purchasers, that some definitely ascertained tract or tracts should be put up for sale. There would be little inducement to buy if the parcels offered are not pointed out by some apt and suitable description familiar to the public, which would enable a purchaser to identify, not merely a tract, but the particular parcel purchased. *Bidwell* v. *Webb*, 10 Minn. 59, (Gil. 41;) Black, Tax Titles, § 38; 1 Desty, Tax'n, 564. To us the proposition that fractions of whole sections need not be designated in a tax roll further than by giving the section, town, range, and number of acres, in connection with the owner's name, is novel, and somewhat startling. Our observation and study have led us to believe that the practice of describing parts of sections in tax rolls, as well as in deeds of conveyance, is universal at the west. We are certain that the statute in force when these lands were assessed required such descriptions in addition to the other data mentioned. Comp. Laws, § 1582; also Id. § 1544. Section 1582 provides that the assessment roll, among other things, shall contain a list of lands, "with the number of acres in each tract set opposite the same." To set the number of acres down in the roll opposite the tract necessitates a description of the tract in connection with the number of acres. We think this statute is not only plain, but is likewise mandatory. It is well settled that a description in a tax proceeding—which is a proceeding in *invitum*—that is inherently and fatally defective cannot be helped out and validated by extrinsic evidence. It is also true that where premises have acquired a name or description by repute, though not technically correct, the same will suffice for purposes of taxation, and parol evidence is competent to show the name acquired by repute coincides with the proper description of such land. *Gilfillan* v. *Hobart*, 34 Minn. 67, 24 N. W. Rep. 342. This line of authority is clearly not in point in the case at bar. There is neither allegation in the answer nor claim that the lands of the

plaintiff have acquired any name or designation by repute which is peculiar and different from other lands situated within government surveys in the state. On the contrary, the assertion is emphasized in the answer that the descriptions of the lands in suit are technically accurate, and conform precisely to a usage of language which is general in describing lands in this state. See extract from amended answer, *supra*; also, *Knight* v. *Alexander*, 38 Minn. 384, 37 N. W. Rep. 796.

Counsel make the further point that inasmuch as § 1554, Comp. Laws, required taxpayers to "list all property subject to taxation." and because it does not appear from "annotations on the roll" that plaintiff's property was in fact listed by the assessor, that the court must conclusively presume that plaintiff not only made a statement of his property, as required by § 1547, but the plaintiff furnished the assessor a list in which the lands in question were described by precisely similar symbols to those now appearing on the roll. In support of this point, counsel cite §§ 1549, 1550, Comp. Laws, to show that, where the taxpayer fails or refuses to list his property, it then becomes the duty of the assessor to "note the fact on the roll," and return it to the auditor. We did not so read the two sections last cited. Said sections we think, have reference to documents of a different character from the "return" and roll, viz: to lists such as the county commissioners are required, under § 1544, to furnish all assessors. We have found a section—one not cited—which we think is the only one which requires an assessor in a case of failure or refusal to list to note the fact on the roll or "return." But this is confined to "personal property," and the ommission to include real estate is, we think, significant, and implies, at least, that no such annotation on the roll is to be made as to real estate. Comp. Laws, § 1583. This view is strengthened by a requirement of law that the county commissioners shall furnish assessors in each year blank forms for listing, containing "a list of all the entered lands in his county subject to taxation," which list shall contain "lands by township, range and section, and any division or part of a section." Where the owner

is neither absent or unknown, it becomes the duty of the assessor both to "ascertain and value" the property. Section 1548. In the total absence of proof we cannot assume in any case that the owner was not absent and not unknown, and that the assessor did not ascertain and value his property for one or the other reason. In this case for a special reason, that theory cannot be indulged. The answer expressly avers that said land "was by the assessor of said Barnes County duly assessed for taxation at its true value." It is true, and the fact has been a source of embarrassment to this court, that the statutes governing the listing and assessing of these lands were conflicting, and far from being clear in meaning. Yet one thing stands out with clearness and certainty, and that is the fact that the entire responsibility for describing property in the "roll" is devolved by statute upon the assessor. It is that official who is requied to make out and deliver to the county clerk a "return" or "roll." Comp. Laws, § § 1550, 1582. It is with the descriptions of land in the return or roll that we are dealing in this case. Such description must govern in all subsequent steps in the process of taxation, and in transferring the title of land sold for taxes and not redeemed. It certainly would be the duty of the assessor, in making out his roll, to have recourse to any lists of property furnished him, either by his official superiors, the county commissioners, or by taxpayers individually; but as between lists differing as to description the arbiter must be the assessor himself, whose official duty it is to make out and deliver a roll containing sufficient descriptions. We cannot see, in view of all the provisions of the statute, that an assessor can avoid full responsibility for all descriptions and other data in the roll. Moreover, as has been seen, we are of the opinion that a description of realty essentially insufficient cannot be upheld as a basis of taxation, or for building up title under the revenue laws, even when such description is furnished by the owner. The public and purchases at tax sales, and their successors, have an interest in descriptions of land as well as owners. We think the weight of authority supports our view

upon this point, but we are aware that some cases hold that, where the owner furnishes the exact description involved, he is estopped from questioning its sufficiency.

In conclusion we feel like saying that every member of this court has given to this case his very best and most faithful consideration. We appreciate the importance of the questions involved, relating, as they do, to the public revenues, and bearing vitally, also, upon the stability of land titles in this state. We readily concede that views differing from ours may be and are honestly entertained; but we have concluded that stability in a rule of property, when once deliberately adjudged, is of prime importance, and hence have adhered to the views laid down in the previous decisions. Moreover, we believe that comparatively a small number of the whole population have any degree of familiarity with the symbol writing in question. Those who have close relations with the local land offices, and with such of the county officers as have copied and adopted the symbol writing from the land officers, are indeed strongly impressed with the idea that all of the people understand and use this mode of describing land. We cannot come to the same conclusion. We think symbol writing in tax records has already disappeared, and is no longer employed in county offices in this state, and our belief is strong that when the public land has been disposed of, and the local land offices have performed their limited and temporary functions and have been removed further west, it will be found that symbol writing in describing realty will have failed to become ingrafted upon the vernacular language. We feel justified in this conclusion from our observations and experience in the older states of the west. If we are mistaken, the remedy can be readily found in the legislative branch of the government, where a statute can be passed to govern future assessments. See "The Elements of Jurisprudence," by T. E. Holland, p. 54.

The judgment entered below must be reversed, and a new judgment entered, quieting title in the plaintiff, and also setting aside the taxes on the land in question for the years 1886, 1887, and

1888, and vacating all tax deeds and certificates described in or referred to in the amended answer. Neither party will recover costs or disbursements in this court. The District court will enter judgment accordingly.

(54 N. W. Rep. 404.)

O. M. ENGLISH *vs.* J. D. GOODMAN.

Opinion filed Dec. 23rd, 1892.

Trial—Verdict—Amendment by Court.

In a case where the sole issue is plaintiff's right to recover anything of defendant, and where the amount due, if anything, is admitted by the pleadings, and where the jury returns a general verdict in favor of plaintiff, and against defendant, without fixing the amount of the recovery, it is not error prejudicial to the defendant for the court to order judgment for plaintiff for the amount admitted by the pleadings.

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

Assumpsit by O. M. English against J. D. Goodman and another. Plaintiff had judgment, and defendants appeal.

Affirmed.

Lewis T. Hamilton, for appellants.

S. L. Glaspell, for respondent.

PER CURIAM. This case originated in justice's court, and was brought to recover $50 for work and labor performed under a special contract. At the trial in the District Court the jury returned a sealed verdict, as follows, omitting title: "We, the jury, find for the plaintiff, and against the defendants." Upon this verdict the court ordered judgment for plaintiff for $50, and costs. Defendants appeal, and insist that under § 5062, Comp. Laws, which provides that, where a verdict is found for plaintiff in an action for the recovery of money, the jury must also find the amount of the recovery; that the court was without authority to order any judgment. No doubt the more regular and orderly

method is to have the amount always stated in the verdict; but this statute never was intended to render a verdict that failed to state the amount a nullity in a case where the sole issue was plaintiff's right to recover anything, and where the amount was admitted by the pleadings. In this case, under the pleadings, the trial court would have been fully warranted in instructing the jury that, in case they found the plaintiff entitled to recover, they should fix the amount of his recovery at $50; or the court might, upon the return of the verdict, have ordered it amended in that respect. Under these circumstances, the court might well treat the verdict as amended, and order judgment. Such action in no manner prejudiced appellants. To put these parties to the expense of a new trial for so harmless an irregularity would be a reflection either upon legislation or judicial wisdom. For a very similar case, see *Hodgkins* v. *Mead*, 119 N. Y. 166, 23 N. E. Rep. 559. The judgment of the District Court is affirmed. All concur.

(54 N. W. Rep. 540.)

STATE *ex rel.* MAGNUS PETERSON *vs.* BARNES.

Opinion filed February 21st, 1893.

Complaint Before Magistrate—When Sufficient.

Section 8, Ch. 71, Laws 1890, which provides that, with certain specified exceptions, "no information shall be filed against any person for any crime or offense until such person shall have had a preliminary examination therefor, as provided by law, before a committing magistrate or other officer having authority to make preliminary examinations, unless such person shall waive his right to such examination," etc., construed. *Held*, where a criminal complaint filed against the accused with an examining magistrate, after alleging time and place, designates the offense in general language, giving its name, and, in addition thereto, sets out such of the facts and circumstances constituting the offense as will fairly apprise a person of average intelligence of the nature of the accusation against him, it will be sufficient, within the meaning of the statute, to authorize the State's Attorney to file an information against the accused for the same offense if he has had or waived an examination on such complaint. It will make no difference with this rule if certain averments of fact which are essential in an information are omitted from the complaint. Such complaints need not be framed with the same degree of care and technical accuracy as is required in framing informations and indictments. Tested by this rule, the complaint against the petitioner is examined, and found sufficient.

Errors of Procedure not Reviewed on Habeas Corpus.

Rulings of the District Court made upon the trial of criminal actions are reviewable by writ of error, but the writ of *habeas corpus* cannot be invoked for that purpose.

Habeas Corpus and Writ of Error Distinguished.

Where the petitioner pleaded in abatement to an information filed in the District Court against him that he had neither had nor waived a preliminary examination for the offense charged in such information, and the plea was overruled. *Held*, that such ruling was made by a court having jurisdiction of the person and the subject matter, and therefore the ruling cannot be reviewed by *habeas corpus*.

Petition for a writ of *habeas corpus* by the state, on the relation of Magnus Peterson, against Oscar G. Barnes, as Sheriff of Cass County.

Writ discharged.

Taylor Crum, for petitioner.

Robt. M. Pollock, State's Attorney.

WALLIN, J. Magnus Peterson, the petitioner, was arrested upon a criminal warrant issued by a justice of the peace of Cass County, and was taken before such justice of the peace for a preliminary examination. The complaint upon which the warrant was issued was read to the petitioner, and, acting upon the advice of counsel, the petitioner waived an examination, and was committed for trial at the next ensuing term of the District Court for Cass County. The complaint was sworn to, and, omitting certain formal parts not criticised, is as follows: "State of North Dakota vs. Magnus Peterson, defendant. A. E. Jones, being by me first duly sworn, on oath complains and charges that the defendant, Magnus Peterson, at the said County of Cass, on the 15th day of August, A. D. 1891, with force and arms, did then and there commit the crime of obtaining property under false pretenses, as follows, to-wit: That on the said 15th day of August, 1891, at the City of Fargo, in said County of Cass, the said Magnus Peterson, with intent to cheat and defraud Aultman, Miller & Co., and for the purpose of obtaining of it, the said Aultman, Miller & Co., property of the value of seventy dollars by means thereof, did falsely and feloniously represent and state to said Aultman, Miller & Co., that he, said Magnus Peterson, was then and there the owner of 80 acres of land in the County of Clay and State of Minnesota free from all incumbrances, and of the value of $1,500, and also of personal property within said County of Clay and State of Minnesota of the value of $1,000, over all indebtedness and legal exemptions; that, by reason of said false and fraudulent representations, the said Aultman, Miller & Co., were induced to and did sell and deliver to said Magnus Peterson on said 15th day of August, 1891, 540 pounds of pure manilla twine, then and there the property of said Aultman, Miller & Co., and of the value of $70, against the peace and dignity of the State of North Dakota, and contrary to the form of the statute in such case made and provided, and prays that the said Magnus Peterson may be arrested and dealt with according to law." No depositions or testimony other than said complaint was taken by the

justice of the peace before issuing the warrant of arrest, or at any time. At a term of the District Court for Cass County next following such commitment the state's attorney of said county filed an information in due form against said Magnus Peterson, charging him with "the crime of obtaining property under false pretenses."

It will be unnecessary, for the purpose of disposing of this case, to set out the information in detail. It is conceded that it is a valid and sufficient information; also, that certain averments of fact, which are essential in an information or indictment charging said offense, were embodied in the information, but were ommitted from the complaint upon which the warrant of arrest was issued.

The petitioner, on being brought to trial on the information, pleaded in abatement thereto that "he had never had a preliminary examination for the crime or offense charged, nor waived the same, and that the crime charged was not committed during the session of the court, and that the petitioner was not a fugitive from justice." The antecedent history of the case appeared of record as above narrated, and no issue of fact was litigated upon the issues raised by the plea in abatement. The District Court overruled the plea, holding that the petitioner, having waived a preliminary examination, was in a position which authorized the state's attorney to file an information against him for the offense charged by such information, and that the offense set out in the complaint was the same offense, in substance, as that charged in the information. This ruling is assigned as error in this court.

The petitioner refused to plead either guilty or not guilty, whereupon the court directed a plea of not guilty to be entered in his behalf, and after a trial the prisoner was found guilty. A motion was made and overruled in arrest of judgment, and the petitioner was sentenced to a term of six months in the state's prison at Bismarck. Exceptions were saved to the several rulings above mentioned. While in the Cass County jail under said sentence the petitioner was awarded the writ of *habeas corpus*, directed to the sheriff of Cass County, and upon the return of

the writ the foregoing facts are upon the record of this court.

Upon the facts appearing of record, only one question arises upon the merits. It is this: In waiving a preliminary examination before the magistrate, did the petitioner, within the meaning of the statute, waive an examination for the crime or offense charged in the information lodged against him by the state's attorney? We think he did. Section 8, Ch. 71, Laws 1890, provides, with certain exceptions, not necessary to notice in this case, that "no information shall be filed against any person for any crime or offense until such person shall have had a preliminary examination therefor, as provided by law, before a committing magistrate or other officer having authority to make preliminary examinations, unless such person shall waive his right to such examination," etc. The manifest purpose of this provision of the statute is, with the exceptions specified in the statute, to prohibit the state's attorney from filing an information in the District Court charging any person with a public offense until the person accused has first had or waived a preliminary examination before an examining magistrate upon a complaint charging the offense set out in the information filed in the District Court. The grand jury being abolished, this statute was enacted to furnish the citizen with a substantial safeguard against hasty and ill advised prosecutions for grave public offenses. . Without this statute, or one of similar import, the grand jury no longer existing, a citizen would be required to stand his trial for a felony on the mere accusation of one person, viz: the state's attorney. It was to prevent such a state of things that the statute above quoted was enacted, and it should therefore be upheld, and not be frittered away by judicial construction. Was the petitioner denied any right secured to him by the statute? He exercised his privilege, and waived an examination, which was tendered to him. In so doing did he waive an examination, within the meaning of the statute? In other words, was the examination tendered him by the proceedings in justice's court such as is "provided by law?" The prisoner's counsel has suggested but one reason why the preliminary

examination was not such as is contemplated by the statute. The point is made that the complaint lodged with the magistrate omitted to state one or more averments of fact which are necessary to constitute the crime of "obtaining property under false pretenses." Conceding this to be true, we cannot sustain the contention of counsel that the petitioner has not waived a preliminary examination, within the meaning of the statute. We know of no case or principle of law which requires that a complaint made as a basis for a mere preliminary examination should be drawn with the fullness and technical accuracy required in cases where the prisoner is put upon his trial in a court having authority to hear and determine the case and impose a final judgment. The system of criminal procedure which is established by the laws of this state contemplates that nonprofessional persons, and particularly justices of the peace, who, as a rule, are men unlearned in the abstruse rules of criminal pleading, may have frequent occasion to write out criminal complaints, to be filed as a basis for the arrest of offenders. To require of persons who are without professional training to frame criminal complaints with the same degree of technical accuracy which is required in indictments and informations would be to exact the impossible. No such rule has hitherto existed, and this court will not lend its sanction to such a notion. In cases of felony the jurisdiction of a justice of the peace does not extend beyond the mere initiation of the proceeding. At the utmost, he can only direct that the prisoner shall be put upon his trial before a court having competent jurisdiction. It is true that a preliminary examination, under Ch. 71, Laws 1890, has assumed a degree of importance which did not attach to it prior to the enactment of the statute. Under the statute, with the exceptions named, an examination before a magistrate must antedate the filing of an information in the District Court. The statute, however, does not undertake to modify the system of examinations existing at the time of its passage. The sole requirement is that "no information shall be filed against any person for any crime or offense until such person

shall have had a preliminary examination therefor, as provided by law, before a committing magistrate, * * * unless such person shall waive his right to such examinations," etc. The only new feature embraced in the statute under consideration is that the examination of the accused before the magistrate must have been based upon a complaint charging the same offense as that set out in the information filed against the accused by the state's attorney. Such examination can be inaugurated only upon a complaint called an "information." Comp. Laws, § 7117. "The information is the allegation in writing, made to a magistrate, that a person has been guilty of some designated public offense." But how designated? We hold that a complaint, after stating time and place, which names or describes an offense in general terms, and which, in addition thereto, sets out such facts and circumstances of the offense as will fairly apprise a person of average intelligence of the nature and cause of the accusation against him, will be sufficient, as a basis of an examination, even in cases where other averments, not inserted in such complaint, would be essential to a valid information charging the same offense. Tested by this criterion, the complaint against the petitioner was sufficient as an accusation charging him with the same offense as that embodied in the information filed in the District Court. Hence the error assigned must be overruled.

Counsel for petitioner cites *White* v. *State*, (Neb.) 44 N. W. Rep. 443. The case is good law, but is not in point here. In that case the complaint on which White was arrested did not in any manner set out any criminal charge against the accused, and the Supreme Court held that the District Court was therefore without authority to put the accused on his trial upon an information filed by the states attorney. As has been seen, we fully concur in that construction of the statute, and Nebraska statute being identical with ours. Counsel also cites the following cases: *People* v. *Chapman*, (Mich.) 28 N. W. Rep. 896; *State* v. *Braithwaite*, (Idaho,) 27 Pac. Rep. 731; *People* v. *Wallace*, (Cal.) 29 Pac. Rep. 950; *People* v. *Parker*, (Cal.) 27 Pac. Rep. 537. Some of the cases last

cited turn upon mere questions of practice arising under statutes differing from those in this state, but the general principle running through them all has our approval, viz: that the charge made in the trial court must have been made substantially—*i. e.* with fair and reasonable fullness—in the complaint upon which the prisoner was examined, unless the examination is waived. The statute in the state of Kansas is essentially the same as that of North Dakota upon the question involved in this record, and the Supreme Court of that state has, in the cases cited below, reached conclusions which are essentially in harmony with the views already stated in this opinion: *State* v. *Tennison*, (Kan.) 18 Pac. Rep. 948; *State* v. *Reedy*, (Kan.) 24 Pac. Rep. 66; *State* v. *Bailey*, (Kan.) 3 Pac. Rep. 769.

One point further, a decisive one, remains to be considered. We hold that the petitioner has mistaken his remedy. The writ of habeas corpus will not lie in behalf of a prisoner confined in execution upon a criminal judgment as a means of reviewing errors of procedure occurring upon the trial. Such errors can be reviewed in this state only by the writ of error. This doctrine has long since passed beyond the domain of debate, and is reckoned among the fundamentals of the law of procedure. See petition of Semler, 41 Wis. 518; *Elsner* v. *Shirgley*, (Iowa,) 45 N. W. Rep. 393; *in re* Ellis, (Mich.) 44 N. W. Rep 616; *ex parte* Ah Sam, (Cal.) 24 Pac. Rep. 276; *ex parte* Siebold, 100 U. S. 375; *Wood* v. *Brush*, 11 Sup. Ct. Rep. 738; *in re* Thompson, (Mont.) 23 Pac. Rep. 933; *ex parte* Max, 44 Cal. 579.

It is quite clear that the question whether a prisoner accused of a crime by information filed in the District Court has had or waived a preliminary examination for the same crime is a question of procedure, pure and simple. The point presented for decision may involve questions of fact alone, or of law alone, or of both law and fact. From nature of the question, it can only arise upon the trial of the action, and it must be presented to a court which has full authority to decide the question in common with all questions arising at the trial. The question in this case arose at

the trial after an arraignment upon the information in a court possessing full jurisdiction over the subject matter and over the person of the accused. The ruling of the District Court in such a case may be correct or it may be erroneous. In either event, from the nature of the case, the authority to rule is unassailable.

The question of practice presented by the record is decisive against the prayer of the petitioner, but we have deemed the case to be one of unusual practical importance, considered with reference to the prosecution of offenders by information, and as the questions involved have never before been presented to this court, we have conceived it to be important to pass upon the merits as well as upon the practice question. The writ is discharged, and the prisoner remanded. All concur.

(54 N. W. Rep. 541.)

WASHBURN MILL COMPANY *vs.* S. J. BARTLETT, *et al.*

Opinion filed December 3rd, 1893.

Foreign Corporation—Right to do Business.

Sections 3190, 3192, Comp. Laws, which prescribe the terms upon which foreign corporations may do business in this state, do not render contracts entered into with such corporations, before compliance with the terms of said sections, unenforceable and void.

Contracts With—Estoppel.

Parties who have contracted with such foreign corporation as a corporation, and received and retained the benefits of such contract, cannot, in an action by such corporation, based thereon, raise the question of noncompliance with the terms of said sections. .

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

Action by the Washburn Mill Company against S. J. Bartlett and another to foreclose a real estate mortgage. A demurrer to the answer was overruled, and plaintiff appeals.

Reversed.

J. E. Bishop, (*Akers & Lancaster of Counsel*,) for appellant.

Defendant's answer is insufficient to raise the question of non-compliance with the statute. It pleads legal conclusions. *Gull River Lumber Co.* v. *Keefe*, 41 N. W. Rep. 743, 6 Dak. 160. The defense that a foreign corporation has not complied with the statute, by filing its articles of incorporation and appointing a resident agent must be specially pleaded. *American Buttonhole Co.* v. *Moore*, 2 Dak. 280, 8 N. W. Rep. 131. The consideration for contracts is presumed to have been lawful. Illegality is never presumed, it must be alleged and proved. *St. Louis etc. Ry. Co.* v. *Fire Association*, 18 S. W. Rep. 43; *Dahl* v. *Montana Copper Co.*, 10 S. C. Rep. 97; *White River Lumber Co.* v. *Southwestern Imp. Ass'n*, 18 S. W. Rep. 1055. The fact of violation of law in one transaction, will not inure to a stranger as a defense to an action on a contract not in violation of law. *Northwestern Mutual Ins. Co.* v. *Brown*, 36 Minn. 108, 18 S. W. Rep. 43, and 1055, *supra*. Penal statutes are strictly construed and a forfeiture will not be enforced unless such appears to have been the unmistakable intention of the legislature. *Toledo etc. Co.* v *Thomas*, 11 S. E. Rep. 37; *United States* v. *Athens Armory*, 31 Ga. 344. There is a clear distinction between an intent to prohibit a transaction until a certain thing is done (when the primary object is actual prohibition) and an intent to compel the performance of an act collateral to the transaction. *Larned* v. *Andrews*, 106, Mass. 435, *Aiken* v. *Blaisdell* 41, Vt. 655; *DeMers* v. *Daniels*, 39 Minn. 158; *Pangborn* v. *Westlake*, 36 Ia. 546; *Strong* v. *Darling*, 9 Ohio, 201. The restriction imposed by statute is a simple inhibition—no one but the state can object. The contract is valid as to the defendant and he has no right to raise the question of *its invalidity*. *Whitney* v. *Wyman*, 101 U. S. 392, *Nat'l Bank of Genessee* v. *Whitney*, 103 U. S. 101; *Fortier* v. *New Orleans Bank*, 112 U. S. 439, 5 S. C. Rep. 234; *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405, 5 S. C. Rep. 213; *Frills* v. *Palmer*, 132 U. S. 293, 10 S. C. Rep. 93. A person who has had the benefit of an agreement cannot be permitted in an action founded upon it to question its validity. *Union Nat'l Bank of St. Louis* v. *Matthews*, 98 U. S. 621; *Wright* v. *Lee*, 51 N. W. Rep. 706.

Thorp and *Ellsworth*, (*Ball & Watson* of Counsel) for respondent.

It is the right of any state to entirely exclude foreign corporations from doing business as such corporations within its territorial limits. *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; *Home Ins. Co.* v. *Davis*, 29 Mich. 238, 8 Am. and Eng. Enc. Laws 333. It follows that the state may impose such conditions as may be deemed expedient, upon foreign corporations doing business within the state and may declare that all contracts made without compliance shall be void. *Doyle* v. *Ins. Co.*, 94 U. S. 535; *W. U. Tel. Co.* v. *Mayer*, 28 Ohio St. 539.

BARTHOLOMEW, J. The appellant herein, the Wasburn Mill Company, is a corporation chartered by the State of Minnesota, and organized and existing under and by virtue of her laws. It brought this action in the District Court for Sargent County, in this state, to foreclose a real estate mortgage executed by S. J. Bartlett and F. G. Bartlett, the respondents herein, to secure a promissory note given by respondents to appellant. The answer admits the execution of the note and mortgage, and as a sole defense thereto alleges, in substance, that at the time the same were given, appellant was a foreign corporation, and was engaged in and carrying on the regular business of dealing in lumber at Forman, and other points in the Territory of Dakota, (now State of North Dakota;) and that said Note and Mortgage were given and received at said Forman, and in the regular course of appellant's business; and then proceeds to set forth certain facts to show that at the time of said transactions appellant had not complied with the statutory provisions then in force in the Territory of Dakota, and now in force in this state, relative to the transaction of business by foreign corporations. There was a demurrer to the answer, which the trial court overruled, and this ruling is the only question involved in this appeal. The statutes relied upon constitute §§ 3190, 3192 of our Comp. Laws, and read as follows: "No corporation created or organized under the laws of any other state or territory shall transact any business within

this territory, or acquire, hold, and dispose property, real, personal, or mixed, within this territory, until such corporation shall have filed in the office of the secretary of the territory a duly authenticated copy of its charter or articles of incorporation, and shall have complied with the provisions of this article: provided, that the provisions of this act shall not apply to corporations or associations created for religious or charitable purposes only." Section 3192: "Such corporation shall appoint an agent, who shall reside at some accessible point in this territory, in the county where the principal business of said corporation shall be carried on, duly authorized to accept service of process, and upon whom service of process may be made in any action in which said corporation may be a party; and service upon such agent shall be taken and held as due service upon such corporation. A duly authenticated copy of the appointment or commission of such agent shall be filed and recorded in the offices of the secretary of the territory and register of deeds of the county where said agent resides, and a certified copy thereof by the secretary or register of deeds shall be conclusive evidence of the appointment and authority of such agent." Three errors are assigned and argued: *First*, the answer does not state facts sufficient to show noncompliance with said statutes: *Second*, said statutes do not make contracts made in violation of the provisions thereof void or unenforceable as between the parties thereto, or in any way affect their rights or remedies. *Third*, said statutes, as applied to the case at bar, are unconstitutional, in that they interfere with interstate commerce.

As to the first point, without setting forth the allegations in detail, we have to say that a careful consideration of them leaves no doubt in our minds that the allegations fairly show noncompliance with the statute, and the trial court committed no error in so holding.

The second point is difficult, and involved in much confusion. While these provisions have been upon our statute books for years, appearing as § § 567, 569 in the Civil Code of 1877, yet they are now, for the first time, to be passed upon by the court of

last resort in this jurisdiction. On three different occasions (*Machine Co.* v. *Moore*, 8 N. W. Rep. 131, 2 Dak. 280; *Manufacturing Co.* v. *Foster*, (Dak.) 30 N. W. Rep. 166; and *Lumber Co.* v. *Keefe*, 41 N. W. Rep. 743, 6 Dak. 160) an effort was made to raise the point before the Supreme Court of Dakota Territory, but no ruling was ever made. In declaring the effect of statutes prohibitory in form, courts have but one object in view,—the real purpose of the statute; the real intention of the legislature in its enactment. It may be stated as a rule at common law that if a statute forbids an act to be done—provides a penalty for doing it—any contract to do the forbidden act is void, whether the statute expressly so declares or not. *Machine Co.* v. *Caldwell*, 54 Ind. 276. And when the purpose of the enactment is the absolute prohibition of a certain act, then the performance thereof is invalid, whether the prohibited act be *malum in se* or simply *malum prohibitum*. *Holt* v. *Green*, 73 Pa. St. 198; *Pratt* v. *Short*, 79 N. Y. 437. But in determining the purpose of the enactment, courts consider the nature of the forbidden act, for the very obvious reason that when such act is immoral or criminal in its nature, or dangerous to life, health or property, the presumption must prevail that legislative wisdom intended to stamp it out; while if the act be innocent in itself and in its consequences, no such presumption necessarily arises. Among the former may be mentioned gaming contracts, contracts for the sale of intoxicating liquors, where such sales are made criminal, contracts for the sale of diseased food, champertous contracts, etc. A large number of the cases arose under statutes of this kind, and are not authority for the case at bar. To properly construe statutes of the nature of the one here involved, it is necessary to first consider the powers and privileges of foreign corporations in the absence of all statutory regulations. While it is undoubtedly true, as stated by Chief Justice Taney in *Bank* v. *Earle*, 13 Pet. 588, that "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created," and that "every power, however, of the description of which we are speaking, which a corporation

exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised, and a corporation can make no valid contract without their sanction, express or implied," yet this implied sanction is always presumed to exist until the contrary appears. In the same case it is said: "We think it well settled that by the law of comity among nations a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts, and that the same law of comity prevails among the several sovereignties of this Union." In *Elston* v. *Piggott*, 94 Ind. 17, it is said: "This principle of the comity of nations is a part of the common law, and is by long settled rules, as well as by positive statute, ingrafted on our law." And to same effect are *Christian Union* v. *Young*, 101 U. S. 352; *Thompson* v. *Waters*, 25 Mich. 214; *Lumber Co.* v. *Thomas*, 33 W. Va. 566, 11 S. E. Rep. 37; Ang. & A. Corp. § § 372, 376. Of course, this comity only extends to the exercise of such powers as are expressly granted in the charter conferred by the creating sovereignty. It is true, also, that one sovereignty has the power to exclude from its territory any corporation created by another sovereignty; but this must be done by express statute, or by the settled policy of the state, as evinced by the decisions of its courts of last resort. And this includes the lesser right to prescribe terms with which such foreign corporation must comply. We have no statute excluding foreign corporations, except as heretofore quoted, nor has it ever been the policy of this state to exclude foreign corporate capital and business enterprise. Appellant, unless forbidden by the statute quoted, had the power to transact business and enter into contracts in the Territory of Dakota. The nature of its contracts contravened no policy of that territory. The contract was innocent in itself and in its consequences. Under these facts, was it the legislative purpose, by the enactment of § § 3190, 3192, Comp. Laws, to declare contracts of this character, entered into before the foreign corporation had compiled with the provisions of said sections, unenforceable and void? Similar statutes upon this and other subjects are

found in all the states of this Union, and in their construction so much is left to judicial determination that uniformity in the decisions would hardly be expected. The statutes, too, present great variety. Some, like ours, are prohibitory in form, with no penalty attached, and silent as to the consequences of noncompliance. Others, while not prohibitory in form, attach a penalty for doing or failing to do certain specified things. Others have both the prohibitory form and the penalty. Some declare contracts made without compliance with their provisions void and unenforceable or unlawful. Others specify various consequences that shall follow noncompliance. One class of cases, where the statutes are prohibitory, with penalty attached, holds that contracts made without compliance with the terms of the statute are nevertheless valid and enforceable, on the ground that by annexing a penalty the legislature manifested its purpose that the penalty should be exclusive of all other consequences of noncompliance. Of this class are *Lumber Co.* v. *Thomas*, 33 W. Va. 566, 11 S. E. Rep. 37; *Insurance Co.* v. *Walsh*, 18 Mo. 229; *Insurance Co.* v. *McMillen*, 24 Ohio St. 67; *Harris* v. *Runnels*, 12 How. 79. Another class of cases, under similar statutes, holds that the annexation of a penalty renders all acts which subject the party to the penalty unlawful, and hence unenforceable, on the universally accepted proposition that no cause of action can be based upon an unlawful transaction. See *Buxton* v. *Hamblen* 32 Me. 448; *Miller* v. *Post*, 1 Allen, 434; *Wheeler* v. *Russell*, 17 Mass. 257; *Johnson* v. *Hulings*, 103 Pa. St. 498; *Holt* v. *Green*, 73 Pa. St. 198; *Dudley* v. *Collier*, (Ala.) 6 S. Rep. 304; *Insurance Co.* v. *Harvey*, 11 Wis. 412; *Elkins* v. *Parkhurst*, 17 Vt. 105. But there is still another class of cases, where the statute annexes a penalty, that holds that contracts made without compliance with the statute are nevertheless valid, on the ground that the purpose of the statute was not to prohibit business, but to accomplish some collateral object. In this class we cite *Larned* v. *Andrews*, 106 Mass. 435; *Aiken* v. *Blaisdell*, 41 Vt. 655; *DeMers* v. *Daniels*, 39 Minn. 158, 39 N. W. Rep. 98; *Strong* v. *Darling*, 9 Ohio, 201;

Pangborn v. *Westlake*, 36 Iowa, 546; *Rahter* v. *Bank*, 92 Pa. St. 393. It has been held under statutes, prohibitory in form, but without penalty, and silent as to consequences, such as ours heretofore quoted, that all contracts entered into without compliance with the terms of the statute were absolutely void. These cases are based largely upon the thought that, inasmuch as there is no penalty or forfeiture provided in the statute for a disregard of its terms, there remains no method of its enforcement, other than to declare all contracts made in disregard of the statutory provisions unenforceable. *Bank* v. *Page*, 6 Or. 431; *Hacheny* v. *Leary*, 12 Or. 40, 7 Pac. Rep. 329; *in re* Comstock, 3 Sawy. 218; *Hoffman* v. *Banks*, 41 Ind. 1; *Insurance Co.* v. *Harrah*, 47 Ind. 236; *Insurance Co.* v. *Thomas*, 46 Ind. 44; *Assurance Co.* v. *Rosenthal*, 55 Ill. 85.

Other cases arising, like those last noticed, under statutes prohibitory in form, but without penalty or expressed consequences, have held that contracts entered into without compliance with the terms of the statute were valid, enforceable contracts as between the parties, and that one who had received and retained the benefits of such a contract could not raise the question of noncompliance. *Bank* v. *Matthews*, 98 U. S. 621, arose under that provision in the national banking law permitting national banks to purchase, hold, and convey real estate for certain specified purposes, and no other. The bank had received real estate security contrary to the terms of the act, and it was sought to declare such security void in the hands of the bank. The court said the prohibition was clearly implied, and as effectual as if it were expressed; but, on full consideration and a review of the authorities, it was held that the purpose of the statute was not to render such contracts void and unenforceable. The court used this language: "The intent, not the letter, of the statute constitutes the law. A court of equity is always reluctant in the last degree to make a decree that will effect a forfeiture. The bank parted with its money in good faith. Its garments are unspotted. Under these circumstances, the defense of *ultra vires*, if it can be

made, does not address itself favorably to the mind of the chancellor." And as a conclusion the court said: "The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by congress. That has been always the punishment prescribed for wantom violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government." The court also quoted with approval the following language from Sedg. St. Const. 73: "Where it is a simple question of authority to contract, arising either on a question of regularity of organization or power conferred by charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded upon it, to question its validity." *Whitney* v. *Wyman*, 101 U. S. 392, is equally instructive. It arose under a Michigan statute, which prohibited corporations from transacting business until their articles of incorporation were filed in the proper office, but attached no penalty. Certain parties purporting to act for a certain corporation, but before articles of incorporation were filed, ordered certain machinery of plaintiff, which was forwarded and charged to the parties ordering, and not to the corporation. The parties refused to pay, and plaintiff brought action against them, claiming that the corporation for which they purported to act could not transact business by reason of the statutory restriction. A unanimous court, speaking by Justice Swayne, said: "The restriction imposed by the statute is a simple inhibition. It did not declare what was done should be void, nor was any penalty prescribed. No one but the state could object. The contract is valid as to plaintiff, and he has no right to raise the question of its invalidity;" citing the case of *Bank* v. *Matthews*, and showing that the court considered the principle involved to be the same. In *Grant* v. *Coal Co.*, 80 Pa. St. 218, it is said: "Having dealt with the defendant in error as a *de facto* corporation, there is little merit in the defense now taken, that they were not duly incorporated, and had no right to sue for coal which it is admitted they

delivered. Nor is there any question raised upon the record as to the right of this company as a foreign corporation to hold real estate or even mining leases in this state. If the commonwealth has any interest in such inquiry, it can be raised by her proper officer. It is a matter with which the plaintiff in error has no concern." Since the decision of this case in the trial court, the Supreme Court of South Dakota, in an elaborate and instructive opinion by Bennett, J., has passed upon the identical statute here in question, which South Dakota, like North Dakota, received at the hands of the late Territory of Dakota. The conclusion reached by that court, after a full review of the authorities, is thus stated: "Aided by the light of these able decisions, endeavored to be reviewed upon both sides of the question raised in the case at bar, we have come to the conclusion that the constitutional provision and legislative enactment in our state, as quoted above, was not designed or intended as a prohibition upon foreign corporations to contract in this state, to the extent to declare such contracts void, but were merely intended to furnish the means by which our citizens could procure personal judgments against foreign corporations who were their debtors. And while the statute did in terms prohibit the transaction of business until its provisions are complied with, yet whatever objection there might be made to a foreign corporation for noncompliance, it being a statute regulating a public policy, this objection could not be urged collaterally by a private person, but it must be done by a direct proceeding instituted by the state." *Wright* v. *Lee*, (S. D.) 51 N. W. Rep. 706. See also, Mor. Priv. Corp. § 665; *Fritts* v. *Palmer*, 132 U. S. 282, 10 Sup. Ct. Rep. 93; *Fortier* v. *Bank*, 112 U. S. 439, 5 Sup. Ct. Rep. 234; *Reynolds* v. *Bank*, 112 U. S. 405, 5 Sup. Ct. Rep. 213; *Chase's Patent Elevator Co.* v. *Boston Tow Boat Co.*, 152 Mass. 428, 28 N. E. Rep. 300; *Merrick* v. *Engine & Governor Co.*, 101 Mass. 384.

The cases which we have cited from the various classes demonstrate, perhaps, the lack of uniformity with more certainty than they point to the correct rule of construction. Yet when studied,

the cases are all found seeking one common object,—the legislative purpose. "The intent of the law maker is the law;" the embarrassment is in declaring that intent. This intention may be declared in the act, or it may be inferred from its provisions in connection with the subject matter and circumstances. *Howell* v. *Stewart*, 54 Mo. 400; *Machine Co.* v. *Caldwell*, 54 Ind. 279. In the statute under discussion the legislature specified reasonable terms upon which a foreign corporation could launch its business over the entire state, unquestioned by private interests or sovereign power. Whatever may have been the primary purpose of the legislature, it certainly was not to exclude foreign corporations from the state. Nor is it reasonable to presume that it was the legislative intent to declare all contracts made by foreign corporations without compliance with the statute absolutely void. It were a reflection upon legislative wisdom to presume that consequences so unusally harsh and oppressive were expected to flow from the use of language so mild and uncertain. Our statute is a simple inhibition. It declares no penalty. It does not declare the transaction of business unlawful or contracts void. We may well use the language of Justice Swayne in *Bank* v. *Matthews*, *supra*: "The statute does not declare such a security void. It is silent upon the subject. If congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of legislative and judicial decision." The statute by its terms places foreign corporations upon an equality with domestic corporations in the matter of the publicity of the purposes of their creation and their powers, and in the matter of convenience and certainty with which process may be served upon them. It is not possible to read the statute without perceiving this to have been the primary purpose of its enactment. These objects are, or may be, highly necessary for the protection and convenience of our citizens dealing with such corporations. The legislature, having specified the duties of the foreign corporation, provided, in Ch. 26 of the Civil Code, the means for their enforcement,

and made it the duty of every prosecuting attorney to see that such conditions were fulfilled, or the corporation barred from the exercise of any corporate franchise within this state. This we believe to have been the remedy, and the only remedy, in the mind of the legislature. These respondents dealt with appellant as a corporation. They received and retained its property, and executed their obligation to pay for the same. The corporation has fulfilled its contract, and now respondents, without offering to return the consideration for their note, ask that they be released from the performance of their contract, for no reason other than the failure of appellant to perform a duty that it owed to the state at large, but the nonperformance of which in no manner prejudiced respondents. We are unwilling to ingraft upon a silent statute a consequence so inequitable. Upon both principle and authority, respondents are precluded from raising the question of noncompliance upon the part of appellant with the provisions of said §§ 3190, 3192, Comp. Laws. The facts alleged in the answer did not invalidate the contract, and the demurrer should have been sustained upon that ground.

It will not be necessary nor proper, in view of what we have said upon the second assignment of error, for us to discuss the constitutional question raised by the third assignment.

The District Court is ordered to vacate its order heretofore entered, and enter an order sustaining the demurrer.

Reversed. All concur.

(54 N. W. Rep. 544.)

STATE *vs.* CHARLES JOHNSON.

Opinion filed February 21st, 1893.

Conviction of Lesser Crime, Than Charged.

Comp. Laws, § § 6479, 6480, 6491, 6492, 6510, 7429, construed. *Held*, on a trial for the crime of assault and battery committed with a deadly weapon, "with intent to kill," the accused, under § 6510, Comp. Laws, may be convicted of an assault and battery, armed with a dangerous weapon, "with intent to do bodily harm." The commission of the latter is necessarily included in the commission of the former, within the meaning of § 7429, *supra*.

Verdict—Weapon Not Named—Assault and Battery.

Where the accused was charged with an assault and battery when armed with a deadly weapon, "with intent to kill," and the verdict was for "assault and battery with intent to do bodily harm, as charged in the information," *held*, the verdict will warrant a conviction for assault and battery only. The weapon with which an assault is committed is an essential feature of the crime defined by § 6510, *supra*. The jury failed to find the weapon, and the ommission is fatal to a conviction for felony.

Acquittal of Greater Offense.

The following words found in the verdict, "as charged in the information," are ambiguous, and cannot be resorted to for the purpose of showing that the assault and battery was committed with a dangerous weapon, in view of the fact that the effect of the verdict is to acquit the accused of the offense "charged in the information."

Error to District Court, Cass County; *McConnell*, J.

Charles Johnson was indicted for assault with intent to kill. The Jury found him guilty of assault with intent to do bodily harm. He was sentenced for the first named crime, and brings error.

Judgment modified.

Taylor Crum, for plaintiff in error.

Robt. M. Pollock, State's Attorney, for defendant in error.

WALLIN, J. Plaintiff in error was tried and convicted in the District Court upon an information charging him, in effect, with feloniously committing an assault and battery, while armed with a deadly weapon, "with intent to kill." The verdict is as follows: "We, the jury, find the defendant guilty of the crime of assault

and battery with intent to do bodily harm as charged in the information, and recommend him to the mercy of the court." When the prisoner was brought into court for sentence, his counsel appeared and objected to any sentence being pronounced against the prisoner for "any other or higher grade of offense than simple assault." This objection was overruled, and an exception was taken to the ruling. The court then sentenced the prisoner to a term of eight months in state's prison, an exception being saved to the sentence. The contention in this court is confined to the one question of the legality of the sentence, and the question presented is this: Did the verdict justify a sentence for felony, or should the punishment have been limited to a sentence for a simple assault, or assault and battery? A solution of this question will involve an examination of the information and the verdict, and these must be considered with reference to certain sections of the Penal Code. It is conceded that the information upon which the accused was tried was framed under that part of § 6479 of the Comp. Laws (§ 279 of the Penal Code) which provides that any person "who commits any assault and battery upon another by means of any deadly weapon, and by such other means or force as was likely to produce death, with intent to kill any other person, is punishable by imprisonment in the territorial prison, not exceeding ten years." As has been seen, the verdict, in terms, finds the accused guilty of "an assault and battery with intent to do bodily harm, as charged in the information." It is obvious that the legal effect of this verdict is to acquit the prisoner inferentially of the specific offense charged against him in the information, viz: the offense of assault and battery with intent to kill, and the question then presented is whether the verdict will justify the sentence actually pronounced against the prisoner. It is clear that the sentence cannot be sustained under the section upon which the information was drawn, (§ 6479, Comp. Laws,) for the reason, as has been stated, that the effect of the verdict is to find the accused not guilty of the crime defined and punished by that section; nor can the conviction be sustained

under § 6480, Id., which provides for the punishment of "assaults with intent to kill" which are not punishable under § 6479. The plaintiff in error has not been charged with the crime of committing an assault with intent to commit a felony "other than assaults with intent to kill;" hence the conviction cannot be upheld under § § 6491, 6492, Comp. Laws. It is contended, however, in behalf of the state, that the sentence is valid as a conviction for an offense defined by § 6510, Comp. Laws, (§ 309, Penal Code,) which provides that "every person who, with intent to do bodily harm, and without justifiable and excusable cause, commits any assault upon the person of another with any sharp or dangerous weapon, * * * is punishable by imprisonment in the territorial prison," etc. It is well settled at common law that a defendant in a criminal case may be convicted of any offense "included" in the offense charged by the indictment. This principle has been embodied in § 7429, Comp. Laws, (§ 402, Code Crim. Proc.) which reads: "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 indictment." Under a similar statute of the State of Iowa, the Supreme Court of that state, upon rehearing, overruled the original opinion of the court as written by Chief Justice Miller, and held that, "upon the trial of an indictment for an assault with intent to commit murder, the defendant may be convicted of an assault with an intent to commit manslaughter." *State* v. *White*, 41 Iowa, 316, 320; followed in *State* v. *Connor*, (Iowa,) 13 N. W. Rep. 327. The principle has frequently been applied, under statutes similar to those in this state, by the Supreme Court of California. *People* v. *Davidson*, 5 Cal. 134; *People* v. *English*, 30 Cal. 216; *People* v. *Congleton*, 44 Cal. 93; *People* v. *Lightner*, 49 Cal. 226. In *People* v. *English*, *supra*, the following language is used by the court: "The verdict is followed by the same judgment as though the defendant had been indicted for the offense of which he was convicted." The same rule obtains in New York, (*O'Leary* v. *People*, 4 Parker, Crim. R. 187,) and in Missouri, (*State* v. *Burk*, 2 S. W. Rep. 10.) These cases,

with many others, have fully established the modern doctrine that, even in those peculiar crimes where a specific intent constitutes the gist of the offense charged, a conviction will be sustained for any other offense, not charged in terms, the commission of which is necessarily included in the commission of the offense charged. *Beckwith* v. *People*, 26 Ill. 500. In the case at bar, however, the established rule now voiced by § 7429, Comp. Laws, by reason of an insufficient verdict, cannot be applied to the extent of affirming a conviction for felony for the offense defined by § 6510, Id. The verdict does not find the defendant guilty of the offense charged in the information, and fails to find him guilty of any other felony. "Assault and battery with intent to do bodily harm" is not felony at common law, nor under any statute of this state. An essential element of the felony defined by § 6510 is lacking in the verdict. An armed assault is not found, and the omission is fatal to the sentence. The verdict will sustain a sentence for assault and battery, which offense is both charged and found. This view has direct and ample support in the adjudications of other states, under statutes essentially the same as in this state. *People* v. *Vanard*, 6 Cal. 562; *Sullivan* v. *State*, 44 Wis. 595; *Territory* v. *Conrad*, (Dak.) 46 N. W. Rep. 605; *O'Leary* v. *People*, 4 Parker, Crim. R. 187.

We are of the opinion that the words "as charged in the information," which are embraced in the verdict in this case, when considered with reference to the fact that the defendant is not found guilty of the offense charged in the information, are ambiguous, and too indefinite to sustain the sentence. If the inference may properly be drawn from the general language of verdict above quoted, that the accused was armed with a dangerous weapon when he committed the assault and battery of which the jury found him guilty, the same rule of construction would, we think, require the court to infer that an armed assault and battery was committed if the verdict had been as follows: "We, the jury, find the defendant guilty of an intent to do bodily harm, as charged in the information;" but to thus speculate, and "give

loose rein to conjecture," would, in our opinion, be very dangerous in a criminal case. We find no precedent to justify such a mode of spelling out the meaning of ambiguous language in a verdict in order to sustain a conviction for felony. A verdict of guilty for an offense not charged in terms is allowable, as has already been shown, in certain cases, but such verdicts, to be legal, must embody all the essential elements of the crime not charged in terms, but which is "included" in the commission of the offense charged. The offense of assault and battery was charged and found by the jury, and the verdict warrants a conviction for that offense only. The judgment of the District Court must be modified, and that court will be directed to sentence the plaintiff in error for the crime of assault and battery only. All concur.

(54 N. W. Rep. 547.)

NATIONAL BANK OF NORTH DAKOTA *vs.* FREDERICK LEMKE.

Opinion filed March 1st, 1893.

Usury—Repeal of Statute—Penalty.

Under § 4767, Comp. Laws, the penalties prescribed by § 3723, Id., against usury, were not extinguished by the repeal of said § 3723 by Ch. 184, Laws 1890, as to any transactions had and completed prior to the enactment of said repealing statute.

Erroneous Instruction—Harmless Error.

While the giving of an erroneous instruction raises an immediate presumption of prejudice, yet a case will not be reversed by reason of such error where it is clear from the record that the complaining party could not have been prejudiced thereby.

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

Action in claim and delivery by the National Bank of North Dakota, a corporation, against Frederick Lemke. Defendant had judgment, and plaintiff appeals.

Affirmed.

A. S. Drake, (*H. C. Meacham*, of counsel,) for appellant.

John W. Maher and *M. H. Brennan*, for respondent.

BARTHOLOMEW, C. J. This action was brought, in claim and delivery, to obtain possession of certain personal property which the National Bank of North Dakota, plaintiff and appellant, claimed as assignee of a chattel mortgagee. The defendant and respondent, Lemke, was the mortgagor. The trial resulted in a verdict and judgment for respondent. The facts are somewhat involved, and the evidence upon some points conflicting. On November 24th, 1888, Lemke and his wife executed to the firm of Whited & Johnson their promissory note for $633.65, drawing interest at 12 per cent. per annum, and due October 1st, 1889. This note was secured by a chattel mortgage covering some—perhaps all—of the property here in controversy. This note is indorsed October 28th, 1889, with interest to October 1st, 1889, and $180.88 to apply upon the principal. This indorsement was made by Whithed & Johnson. Following this is the indorsement without recourse by said firm, and on April 2nd, 1891, a further payment of $9.50; and under date of April 15th, 1891, there is a memorandum indorsed on the note, showing balance due on April 2nd, 1891, to be $531.65. It is undisputed that Whited & Johnson transferred the note to E. A. Mears, but at just what date does not appear. It must, however, have been subsequent to October 28th, 1889, and after the date of the maturity of the note. On April 2nd, 1891, Lemke and wife executed a new note for $531.65 to E. A. Mears, due October 1st, 1891, and bearing 12 per cent. interest. This note was secured by chattel mortgage covering the same property as the first mortgage. The old note was not delivered to the makers when the new note was taken. Both notes subsequently came into the possession of the appellant bank, of which E. A. Mears has been president since its organization. There was some claim made that the appellant received these notes before the maturity of the note of April 2nd, 1891, but this question was submitted to the jury upon an instruction requested by appellant, and their verdict is conclusive of the fact that appellant received such note after maturity. One of the defenses set up in the answer is that the only consideration for

the second note was the balance due on the first, and that in fact there was no balance remaining when the second note was given, and hence it was without consideration. Appellant's theory of the case is, also, that the consideration of the second note was the balance due upon the first, but the parties differ widely as to what that balance was. Nearly all the payments on the original note were made by the delivery of elevator wheat checks, some of which were delivered to Whited & Johnson, and some to the agent of Mears. The mortgage covered successive wheat crops on certain land, and, as this wheat was hauled to the elevators, wheat checks were taken, and delivered to the party holding the note. But during the time that Mears held the original note, and before the second note was given, he also held various small notes against respondent, aggregating, according to the testimony, $319.60. Appellant claims that this money arising from the sale of the wheat represented by the checks was; by agreement, to be applied to the payment of these small notes, and there is testimony to that effect. This respondent, in his testimony, denies. It is not very material. When the second note was given, these small notes were delivered to, or at least left with, respondent. With full knowledge of the fact, he has retained them, with no offer to return. Hence, as against him, it must be held, either that the small notes were paid by the wheat payments, or that they formed, *pro tanto*, the consideration of the second note. It would be necessary, therefore, in order to establish a total absence of consideration in the second note, to show that the payments made not only extinguished the note of November 24th, 1888, but also the smaller notes. Further, the agent of Mears testifies that at various times he let Lemke have cash for expenses,—$25 at one time, and $5 or $10 at two or three other times; that this money was to be repaid from the proceeds of the wheat; that he simply put slips in the money drawer to represent the cash so advanced, and when the wheat was sold he replaced the money, and destroyed the slips, and no record was made of the transactions. This testimony respondent denies, and we have no means of

knowing what the jury found to be the fact in this regard. But whatever amount, if any, the jury found had been so advanced, must be first deducted from the payments, and the balance, only, applied on the notes. Respondent claims that the payments made, and as to which there is no conflict in the testimony, were sufficient to extinguish all legal claims held by Mears againt him, and that at the time of the execution of the note of April 2nd, 1891, he owed Mears nothing. It is averred in the answer, and respondent's testimony supports the averment, that the original note of $633.65 was in fact usurious; that respondent received $465.65 on said note, and no more; and that the excess, to-wit: $168, was simply an usurious bonus. There is no evidence in the abstract that contradicts this, but there is documentary evidence tending to corroborate it. The jury would have been unwarranted in finding the fact otherwise. The court instructed the jury that, under the law at the time said note was given, "any person receiving, retaining, or contracting for any higher rate of interest than 12 per cent. per annum forfeits all the interest so taken, received, retained, or contracted for, and when the note is sued on the plaintiff can recover only the principal." Under this instruction the jury could consider that note as for $465.65, and no more. The small notes amounted to $319.60, making a total of $785.25 to be paid without reference to the cash advances. The indorsement on the note made by Whited & Johnson amounts (interest and principal indorsed separately) to $245.50. It is undisputed that the wheat checks delivered by respondent to Whited & Johnson at and prior to the making of such indorsement sold for $397. A part of the indorsement on the note at that time reads, "Balance wheat for atty. fee, Eaton suit, as per contract," and there was evidence that Mr. Whited at one time acted as attorney for respondent in a suit with one Eaton. But respondent testified that he owed Mr. Whited nothing at that time as attorney's fees, or in any other capacity, and that he repeatedly asked to see the note on which the indorsement was made, but that his request was always evaded in some manner,

but that Whited & Johnson gave him a receipt for $397 "to apply on what he owes on note." This receipt is in evidence. The abstract contains nothing to contradict this testimony, and the jury must have have allowed respondent credit on this payment for $397. The amount of wheat for which the agent of Mr. Mears gave respondent receipts, all of which are in evidence, figured at the prices which the agent swears he received for the respective amounts, makes the further sum of $439.10; making total payments $836.10, or $50.85 in excess of the amount of the original note, shorn of its usury, and all the smaller notes. This excess more than equals the largest amount of cash advances claimed.

It is thus clear that at the time of the execution of the note of April 2nd, 1891, respondent owed E. A. Mears, to whom the note was given, and who is president of the appellant bank, nothing; and such note is entirely without consideration, unless appellant's contention that the court erred in its instruction heretofore quoted, as to the effect of usury in the original note, can be sustained. The instruction given was clearly in harmony with § 3723, Comp. Laws 1887, which was in force when the note was given, but this section was repealed by Ch. 184, Laws 1890, and hence was not in force when this action was tried; and it is urged that this repeal wiped out all the penalties and forfeitures under the old statute, and left the note to be enforced in its entirety. In other words, that neither the penalty prescribed by said § 3723, nor by the usury law enacted in 1890, and which repealed the old law, could be applied to this particular transaction, and, even if confessedly usurious under either or both statutes, still there is no remedy left for the enforcement of the consequences of such usury. That the repeal of a statute penal in its nature, without a saving clause, operates to absolutely extinguish all penalties under such law, is, we think, quite well settled. See *Ewell* v. *Daggs*, 108 U. S. 143, 2 Sup. Ct. Rep. 408, and cases there cited. But this rule of law has been abrogated by a general provision in this state. Section 4767, Comp. Laws, reads: "The repeal of

any statute by the legislative assembly shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force, for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." Other states have substantially this same provision. For a construction of the Indiana statute, see *W. U. Tel. Co.* v. *Brown*, 108 Ind. 538, 8 N. E. Rep. 171. For Missouri statute, see *State* v. *Kansas City*, etc., R. Co., 32 Fed. Rep. 722. For Kentucky statute, see *Com.* v. *Sherman*, 85 Ky. 686, 4 S. W. Rep. 790. In each of these cases the court enforces a penalty incurred under a statute that had been repealed prior to the time of the trial. The repealing statute of this state passed in 1890 is silent as to the penalties incurred under the former law. Hence, under this plain provision of § 4767, Comp. Laws, appellant is not relieved from that penalty.

On the question of payment, the court instructed the jury that, if they found that payments were made in wheat, they should allow respondent the highest market price from the time of delivery to the time of trial. This was clearly error. The court had in mind a rule sometimes applied in cases of conversion, but clearly foreign to this case. Appellant insists that for this error the case must be reversed. When an erroneous instruction is given an immediate presumption of prejudice arises, and the case must be reversed, unless it is clear that such error, under the facts, could have worked no prejudice to the complaining party. *McKay* v. *Leonard*, 17 Iowa, 569; *Hook, Adm'r* v. *Craghead*, 35 Mo. 380; *Freeman* v. *Rankins*, 21 Me. 446, Hayne, New Trials, § 287, and cases cited. It is equally certain that when the error could work no injury to the complaining party the case will not be reversed by reason thereof. See last citations. In the statement of facts as heretofore made, we have either taken facts about which there was no dispute in the testimony, and which the jury were bound to accept as true, or we have in every case taken

appellant's amounts and computations; and yet as we have seen, the payments exceeded all legal demands. It is clear that the error could work no injury to appellant.

The defense of duress is pleaded, and much of appellant's brief is devoted to that subject, but, as the case must be affirmed by reason of the total want of consideration for the note secured by the mortgage under which appellant claims the property, the question of duress becomes immaterial.

Affirmed. All concur.

(54 N. W. Rep. 919.)

HELENE WESSEL *vs.* D. S. B. JOHNSTON LAND & MORTGAGE CO.

Opinion filed March 8th, 1893.

Redemption from Foreclosure Sale—Voluntary Payment.

Where a party in possession, and with full knowledge of all the facts, pays to the proper officer the money necessary to redeem certain real estate from a foreclorure sale by advertisement, which sale was made after the lien of the mortgage had been fully satisfied and destroyed, and where such payment is made for the sole purpose of preventing the execution of a deed to the purchaser at the foreclosure sale, which would create an apparent cloud upon the title, such payment is voluntary, and cannot be recovered.

Payment Under Protest Unavailing.

That a payment was made under protest is of no avail, unless there was duress or coercion of some character, and then its only office is to show that such payment was made by reason of such duress or coercion. Protest can never make that involuntary which in its absence would be voluntary.

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

Reversed.

McCumber & Bogart, for appellant.

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

BARTHOLOMEW, C. J. Action by Helene Wessel, the respondent, to recover certain money paid by her to redeem certain real estate owned by her from foreclosure sale under a power of sale

contained in a mortgage executed by her to the D. S. B. Johnston Land & Mortgage Company, the defendant and appellant. Trial to a jury. Verdict for plaintiff. Motion for a new trial denied and defendant appeals.

When the case was called for trial the appellant, by motion, asked to have the case dismissed because the complaint did not state facts sufficient to constitute a cause of action, and because the action was improperly brought, and also moved by judgment on the pleadings. An exception was taken to an adverse ruling on these motions. The central idea upon which these motions were based was that the money sought to be recovered was voluntarily paid by respondent. The complaint showed that on November 13th 1886, respondent executed to appellant her promissory note for $54, payable in six equal semiannual payments, of $9 each, and secured the same by mortgage on real estate. It avers payment of the first five payments as they became due, and tender of $9 on the last payment at appellant's office, in St. Paul, Minn., where the note was, by its terms, payable; that such tender was refused, and the amount deposited, subject to the order of appellant, in the First National Bank of St. Paul, where it has since remained. Avers the subsequent foreclosure of said mortgage by advertisement under the claim of $23.98 due thereon, and the sale of the real estate by the sheriff to appellant for said amount, with interest and costs of foreclosure; that respondent had no actual knowledge of such foreclosure proceedings and sale until about three months before the expiration of the term for redemption, and that prior to the expiration of said time, and to prevent the execution of a sheriff's deed to said realty, respondent paid to the sheriff the amount necessary to redeem from such sale. The payment was accompanied by a written protest.

Under these circumstances, was the payment voluntary, or was it under legal duress? We think the answer must be that it was voluntary. There is no claim that such payment was made under any mistake of facts. The facts were all known and understood,

and under the allegations the lien of the mortgage was entirely destroyed when tender of the last payment was made. Immediately upon the refusal thereof,—which was well known to respondent,—she might have brought her action in equity against appellant, and compelled a satisfaction of the mortgage of record. This right she failed to exercise. The subsequent sale under the foreclosure was made to the mortgagee, who, if such were the fact, had full knowledge that the lien of the mortgage had been extinguished by tender of the full amount due thereon, and that the power of sale contained therein was no longer operative. Under these circumstances, nothing passed to the mortgagee by virtue of such sale. A sheriff's deed to appellant, based upon such sale, would be of no effect to divest respondent's title. She was in possession, and no action by appellant could disturb that possession. Further, she had actual knowledge of the foreclosure proceedings three months before the time for redemption expired. The appellant continued to hold the certificate until the expiration of the redemption period, and was, according to the complaint, "about to apply for a sheriff's deed of said premises, by virtue of said pretended foreclosure and sale." At any time during the three months that she had knowledge of the sale, and prior to the expiration of the time for redemption, an application to the proper court would have resulted in a perpetual injunction against the execution of the deed. After the execution of the deed, she might have maintained an action to remove the apparent cloud created thereby. There is no allegation that appellant was threatening or intending to transfer the certificate or convey the land after receiving the deed. Without intimating whether or not it would have been in the power of appellant to prejudice respondent's rights by any such transfer to a bona fide purchaser, it is sufficient to say that in either case the filing of a *lis pendens* would have afforded her complete protection. The same testimony that would establish, in the case at bar, that the money sought to be recovered was paid upon an unjust claim, would have enabled respondent to succeed in either of the actions above

indicated. No case can be found wherein the party had so ample opportunity to litigate, and yet elected to pay, in which the payment was held to be involuntary. There is no allegation or suggestion of any immediate or special damage to her by reason of the cloud upon her title that would have been created by the deed. The only circumstance relied upon to constitute legal duress is the fact that, had respondent suffered the deed to issue, the whole value of the land would have been risked upon the successful termination of the litigation, instead of the small amount required to redeem. We are sure no case can be found wherein that circumstance, alone, has been held to render a payment involuntary. With the reasoning of the well considered case of *Joannin* v. *Ogilvie*, (Minn.) 52 N. W. Rep. 217, chiefly relied upon by counsel for respondent, we fully agree. It may be that the application of the reasoning to the facts in that case carried the court as far as any decided case has gone, but a mere statement of the facts will show their radical difference from the facts in the case at bar. There a party had placed an unfolded mechanic's lien upon certain realty. There was a prior mortgage upon the property, which was due, and foreclosure proceedings were threatened. The only resource of the owner for raising money to meet such mortgage was by placing another mortgage upon the land. This he could not do while the mechanic's lien remained of record. He paid the unfounded claim under protest, and was allowed to recover the money. There was an immediate, special, and irreparable injury, by reason of the cloud, that could not tolerate the delay incident to its removal by an action in equity. The case of *Panton* v. *Water Co.*, Id. 527, was decided upon the same principle. In *Shane* v. *City of St. Paul*, 26 Minn. 543, 6 N. W. Rep. 349, the defendant was about to issue a tax deed to certain land belonging to plaintiff, upon a tax sale certificate. The sale had been made in pursuance of a judgment void upon its face. The deed, when issued, would be *prima facie* evidence of title, and would constitute a cloud upon plaintiff's title. He redeemed from the tax sale, under protest, and sought to

recover back the money so paid. A recovery was denied. The plaintiff was in possession, and the court said: "The execution and delivery of the tax deed in accordance with the alleged threat could work no disturbance to that possession, for, being founded upon a judgment void upon its face, its invalidity could always been shown, to defeat any claims that might be at any time asserted under it. There was therefore no necessity for plaintiff to make any redemption in order to protect his possession of the property. Neither was he required to do so to avoid any injurious consequences which might arise by reason of the apparent cloud which might be cast upon his title, for upon the facts stated he had a perfect and adequate remedy by action for the removal of such apparent cloud, whenever created."

We deem it a well settled rule of law that where a party, with full knowledge of the facts, pays a demand that is unjustly made against him, and to which he has a valid defense, and where no special damage or irreparable loss would be incurred by making such defense, and where there is no claim of fraud upon the part of the party making such claim, and the payment is not necessary to obtain the possession of the property wrongfully withheld, or the release of his person, such payment is voluntary, and cannot be recovered. Nor will the fact that such payment was accompanied by a protest make that involuntary which otherwise would be voluntary. A protest is of no avail unless there be duress or coercion of some character, and then its only office is to show that the payment is the consequence of such duress or coercion. *Benson* v. *Monroe*, 7 Cush. 125; *Commissioners* v. *Walker*, 8 Kan. 431; *Emmons* v. *Scudder*, 115 Mass. 367; *Lester* v. *Mayor*, etc., 29 Md. 415; *Potomac Coal Co.* v. *Cumberland & P. R. Co.*, 38 Md. 226; *Gerecke* v. *Campbell*, 24 Neb. 306, 38 N. W. Rep. 847; *Mariposa Co.* v. *Bowman*, Deady, 228; *Lamborn* v. *Commissioners*, 97 U. S. 181; *Powell* v. *Board*, 46 Wis. 210, 50 N. W. Rep. 1013. The District Court is directed to reverse the judgment in this case, and enter judgment for the defendant on the pleadings. All concur.

(54 N. W. Rep. 922.)

PLANO MANUFACTURING CO. *vs.* WILLIAM ROOT.

Opinion filed March 15th, 1893.

Breach of Warranty—Burden of Proof.

Written contract construed, and *held*, to constitute an agreement for sale and purchase of property, the title to pass on delivery and acceptance thereof. After such delivery and acceptance the purchaser cannot claim, in an action for the purchase price, that the burden is on the vendor to show that the property was as warranted. The warranty is collateral, and the purchaser must affirmatively show a breach thereof, and full performance of all conditions precedent of the warranty, to entitle him to rescind and defeat the action.

Declarations of Agent—Incompetent Proof of Agency.

The fact of agency and the extent of an agent's power cannot be proved by the agent's declarations.

Authority in Writing—Excludes Parol Proof.

The scope of an agent's authority cannot be established by parol when the employment of the agent defining his power is in writing.

Prior Negotiations Inadmissable.

The rule excluding all prior and contemporaneous negotiations when a contract is reduced to writing *held* applicable to the facts of this case.

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

Action by the Plano Manufacturing Company against William Root. Plaintiff had judgment, by direction of the court, and defendant appeals.

Affirmed.

McCumber & Bogart, for appellant.

Plaintiff sued upon a written contract. By the terms of its warranty it was incumbent upon the plaintiff to furnish the defendant a machine that was well made, of good material and with proper care and management, capable of doing as good work as any other machine on the market.

The basis of plaintiff's action being upon a contract, it was necessary for it to show that it had complied with the terms of the contract, and this before it could put the defendant on his defense. When plaintiff closed its case it had not shown compliance with its contract; therefore defendant's motion for a directed

verdict, should have been allowed. *J. I. Case Threshing Machine Co.* v. *Smith*, 18 Pac. 641; *Fairfield* v. *Madison Mfg. Co.* 38 Wis. 346.

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

This is not an action to enforce an executory contract of sale, nor for damages for breach of such contract but for purchase money on an executed sale. *Fishback* v. *VanDusen*, 22 N. W. Rep. 244; *Warden* v. *Fisher*, 4 N. W. Rep. 470; *Jenkinson* v. *Monroe Bros.*, 44 N. W Rep. 1113; *Smith* v. *Whitfield*, 2 S. W. Rep. 822. Where the authority and power of an agent is in writing, the writing is the best evidence. *Reise* v. *Medlock*, 84 Am. Dec. 611; *Columbia Bridge Co.* v. *Geise*, 38 N. J. L. 39; Mechem on Agency § 103.

CORLISS, J. The action was brought to recover the purchase price of a binder sold by plaintiff to defendant. On the trial a verdict was directed for the plaintiff. Defendant appeals. The order for the binder was in writing. It constituted the contract between the parties. It, in substance, authorizes and requests an agent of the plaintiff's to procure for defendant a harvester and binder, describing it, for which defendant agrees to pay $120 in addition to freight, etc., on delivery of the property. The order then continues as follows: "I understand that the machine referred to is sold, and that I am purchasing the same subject to the following warranty and agreement, and that the agent above named, as well as the person to whom I deliver this instrument, has no authority to add to, abridge, or to change said warranty in any manner. The warranty is as follows, to-wit: The warranty referred to states that the binder is well made of good materials, and with proper care and management is capable of doing as good work as any other machine in the market. Other provisions of the warranty will be referred to later. The execution of this order, and the delivery of the machine thereunder, were admitted.

Plaintiff having rested without proving that the binder was well made of good materials, and was capable of doing as good work as any other machine in the market, defendant moved to dismiss,

on the ground that plaintiff had failed to establish performance of conditions precedent to recovery. We cannot assent to his interpretation of the contract. It was a contract of sale and purchase, with a collateral agreement constituting a warranty. The burden was on defendant to show a breach of the warranty; and even then he could not defeat the action without showing that he had complied with the conditions of the warranty to be performed on his part, and had rescinded the contract, or had sustained damages by reason of such breach of warranty equal to or exceeding plaintiff's claim. The parties intended that the title to the property should pass on delivery. The defendant states in the order signed by himself that he understood that the machine is sold, and that he is purchasing it subject to the following warranties, etc. The defendant did not agree to buy if certain conditions were fulfilled. He agreed to purchase a certain machine, and, when it had been delivered to and accepted by him, he was obliged thereafter to rely upon the warranty as any other purchaser of property. He must perform its conditions. He must either rescind or claim damages for breach. On the trial defendant asked leave to amend his answer by alleging, in substance, that, at the time he executed and delivered this order, one Parsons, general agent of the plaintiff, agreed with defendant that, if the machine did not do good work, defendant need not keep it, and that such agent informed defendant at the same time that defendant would not be bound by the terms of the written order. This request was denied. In this there was no error. Defendant could not vary by parol the terms of the written contract. This talk was contemporaneous with the execution of the writing, and it would violate all rules of evidence to allow defendant to contradict the solemn agreement of the parties in this manner. It was not error to refuse to permit defendant to plead what he would not be suffered to prove. The defendant himself stated on the stand that he could not tell when he had such a conversation with Parsons, whether before or after the execution of the contract, and that he could not say that this alleged talk was after

the signing of the written agreement. Parsons himself was not asked anything about such a conversation. There was therefore not competent evidence of a contract independent of the writing. All prior and contemporaneous negotiations and talks were merged in the written agreement. There was no attempt to prove any subsequent modification of the written instrument, or the making of a new contract after the execution of the original order. Whether, therefore, Parsons was or was not general agent is entirely immaterial. We think, however, the court did not err in excluding the inquiries as to the scope of his powers. It was undisputed that his employment was in writing, and an attempt was made to prove the loss of this writing which defined the extent of Parsons' powers as agent. What authority he possessed could be proved only by the best evidence. Defendant's whole contention that the written contract was modified by an oral agreement with Parsons rests upon the hypothesis that Parsons was general agent. It is apparent from the record that he was not, but, on the contrary, occupied a very subordinate position in the employ of plaintiff. The order contains a statement that plaintiff understands that the agent, Parsons, has no authority to add to, abridge, or change the warranty in any manner. Unless he was a general agent, there could be no pretense that Parsons could alter the conditions of this warranty in the face of this explicit provision. The defendant has made these contentions because it is apparent that he has not complied with a material provision of the written warranty, nor has there been a waiver thereof, and he must therefore suffer defeat if he is forced to stand upon the written instrument. The warranty expressly requires the defendant to give written notice, stating wherein the machine is defective, to the agent from whom it is received, and also to the "Plano Mfg. Co., at Chicago, Ill." Such notice was never given. It was not waived. There was therefore no defense to the action, although there may have been a breach of the warranty. Defendant cannot take advantage of such breach for the purpose of recovering damages, or of rescinding the sale, unless he has

performed the conditions which the warranty imposed upon him. The breach of the warranty, followed by a return of the property, constituted no defense, because the plaintiff warranted the machine on the condition that defendant should give it notice of the breach at its head office, and this condition was not performed by defendant. The contract does not give the defendant the unrestricted right to rescind in case the machine fails to comply with the terms of the warranty. After written notice the company is to have a chance to remedy the defect; and then, if it will not do good work, the defendant has for the first time a right to return the machine. Even then he cannot insist that he should have back his money or his notes, or treat the contract as ended and his liability as extinguished. The company has the option to agree to this, or to furnish a new machine in the place of the defective one. There was no error in excluding the offer to prove by defendant Parson's declarations that he was plaintiff's general agent. It was mere heresay. An agent's powers or the fact of agency cannot be established by the agent's own declarations. Such evidence was not competent to impeach the witness Parsons, because no foundation for impeachment had been laid, and, being defendant's own witness, he could not be impeached by defendant. There was no question of fraud in the case. Fraud was not set up in the answer. No such question was raised upon the trial. It is too late to urge it here for the first time, nor was there any evidence of fraud. The judgment of the District Court is affirmed. All concur.

(54 N. W. Rep. 924.)

EDWARDS & MCCULLOCH LUMBER CO. *vs.* L. P. BAKER.

Opinion filed April 25th, 1893.

Bill of Exceptions—Settlement and Signing.

After a trial judge has decided and announced what shall be embodied in a bill of exceptions, it is not his duty to engross the bill in accordance with his decision, and he cannot be said to have neglected to settle such bill unless he neglects to sign the bill after it is presented to him for signature, engrossed as settled by him.

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

Action by the Edwards & McCulloch Lumber Company against L. P. Baker. Defendant moved to dismiss an appeal taken by plaintiff. Motion allowed.

McCumber & Bogart, for appellant.

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

CORLISS, J. The motion to dismiss the appeal, we think, must be granted. The appeal was taken too late, unless the appellant has brought himself within the provisions of an act approved January 9th, 1893, providing, in substance, that when a bill of exceptions is submitted to a judge for settlement within 60 days after service of written notice of an order, and at least 8 days before the expiration of such period of 60 days, and the judge neglects to settle the bill within such period of 60 days, the party appealing may have 30 days after the settlement of such bill in which to appeal. The burden is, of course upon the appellant to bring himself clearly within this exception. The question is jurisdictional, and cannot be left in doubt. It appears from the affidavits of several persons, including that of the trial judge, that before the 60 days had expired he had decided what should be embodied in the bill, and had so informed appellant's counsel. At that time the bill, as so settled, had not been engrossed. It is not the duty of the trial judge to do this. He is to take the proposed bill and the amendments, and determine what the bill shall contain; and it is then his duty to sign the bill, as settled, when it is

engrossed and submitted to him for signature. Haynes, New Trials & App. § 156. It further appears from some of the affidavits that the judge informed appellant's counsel that he was ready to sign the bill, as settled, any time it should be put in form and submitted to him, and that appellant's counsel expressed dissatisfaction with the ruling of the judge as to the matters to be embodied in the bill, and intimated that he would apply to the Supreme Court to have the bill settled. If these facts are true, the trial judge did not neglect to settle the bill within the 60 days. They are, in the main, controverted. We do not believe that there is any intentional misstatement of fact on either side. We simply hold that there is a failure to make out, by a preponderance of proof, that the case falls within the exception, and the general rule regulating the time in which to appeal from an order must therefore govern. The appeal having been taken too late, the motion to dismiss is granted. All concur.

(54 N. W. Rep. 1026.)

WILLIAM MCCANN *vs.* MORTGAGE, BANK & INVESTMENT CO.; DAVID WILLIAMSON *vs.* MORTGAGE, BANK & INVESTMENT CO.; THOMAS HALVORSON *vs.* MORTGAGE, BANK & INVESTMENT CO.

Opinion filed March 13th, 1893.

Foreclosure by Advertisement—Enjoined.

The powers embraced in the proviso of § 5411, Comp. Laws, regulating foreclosures of mortgages by advertisement, construed. *Held*, that the several orders made by the Judge of the District Court in the above entitled matters, directing the discontinuance of foreclosure proceedings by advertisement, and requiring that the further foreclosure proceedings of said mortgages be had in court, are valid orders; the same being based in each case upon an affidavit which was satisfactory to the judge who made the order, and which also set out such facts as are required by said proviso to be embodied in such affidavits.

Foreclosure by Action—Cumulative Remedy.

Held, further, that the proceeding in which the above entitled matters originated is, considered as a remedy, merely cumulative, and the same is not to be classed with, or regulated by, the principles of law and rules of practice which obtain in civil actions in which equitable relief by injunction is sought.

Discretionary Power of Court.

Held, further, that the proviso contained in § 5411, *supra*, is intended to confer upon Judges of the District Courts certain authority, to be exercised at their discretion, and such descretion is nonreviewable, except in cases of abuse, and that the several records herein fail to present a case of abuse of discretion.

Repeal of Usury Law—Forfeiture Not Extinguished.

Held, further, that the usury statute embraced in Ch. 70, Laws 1889, was, without a saving clause, repealed by § 12, Ch. 184, Laws 1890; but such repeal does not operate to extinguish any penalty, forfeiture, or liability incurred under the act of 1889. Section 4767, Comp. Laws.

Appeals from District Court, Bottineau County; *Morgan*, J.

Affirmed.

The facts fully appear in the following statement by WALLIN, J.

An appeal to this court is taken in each of the above entitled matters by the Mortgage, Bank & Investment Company, which company is the mortgagee in all of the above mentioned mortgages. The several appeals are from orders of the District Court for Bottineau County, denying appellant's application to set aside previous orders made by the judge of said court. The opinion

below is based upon the record in the McCann appeal, but the controlling facts and governing principles of law are common to all of the cases, and hence a single opinion will suffice for all.

A. S. Drake, for appellant.

E. A. Maglone and *Ball & Watson*, for respondents.

WALLIN, J., (after stating the facts as above.) This proceeding originated under the proviso embraced in § 5411, Comp. Laws, regulating foreclosures of mortgages by advertisement. The proviso is as follows: "Provided, that when the mortgagee or his assignee has commenced procedure by advertisement, and it shall be made to appear by affidavit of the mortgagor, his agent or attorney, to the satisfaction of the Judge of the District Court of the county where the mortgaged property is situated, that the mortgagor has a legal counterclaim, or any other valid defense, against the collection of the whole or any part of the amount claimed to be due on such mortgage, such judge may, by an order to that effect, enjoin the mortgagee or his assignee from foreclosing such mortgage by advertisement, and direct that all further proceedings for the foreclosure be had in the District Court properly having jurisdiction of the subject matter; and, for the purpose of carrying out the provisions of this act, service may be had upon the attorney or agent of the mortgagee or assignee." On the 25th day of September A. D. 1891, William McCann, the respondent, presented to the Judge of the Second Judicial District Court of North Dakota his affidavit, which after the title and venue is as follows:

"William McCann, being duly sworn, deposes and says that he is the mortgagor mentioned and described in the annexed notice of mortgage sale, which said notice, hereto annexed, marked 'Exhit A,' and made a part of this affidavit. Deponent further says that he has a legal counterclaim, valid defense, against the collection of the mortgage, and the amount claimed therein to be due thereon; that the sum, $86.43, claimed in said notice to be due on said mortgage is, as deponent is informed and verily

believes, for interest on the sum of $600.00, secured by said mortgage; that deponent on the 10th day of February, 1890, made, executed, and delivered to Mortgage, Bank & Investment Company his promissory note for the sum of $600.00, with interest at the rate of 9 per cent. per annum, and to secure the payment of said sum, deponent, at said time and place, executed the mortgage described in said Exhibit A; that deponent received only the sum of $335; that the balance of said sum of $600.00, to-wit: the sum of $265, together with a chattel mortgage for $140.00 and note for same; was kept and retained by said Mortgage, Bank & Investment Company as a bonus or usury, and deponent never received any consideration or benefit therefrom, whatever; that said Exhibit A is taken from the North Dakota Eagle, a newspaper printed and published at Willow City, Bottineau County, N. D.; that said Mortgage, Bank & Investment Company threatens to foreclose said mortgage by advertisement, and sell the premises therein described, on October 15th, A. D. 1891, at 2 o'clock P. M., at Willow City, Bottineau County, N. D.; that deponent fears said mortgagee will so sell said premises at said time and place unless restrained therefrom by an order from the Judge of the District Court of Bottineau County, N. D. Deponent further says that he is the owner of the premises in said Exhibit A described. Wherefore, deponent prays that the honorable Judge of the District Court of Bottineau County, N. D., may, by an order to that effect, enjoin the mortgagee, or its assignee, agent, attorney, or servants, from foreclosing said mortgage by advertisement, and direct that all further proceedings for the foreclosure thereof be had in the District Court of Bottineau County, N. D.; the same being the county wherein said premises are situated. Wm. McCann.

"Subscribed and sworn to before me this 25th day of September, 1891. Jacob Schroeder, Notary Public. [Seal."]

"Exhibit A. Default existing in a contract and mortgage executed by William McCann on February 10th, 1890, to Mortgage, Bank & Investment Company, on the west ½ of northeast

¼ and east ½ of northwest ¼ of section 15, township 160, range 74, in Bottineau County, North Dakota, now due on said contract and mortgage,—$86.43,—therefore, said land will be sold at the front door of the post-office in Willow City, in said county and state, on October 15th, A. D. 1891, at 2 o'clock P. M., under said mortgage. September 1st, 1891, A. S. Drake, Attorney, Fargo, N. D."

Whereupon, on the 30th day of September, A. D. 1891, the Judge of said District Court made an order as follows: "Ordered, that said Mortgage, Bank & Investment Company, and their attorney A. S. Drake, and all their agents, servants, attorneys, and employes, be, and they hereby are, enjoined and restrained from foreclosing said mortgage by advertisement, and they, each and all of them, are further ordered and directed that all further proceedings for the foreclosure of said mortgage be had in the District Court of Bottineau County, N. D., that being the county wherein said premises are situated, and the court properly having jurisdiction thereof,"—which affidavit and order were served upon the Mortgage, Bank & Investment Company prior to the hour of sale, as stated in the published notice of sale. At a term of the District Court for Bottineau County, held in May, 1892, upon due notice, the Mortgage, Bank & Investment Company moved in open court for an order vacating and setting aside the before mentioned order made by the judge of said court. After hearing counsel on both sides, the application to vacate was denied, to which ruling the moving party saved an exception; and the order and exception, together with all of the papers in the proceeding, were brought upon the record, and made a part thereof, by the direction of the District Court. The Mortgage, Bank & Investment Company have appealed to this court from the order of the trial court refusing to vacate the original order made by the judge of said court. The motion to vacate was not supported by affidavits offered by the mortgagee, but was based wholly upon the affidavit of McCann, as presented to the judge on the application for the order, and upon the order made by the judge.

In this court, appellant assigns only the following errors: "*First*, The judge erred in issuing said injunction. *Second*, The court erred in overruling appellant's motion to dissolve said injunction, for the reasons (*a*) that no fact or facts appear in support of said injunction, which could in any manner constitute a valid defense or legal counterclaim against the collection of the whole, or any part, of the amount claimed by appellant to be due in its notice of sale on the mortgage described in the notice of sale mentioned by respondent in his affidavit for the injunction; (*b*) that it does not appear in support of the said injunction that such proceedings have been begun by appellant, or by any person or persons in its behalf, as would, if carried forward to completion, foreclose the said William McCann of his equity of redemption in the land in question."

We are clear that these assignments of error are untenable, and hence must be overruled. An inspection of the affidavit of McCann, the mortgagor, discloses that it embraces all facts which the statute requires to be stated as a basis for an application for a judge's order of the character in question. It sufficiently appeared by the affidavit that the mortgagee had instituted a mortgage foreclosure proceeding by advertisement, and also that the mortgagor had a "valid defense" against the collection of the whole of the "amount claimed to be due on such mortgage." These general averments, if satisfactory to the judge who made the order, would be alone sufficient to authorize the judge, at his discretion, to make the order. But the affidavit goes into detail, and sets out specific facts which tend to show that the sum claimed to be due upon the mortgage was claimed as interest, and that no interest was due upon the note secured by the mortgage in question, by reason of usury, with which it appeared, *prima facie*, the transaction was tainted. The proceeding is wholly statutory, and there is no requirement that the affidavit made in behalf of a mortgagor shall be couched in any specific terms, nor that it shall be framed under the strict rules governing the pleader in framing the pleadings in an action. All that is required is that the facts

enumerated in the statute shall be set out in the affidavit in such manner and form as will satisfy the judge to whom the affidavit is presented. Being satisfied with the affidavit, the judge may make the order. We think the statute is not intended to be mandatory, but is, on the contrary, intended to clothe the Judge of the District Court with a pure discretion, which, unless abused, cannot be reviewed in an appellate court. We see no such abuse in this case. Elliott, App. Proc. § § 597, 605.

Counsel claims, in effect, that the note and mortgage which were given in February, 1890, are wholly exempt from the operation of any usury law, even though illegal interest was exacted in the note and mortgage transaction. The claim is that the usury law of 1889, which is embraced in Ch. 70, Laws 1889, and which was in force when the note and mortgage were executed, does not govern the note and mortgage, because, as is claimed, the law of 1890, found in Ch. 184, Laws 1890, without a saving clause, expressly repealed all pre-existing usury laws of this state. Referring to the defense of usury, as stated in the affidavit of the mortgagor, counsel for appellant uses the following language in his brief: "This supposed defense would have been proper, were it not for such repeal, but he is no longer permitted to set up such defense to his contract made while the old usury law was is in existence." It is true that the usury law of 1890 operated to repeal the usury statute enacted in 1889, but the question lying in the background is this: Does such repeal operate to extinguish any penalty or forfeiture which under the old law had attached to a usurious transaction, had while the old law was yet in force? We think this question is decisively answered in the negative by § 4767, Comp. Laws, as follows: "The repeal of any statute by the legislative assembly shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action

or prosecution for the enforcement of such penalty, forfeiture, or liability." This section constitutes § 2133 of the Civil Code, and was enacted by the territorial assembly on February 16th, 1877. It follows that such section has, under a provision of the state constitution, become incorporated with the laws of this state. Counsel is in error in his claim that § 4767 never was enacted by the territorial legislature. The repealing act (§ 12, Ch. 184, Laws 1890) is as follows: "All acts and parts of acts in conflict with the provisions of this act are hereby repealed." This language does not provide, expressly or otherwise for the extinguishment of penalties or forfeitures which may have been incurred under a former law. Hence, such penalties and forfeitures, if any, are, under § 4767, enforceable, notwithstanding such repeal. The court so held in a decision rendered at this term, *Bank* v. *Lemke*, 54 N. W. Rep. 919. The penalty of the law of 1889 for usury, which was the law in force when the note and mortgage were executed, was a forfeiture of all interest "contracted to be received." Chapter 70, Laws 1889. It follows that the affidavit used as a basis of the order embodied facts tending to establish a valid defense to the claim for interest which was sought to be enforced by the foreclosure proceeding. The following authorities are in point, and fully sustain the construction we have placed upon § 4767, Comp. Laws; *U. S.* v. *Matthews*, 23 Fed. Rep. 74; *U. S.* v. *Ulrici*, 3 Dill. 532; *Com.* v. *Desmond*, 123 Mass. 407.

Referring to the assignment of error marked "*b*." counsel claims that the mortgagor's affidavit is insufficient, and "fails to show a valid foreclosure proceeding," because it fails to set out the following facts: "*First*, That the mortgage contained any power of sale; *second*, that the mortgage was properly acknowledged; *third*, that the mortgage was properly recorded; *fourth*, that the title to the mortgage showed of record to be in the name of the party foreclosing; *fifth*, that the first publication of the notice of sale was made early enough to give time for the proper number of publications; *sixth*, that the publication of the notice of sale was

still running; *seventh*, that no proceeding to collect the mortgage debt appeared of record; *eighth*, that the estate of the mortgagee has not been merged into an estate by deed of record." These objections, quoted from the brief of counsel, may all be met and disposed of adversely to the appellant by the statement that the statute under which the affidavit is made does not require that either or any of the features indicated in the foregoing enumeration of points shall be embodied or referred to in such affidavit. Hence their statement, in whole or in part, would have been superfluous, if made in the mortgagee's affidavit. But it may not be amiss to state here that, as viewed by this court, the proceeding under the proviso of the statute in question cannot be assimilated to, or classed with, the remedy by injunction, as that remedy is administered in a civil action in an equity case. It would follow from this that the rules of pleading, practice, and procedure which obtain in civil actions of an equitable nature do not necessarily apply to this proceeding, nor would an appeal, in our judgment, lie in this case from the order of court refusing to set aside the judge's order under subdivision 3, § 24, Ch. 120, Laws 1891. The question of the appealability of the order appealed from is not discussed by counsel, nor shall we decisively pass upon it here, further that to say that the appeal can be sustained, if at all, only as an appeal from "a final order affecting a substantial right, made in a special proceeding." Subdivision 2 § 24, Id.

The proceeding in question is certainly anomalous, and, so far as we have been able to ascertain, is entirely new and novel, in the annals of statutory law. Our attention has been called to a case which arose under the same statute in South Dakota, (*Bank* v. *Smith*, 44 N. W. Rep. 1024,) in which the learned Supreme Court of that state has held adversely to our views upon certain incidental matters of practice; but we fully indorse the views of the court, as expressed in the opinion in that case, as follows: "We think the statute contemplated an *ex parte* application to the judge, and not a trial before him. Issues raised by counter affidavits on the part of the holder of the mortgage might often, as

in this case, involve the very vitality of the mortgage, or the existence of any indebtedness under it, or the validity of a counclaim or other defense claimed by the mortgagor,—questions which the parties interested are entitled to have tried and determined by the usual methods of trial, where the testimony offered may be sifted, and admitted or excluded, in whole or in part, under the established rules of evidence, and where the witnesses on either side are subject to the test of cross-examination." In our judgment it will follow logically from the reasoning of the court in the case cited that the use of rebutting affidavits upon a motion to vacate the judge's order is not contemplated by the statute. If the facts embodied in the affidavit made by the mortgagor, or in his behalf, cannot be controverted before the judge makes his order, we certainly can see no valid reason why the controversy should be opened later, and after the foreclosure proceeding had been arrested. The entire scope of the statute is to clothe the proper Judge of the District Court with authority, at his discretion, to act fully and finally in the premises, and to take such action upon an *ex parte* showing. We do not wish to be understood, however, as holding or intimating that, if such an order is made improvidently, it cannot be vacated by the judge who made it, either upon application made by the mortgagee, or upon the judge's own motion; but we do say that in our opinion no affidavits can be read upon such application, tending to rebut the showing made by the mortgagor as to his alleged defense or counterclaim. Such facts are not intended to be litigated by such methods and such machinery as are furnished by the proviso in question. This proceeding originates in, and is limited by, a proviso contained in a single section of the statutes which authorize and regulate foreclosures by advertisement. The term of the proviso are scanty, and nothing can be discovered in its language looking towards any ulterior proceeding to be built upon the statute which is not expressly created by the terms employed in the statute. Its words are few, and their meaning is obvious. A mortgagor who is a layman can easily write out the brief affidavit

which the statute requires as a foundation for an order, and he may present the same to the Judge of the proper District Court, and if the order is given the same may be served by the mortgagor himself, and by this simple process a statutory foreclosure may be arrested, and the owner of the mortgage required to foreclose by action, if at all. Whether so radical a measure is expedient or not, or, if expedient, whether an amendment should be made which would afford protection in the way of reimbursement to mortgagees in cases where it might turn out, in the action to foreclose, that the mortgagor failed to assert or failed to prove that he had any counterclaim or defense to the sum sought to be collected by the foreclosure by advertisement, are questions which appertain wholly to the legislative department of the state government, and do not fall within the province of the courts to determine. The proviso in question is not assailed on constitutional grounds, and, under an established rule of construction, we have assumed its constitutionality accordingly. No doubt exists of the plenary power of the legislature over the subject matter of foreclosures of mortgages by advertisement. Such foreclosures are purely statutory in their nature and origin. The statute creates the proceeding, and determines the conditions upon which it may be had. Some mortgages cannot be foreclosed by advertisement, and others may be upon the terms and conditions laid down in the statute; and at present, while we abstain from deciding the point, we are unable to see why it is not competent for the legislature to declare that, upon a certain state of facts being made to appear by affidavit to the satisfaction of the Judge of District Court of the proper county, such judge should not have the discretion to direct that a given mortgage shall be foreclosed in court, particulary in cases where the mortgage involved is executed subsequently to the enactment of the statute. In view of the novelty of the proceeding, and particularly in view of the great number of cases in which it has been resorted to by mortgagors as a means of compelling the foreclosure of their mortgages by action in court, we have been led into a discussion of some

features of the statute which, in strictness, need not have been considered, in order to decide this case. We have done so, of course, only to aid the profession and the public in utilizing a new and peculiar remedy.

Appellant's counsel attempts to distinguish the above entitled case of Thomas Halvorson from the others upon the ground that it appears in Halvorson's case that the mortgagor has a purely equitable defense, as against his mortgage, and one which, if maintained in court, would operate to defeat the mortgage entirely, and set it aside. Conceding this to be true, the result must be the same, because if further appears by the affidavit presented to the judge as a basis for the order that "Thomas Halvorson has a legal counterclaim and valid defense to the amount claimed to be due on and under said alleged mortgage." The printed notice of sale forms a part of the affidavit, and from that it appears that there is "now due on said mortgage $40.36 to said mortgagee." These facts bring the case of Halvorson within the terms of the proviso, inasmuch as they show that the mortgagor had a "valid defense against the whole * * * of the amount claimed to be due on such mortgage," viz. $40.36. Vide section 5411. It must follow from the views already advanced in this opinion that each and all of the orders appealed from in the above entitled matters should be affirmed. The court will so order. All concur.

(54 N. W. Rep. 1026.)

JOHN MCMILLEN *et al vs.* JOHN AITCHISON.

Opinion filed March 7th, 1893.

Verdict—Contrary to Evidence or Instructions.

A verdict that must be either without support in the evidence, or contrary to the instructions of the court, cannot be permitted to stand.

Irrelevant Testimony—Prejudice.

The admission of testimony that has no bearing upon the issues as made by the pleadings, but which, from its nature, would tend to prejudice the jury against the party objecting, constitutes reversible error.

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

Action by John McMillan and Christina McMillan against John Aitchison. Plaintiffs had judgment, and defendant appeals.

Reversed.

Francis & Southard, for appellant.

Benton & Amidon, for respondents.

BARTHOLOMEW, C. J. To reverse a judgment against him, based upon a verdict, the defendant and appellant assigns six errors: *First*, that the evidence was insufficient to support the verdict, specifying wherein it was insufficient; *second*, that the complaint did not state facts sufficient to constitute a cause of action; *third*, error of the court in ruling upon the admission of evidence; *fourth*, error of the court in refusing to nonsuit, or direct a verdict for defendant; *fifth*, error of the court in refusing an instruction asked by appellant; and, *sixth*, that the verdict was contrary to the evidence and instructions. The second assignment is not well taken, and merits no discussion, beyond what is incidental to the disposition of the other assignments.

The respondents are husband and wife, and their complaint alleges that on and prior to April 5th, 1885, one Ober was indebted to respondents for work and labor performed for him at his request, in the sum of $400; that on said 5th day of April, 1885, and while said indebtedness was due and unpaid, the appellant, Aitchison, undertook and agreed to pay said respondents

said amount, and that, as a consideration for said promise, respondents agreed to, and did, enter into the employment of appellant, and did perform valuable services for him, and which were beneficial to him. There is a further allegation that during the year 1885, and, as appears from the evidence, some months subsequent to April 5th, the appellant "had in his possession and control, and was indebted to said Ober, in, a certain large sum of money," and that respondents were about to commence an action against said Ober, and attach the money and property in appellant's hands, and that appellant further promised and agreed that if respondents would not commence such proceedings, and attach said property in his hands, he would pay respondents the debt owing them from said Ober, and that, in consideration of such promise, respondents did not take the legal steps contemplated. The answer was, in substance, a denial. As we read the instructions, the jury were plainly told that respondents could recover nothing by reason of this latter promise, set forth in the complaint; and, as neither party complains of such instruction, it must stand as the law of the case, and our investigations are confined to the first promise alleged. As this promise rests in parol, only, it is admitted that, if it were a collateral promise of guaranty, it was void, under the statute or frauds. But it is claimed that it was an original undertaking based upon a benefit accruing directly to the promisor.

Section 4277, Comp. Laws, reads: "A promise to answer for the obligations of another in any of the following cases is deemed an original obligation of the promisor, and need not be in writing: * * * (3) Where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor, or upon the consideration that the party receiving it releases the property of another from a levy, or his person from imprisonment, under an execution on a judgment obtained upon the antecedent obligation, or upon a consideration beneficial to the promisor, whether moving from either party to

the antecedent obligation, or from another person." In this case the antecedent obligation was not released, as respondents subsequently contemplated an action against Ober. Neither was there a release of property from any levy, as no actual levy was ever made. If the case falls within the statute, it is by reason of the final provision,—"or upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation or from another person." This statutory provision, it will be noticed, excludes a portion of the broad consideration "of benefit or harm moving between the newly contracted parties," as laid down by Chief Justice Kent in *Leonard* v. *Vredenburg*, 8 Johns. 29, and the cases that have followed that decision, and confines it to that which is beneficial to the promisor, but without regard to the source from which the benefit moves. The learned trial court placed the case entirely upon this promise, and the charge to the jury was full, clear, and very fair to appellant. The jury could not have returned a verdict for respondents without disregarding the court's instructions, unless they found the promise was made as alleged, and based upon a consideration beneficial to the promisor.

It is earnestly contended that the evidence does not warrant a finding that any such promise was made. The court told the jury plainly that, if appellant incurred any liability to respondents, "it was by reason of some contract made on April 5th, 1885." As to what occurred on that day, Mr. McMillan testified: "Mr. Aitchison wanted to engage me and my wife, and I told him we would not engage with any person until we got a settlement for the previous year. He said he had everything in that place in black and white, in his own name, but that Ober was to have an interest, but if we would stay he would pay the wages before Ober should have a cent on the farm." This, clearly, was a conditional promise only, and before any recovery could be had thereon the existence of the specified conditions must be alleged and proven. Mrs McMillan testified as to the same transaction: "I was present during the conversation between my husband and Mr. Aitchison.

He had not intended to stay there, unless we had a settlement, but Mr. Aitchison asked him to stay, and said that if we would stay he would pay us for the indebtedness of Mr. Ober, and on that condition we stayed." This was on direct examination, and, if unqualified, would support the finding. But on cross-examination she testified that she did not remember exactly what Mr. Aitchison said; "I remember that I got from what he said that he would pay the wages." And further on: "I heard him say that, before Ober got his interest out of the farm, he would pay this money." This witness is positive about the conditional promise. The absolute promise seems to have been her deduction from what was said. But it would be bordering upon the absurd to suppose that appellant, at the same time, and in reference to the same matter, made both a positive and conditional promise of performance. The appellant testified: "I told him [McMillan] I thought he ought to have something, and that, before I made over anything to this Ober, I would see that they were paid." And on cross-examination: "I told him * * * that I should not let my countryman suffer; that I would take care that I made Ober pay him before I gave him any title to the half section." The testimony of this witness showed that he had a parol contract with this man Ober, by the terms of which, under certain contingencies, he was to convey to Ober one half of the farm on which this work was to be done. The evidence of the two parties who made the agreement shows that it was conditional. A third party who heard it also testifies to its conditional character, but uses language which, if not subsequently qualified, would import a positive agreement. Nor is it possible to avoid giving some consideration to the circumstances under which this agreement was made. It is undisputed that at the same time, and as a part of the same transaction, appellant, employed respondents to work for him on the farm for one year,—he says, for the sum of $460; McMillan says, for the sum of $38 per month. Either sum was the full ordinary price for such services in that locality. Respondents continued to work for appellant a portion of the succeeding

year at the same wages. It is not conceivable that a man of ordinary business prudence should unconditionally bind himself to pay nearly double the ordinary wages. Under the facts and circumstances, as disclosed by the evidence, we are clear that, if the jury found that the positive promise alleged in the complaint was in fact made, such finding was without any sufficient support in the evidence, under the rule announced by this court in *Fuller* v. *Elevator Co.* 2 N. D. 220, 50 N. W. Rep. 359, and the case must be reversed under the first assigned error. If, on the other hand, the jury returned a verdict for respondents, without finding the existence of such positive promise, then the verdict was contrary to the instructions of the court, and the case must be reversed under the sixth assignment.

It is proper to add that the verdict of the jury may have been somewhat influenced by reason of certain matters raised under the third assignment. One Bruce was called as a witness for respondents. He seems to have been the financial agent of Mr. Ober. He was asked whether or not, at any time during the summer of 1886, he received from Mr. Aitchison, for the credit of Mr. Ober, any money. This was objected to by counsel for appellant as irrelevant and immaterial, and the objection was overruled. In answer the witness said that in the summer of 1885 he received $575 from Mr. Aitchison for the credit of Mr. Ober; and by other questions, all answered against appellant's objections, this fact was made prominent before the jury. If respondents were seeking a recovery under the positive promise set forth in the complaint,—and under the instructions they could recover on no other ground,—it was entirely immaterial whether subsequent to such promise appellant paid Ober any money. He was equally liable whether he did or did not. Such fact had no possible bearing upon the issues made by the pleadings. And yet the prejudice to appellant of such testimony, after the evidence as to the contingent character of the promise had been given, is too evident for discussion. The admission of that testimony was

reversible error. *Jones* v. *Bacon*, (Sup.) 19 N. Y. Supp. 553; *Railroad Co.* v. *Hepner*, (Tex. Sup.) 18 S. W. Rep. 441; *Bank* v. *Carson*, 30 Neb. 104, 46 N. W. Rep. 276. The District Court is directed to reverse its judgment and grant a new trial. All concur.

(54 N. W. Rep. 1030.)

THE GOOSE RIVER BANK *vs.* WM. GILMORE, *et al.*

Opinion filed January 25th, 1893.

Appeal From Order Denying New Trial—Motion to Purge the Record.

When an appeal is taken from an order denying a new trial, and the motion for such new trial was heard in part upon certain papers and documents, which, on appeal to this court, have been properly identified by the judge and certified by the Clerk of the District Court, a motion to purge the record of such papers and documents for the reason that the same are not authenticated by any bill or statement cannot be sustained. Under § 5, Ch. 120, Laws 1891, no bill or statement is required to bring such papers and documents before the court.

Bill of Exceptions—Stenographer's Transcript.

The stenographer's transcript of the proceedings had at the trial, and used on a motion for new trial for the purpose of showing errors of law occurring at the trial, does not constitute an authenticated record, and before this court can review errors occurring at the trial the proceeding must be brought upon the record by a bill of exceptions or statement of the case.

Affidavit of Newly Discovered Evidence.

An affidavit used upon a motion for a new trial, which states that certain evidence could and would be offered if a new trial should be granted, is entirely insufficient unless it also states that such evidence is newly discovered, or furnishes some excuse for not introducing it on the former trial.

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

Action by the Goose River Bank against Will Gilmore and others. Defendant's had judgment by direction of the court, and from an order denying a motion for a new trial, plaintiff appeals.

Affirmed.

A. B. Levisee, for appellant.

McMahon Bros. and *J. E. Robinson*, for respondents.

WALLIN, J. In this action the verdict was for the defendants. Plaintiff moved for a new trial, basing its motion upon "the pleadings in the case, the minutes and memoranda of the court, the stenographer's report of the evidence adduced upon the trial, and the affidavit of plaintiff's counsel." The motion was initiated by the service of a notice of intention stating that the "grounds upon which such motion would be urged are: *First*, That the court erred in withdrawing said cause from the jury, and in ordering the jury to render a verdict for the defendants, to which action of the court the plaintiff duly excepted at the time. *Second*, That if the evidence adduced and delivered to the jury on said trial was in fact or in the opinion of the court insufficient to make a fair, *prima facie* case for the consideration of the jury, such defect of proof resulted from the oversight of the plaintiff's counsel, and not from an actual lack of evidence to support said cause as set up in the complaint; and the plaintiffs are justly entitled to have another opportunity to establish the merits of their cause before a jury." The motion was denied, and judgment was entered for defendants dismissing the action, and for costs. No appeal is taken from the judgment, but plaintiff appeals to this court from the order denying the motion for a new trial.

The Judge of the District Court has by his certificate properly identified the papers mentioned below as the papers used on the motion for the new trial, and the clerk has certified such papers to this court, under § 5, Ch. 120, Laws 1891, providing that, "if the appeal is from an order, he shall transmit the order appealed from, and the original papers used by each party on the application for the order appealed from." The papers thus certified up are the following: Complaint; answer; verdict; judgment; order denying motion for a new trial; said notice of intention; an affidavit of plaintiff's counsel, referred to in such notice; a document purporting to be a transcript of the evidence, rulings, exceptions, etc., had and taken upon the trial of this action, which is certified to be correct by the official stenographer of the District Court, but not otherwise authenticated as a true version of the proceedings

had at the trial; lastly 11 pages of what purports to be the evidence of the defendants in a certain other action in which this plaintiff was plaintiff and Willow Lake School township was defendant. The last document was certified to be a true transcript by one Frank La Wall, who affixes the following to his signature: "Ex-Official Stenographer, Sixth Judicial District, Territory of Dakota." The document purporting to be a transcript of proceedings had at the trial of this action embraced, with the testimony, an order based upon the testimony, and directing a verdict in favor of defendants, with plaintiff's exception thereto. It is conceded that no bill of exceptions or statement of the case was ever prepared, served, or allowed in this action. In this court the defendants' counsel submits a preliminary motion to purge the record by striking therefrom all papers except the judgment roll proper, *i. e.* the complaint, answer, verdict, judgment, and order denying a new trial. No authority is cited in support of this motion, and the only reason offered in its support is that the papers sent to this court have not been embodied in either a bill or statement, and hence, as counsel agree, are not authenticated as a record. A motion similar to this was made and granted in *Wood* v. *Nissen*. 2 N. D. 26, 49 N. W. Rep. 103. In that case, "on appeal from a judgment in favor of the plaintiff, a transcript of the proceedings had at the trial, embracing the evidence as extended by the stenographer, was by the order of the District Court, annexed to the judgment roll, and the same was sent up to this court as a part of the record." No bill or statement was prepared or settled, and this court held that such transcript, though vouched for by the court below, "constitutes no part of the judgment roll," and hence the same was stricken from the roll. But the case referred to must be distinguished from the case at bar, because the former was an appeal from a judgment, and in this case the appeal is from an order only, and the record is certified to this court under § 5, Ch. 120, Laws 1891. The clerk of the court below seems to have complied with the mandate of this statute fully. All papers in

the record are certified to as being used on the application for a new trial, and this is substantially what the statute requires. It would seem quite clear that this court ought not to strike from its files any papers or records properly certified to this court from the court below. *Bailey* v. *Scott*, (S. D.) 47 N. W. Rep. 286. Hence the motion to purge the record must be denied, and we are therefore brought to a consideration of the case as it appears in the light of all the papers in the record.

In this court plaintiff has assigned only the following errors: *First*, "the court erred in withdrawing the case from the jury, and ordering a verdict for the defendants;" *second*, "if, as the court seemed to think, there was in fact a deficiency of proof, then the court erred in refusing a new trial to afford the plaintiff another opportunity to establish its claim;" *third*, "the court erred in refusing a new trial." The third assignment of error cannot be sustained, unless some legal ground or reason for granting a new trial was presented to the trial court.

The second assignment of error does not purport to point out any specific error, either of law or fact, which occurred at the trial, and which would of itself constitute a legal ground for a new trial of the action. A deficiency of proof offered at a trial certainly does not alone constitute any ground for a new trial enumerated in § 5088, Comp. Laws. The assignment omits to state, and nothing in the record supplies the omission, if it could be supplied, that any newly discovered evidence had come to plaintiff's knowledge since the trial; much less is there any attempt to excuse the laches which would have been involved in the non-production of evidence know by plaintiff to exist, and which was not produced at the trial. It follows that the second assignment of error must, for the reasons stated, be overruled.

The first assignment of error, according to the stenographer's transcript, is predicated upon an alleged ruling of the District Court made after plaintiff had rested its case, and is based upon the evidence adduced by the plaintiff. In order to review this ruling, the fact that the ruling was made and excepted to,

together with the evidence upon which the ruling was based, must be duly authenticated and brought upon the record of this court. We think such authentication has not been made in this case. The testimony and rulings at the trial are vouched for only by a stenographer's certificate. While it is true that this certificate is transmitted to this court as one of the papers used on the motion in the court below, yet the stonographer's version of the proceedings had at the trial has never been authenticated by being embodied in a bill or statement settled on notice, and in manner and form as the statute directs. The motion below being upon the minutes, it was proper, if the moving party saw fit to do so, to have a stenographer's transcript of the proceedings before the court for reference; but whether or not such transcript is used upon the hearing the law contemplates that upon such motion all disputed matters of fact must be determined by the trial court upon its own recollection of what occurred at the trial. In this court, however, we cannot so determine disputed facts, and hence it is essential that all matters of fact occurring at the trial should be settled by the court below, and the law points out how this shall be done. After judgment is entered, a bill embracing exceptions may be settled, under § 5083, Comp. Laws. See, also, § § 5084, 5094. We can see no legal reason why a bill or statement was not prepared and settled in this case after the motion was denied. This not having been done, we have no proper record before us of what occurred at the trial, and hence must overrule the first assignment of error.

We do not hold, nor do we intimate the opinion; that where a motion for a new trial is based exclusively upon affidavits and upon the grounds stated in the first four subdivisions of § 5088, Comp. Laws, that a bill or statement must be made a record for use in this court. Our views in this case have reference only to cases arising under the last three subdivisions of said section. Our law and practice relating to bills of exception and statements is largely drawn from the State of California, but in that state appeals

from orders granting or refusing a new trial are in a class by themselves. See Haynes, New Trials & App. §§ 262, 263. Our statutes do not embrace a provision similar to § 951 of the California Code of Civil Procedure, and hence decisions from that state are not in point here as to what constitutes the record on appeals from orders granting or refusing a new trial. See Haynes, New Trials & App. (Ed. 1884,) p. 785, § 262. While we regret the necessity which obliges us to dispose of this case upon a question of practice, yet the exigencies of particular cases cannot suffice to justify this court in violating long established rules of practice, which are essential to the regular administration of law. The order appealed from is affirmed. All concur.

(54 N. W. Rep. 1032.)

THE UNION NATIONAL BANK *vs.* T. N. OIUM.

Opinion filed Deccember 28th, 1892.

Sufficiency of Description in Chattel Mortgage.

The description in a chattel mortgage stated that the property was situated on a certain section in a certain township and range, but did not name the county or state within which such section and property were located. The mortgage was filed by the mortgagee in Ransom County, in the then Territory of Dakota, and it was shown that the section named in the mortgage was located in that county, and that property corresponding with that described in the mortgage was situated thereon, owned by the mortgagor. *Held*, a sufficient description as against an attaching creditor as to such property, but not as to property not situated on such section.

Priority of Mortgage Over Attachment Lien.

Where a creditor attaches personal property covered by a mortgage, between the execution and delivery of the mortgage and the filing thereof, his lien is not superior to that of the mortgagee, under the statute (§ 4379) declaring such mortgage void as to creditors unless filed, where the debt for which he attaches existed before the giving of the mortgage, and the creditor has not altered his position to his detriment since the mortgage was given, and before the filing thereof.

Possession Substitute for Refiling.

It is unnecessary, to preserve the lien of a chattel mortgage, to renew the same by refiling a copy thereof, with a statement, etc., as required by Ch. 41, of the Laws of 1890, where the mortgagee has taken possession of the property before the period arrives at which the statute requires the mortgage to be so renewed.

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

Action of replevin by the Union National Bank of Oshkosh against T. N. Oium, as sheriff of Ransom County, and another. There was judgment for defendants, and plaintiff appeals.

Reversed.

Ball & Watson and *Rourke & Allen*, for appellant.

No valid levy of attachment was ever made upon the engine and separator and some of the plows claimed to have been attached, as they were not present nor in the view of the sheriff at any time. *Rogers* v. *Bonner*, 45 N. Y. 379; *Bond* v. *Willett*, 31 N. Y. 102; *Ray* v. *Harcourt*, 19 Wend. 495; *Brown* v. *Pratt*, 4 Wis. 513; *Dresser* v. *Ainsworth*, 9 Barb. 619; Crocker on Sheriff's § 436-7; Freeman on Executions § 262. When the possession of attached property is voluntarily abandoned by the custodian and it comes into the possession of any one claiming adversely to the attaching officer, the lien of the attachment is lost. Wade on Attachments § 164; *Sanderson* v. *Edwards*, 16 Pick. 144; *Boynton* v. *Warren*, 99 Mass. 172; *Littleton* v. *Wyman*, 28 N. W. Rep. 582; *Nichols* v. *Patten*, 36 Am. Dec. 713; *Hardon* v. *Lissen*, 36 Ill. App. 383; *Russell* v. *Mayor*, 29 Mo. App. 167. The engine, separator and certain plows to which the court found that the lien of plaintiffs mortgage did not attach, because of the fact that at the time of the execution of the mortgage they were not on section 19, have since the delivery of such mortgage come into the possession of the mortgagee, and possession equally with filing is notice to all persons of the mortgagees interest in mortgaged property. *Gooding* v. *Riley*, 50 N. H. 400; *Clark* v. *Tarbell*, 57 N. H. 328; Jones on Chattel Mortgages, § 176; *Morrow* v. *Reed*, 30 Wis. 81, *Janvrin* v. *Fogg*, 49, N. H. 340. The taking of possession by the mortgagee of the mortgaged property before any other right or lien attaches, the title obtained under the mortgage is good against everybody, although it be not acknowledged and recorded or the record be ineffectual by reason of any irregularity. The taking of possession is an indentification and appropriation of

the specific property to the mortgage and cures any defect there may be through an insufficient description of the property. Jones on Chattel Mortgages, § § 178, 60; *Chipron* v. *Feikert*, 68 Ill. 284; *Frank* v. *Miner*, 50 Ill. 444; *Brown* v. *Webb*, 20 Ohio 389; *Parsons Savings Bank* v. *Sargent*, 20 Kan. 576.

There is no occasion for *refiling* a mortgage where the mortgagee has taken actual possession of the mortgaged property. Jones on Chattel Mortgages, § 294; *Porter* v. *Parmlee*, 52 N. Y. 185; *Dayton* v. *Peoples Savings Bank*, 23 Kan. 421. The rights of the parties must be determined by the facts as they stood at the time the cause of action accrued. *Bates* v. *Wilbur*, 10 Wis. 415; *Newman* v. *Tymeson*, 12 Wis. 448; *Case* v. *Jewett*, 13 Wis. 498; *Meech* v. *Patchin*, 14 N. Y. 71; *Lewis* v. *Palmer*, 28 N. Y. 271. The defendant cannot take advantage of the failure of the appellant to refile its chattel mortgage. "One not having a judgment and execution is not a creditor within the meaning of the provision of the statute, declaring that the omission to file a chattel mortgage renders it void as against creditors of the mortgagee and subsequent purchasers and mortgagees in good faith." *Jones* v. *Graham*, 77 N. Y. 628; *Thompson* v. *Van Vechten*, 27 N. Y. 568; *Paine* v. *Mason*, 7 Ohio St. 198; *Stewart* v. *Beale*, 7 Hun. 405. Actual notice of an unrecorded mortgage of property is as effectual as constructive notice by record, against subsequent purchasers; and an attaching creditor stands in no better position. Jones on Chattel Mortgages, § 317; *Allan* v. *McCalla*, 25 Ia. 464; *McLaurin* v. *Haupt*, 9 Ia. 83; *Brown* v. *Brabb*, 34 N. W. Rep. 403; *LeNeve* v. *LeNeve*, Leading cases in Eq. 202.

In replevin, defenses must be with reference to the time of the commencement of the action. Cobbey on Replevin, § § 764, 796 and 798; *Patten* v. *Hammer*, 28 Ala. 618; *Coller* v. *Beckley*, 30 Ohio St. 523, *Nichols* v. *Michael*, 23 N. Y. 264; *Allen* v *Crary*, 10 Wend. 349. The pleadings evidence and judgment in an action of replevin should be confined to the points and questions necessary to elucidate the right of plaintiff to the immediate possession of the property in question at the commencement of the suit.

Cobbey on Replevin, § § 977, 978 and 979; *Hamer* v. *Hathaway*, 33 Cal. 117; *Blue Valley Bank* v. *Clement*, 30 N W. Rep. 64. In replevin the value of each item of property should be found separately, as the whole may be returned or a part only in satisfaction of the judgment *pro tanto*. Cobbey on Replevin, § 1063. Under an attachment the sheriff has no right to make use of the property, and no right to damage for being deprived of its use. *Tandler* v. *Saunders*, 22 N. W. Rep. 271; *Broadwell* v. *Paradice*, 81 Ill. 474; *McArthur* v. *Howett*, 72 Ill. 359; Cobbey on Replevin, § 895.

The value of property at the time of the trial should be found instead of its value at the time of its taking. *Rowley* v. *Gibbs*, 14 Johns. 385; *Tuck* v. *Moses*, 58 Me. 361; *Boylston* v. *Davis*, 70 N. C. 485; *Burkeholder* v. *Rudrow*, 19 Mo. App. 60; *Mix* v. *Kepner*, 81 Mo. 93; *Allen* v. *Judson*, 71 N. Y. 76; *Pierce* v. *Vandike*, 6 Hill 613; *Brewster* v. *Silliman*, 38 N. Y. 423-9.

Goodwin & Van Pelt and *Geo. D. Emery*, for respondent.

The mortgage contains no description of the property by which it could be identified. No presumption arises from the execution of the chattel mortgage, that the mortgagor owns the property—nor that such property is in existence. *Warner* v. *Wilson*, 73 Iowa, 719, 36 N. W. Rep. 719.

The mortgage must not be indefinite and uncertain. "It must indicate, suggest and direct inquiry whereby the property can be identified." *Griffiths* v. *Wheeler*, 2 Pac. Rep. 842; *Smith* v. *McLean*, 24 Iowa 322; *Tolbert* v. *Horton*, 33 Minn. 104. The individual description of each separate item or class of chattels is fatally defective. *Barr* v. *Cannon*, 69 Ia. 20, 28 N. W. Rep. 413; *Eggert* v. *White*, 13 N. W. Rep. 426; *Pennington* v. *Jones*, 10 N. W. Rep. 274; *Warner* v. *Wilson*, 36 N. W. Rep. 719; *Hayes* v. *Wilcox*, 17 N. W. Rep. 110; *Smith* v. *McLean*, 24 Ia. 322. As to the separator no clue of identification is furnished by the mortgage. *Leffel* v. *Miller*, 7 So. Rep. 324 *Kellogg* v. *Anderson*, 40 Minn. 207; *Armsby* v. *Nolan*, 28 N. W. Rep. 569; *Rhutassel* v. *Stevens*, 27 N. W. Rep.

786; *Caldwell* v. *Trowbridge*, 26 N. W. Rep. 49; *Leighton* v. *Stuart*, 26 N. W. Rep. 198; *Tabor* v. *Sampson*, 4 Pac. Rep. 45. Plaintiffs mortgage not being filed was void against defendant even though he had actual notice of its existence. *Bank of Farmington* v. *Ellis*, 30 Minn. 270; *Houk* v. *Condon*, 40 Ohio St. 569; *Wilson* v. *Leslie*, 20 Ohio 161; *Barr* v. *Cannon*, 69 Ia. 20, 28 N. W. Rep. 413; *Farmers L. & T. Co.* v. *Hendrickson*, 25 Barb. 484; *Tyler* v. *Strang*, 21 Barb. 198; *Ramsey* v. *Glenn*, 33 Kan. 271; *Jewell* v. *Simpson*, 17 Pac. Rep. 463; *Ransom* v. *Schmela*, 13 Neb. 73. Filing is necessary to give the mortgage validity as to creditors, and the contest between the creditor holding the mortgage and the creditor with the attachment is simply a race of diligence. *Rich* v. *Roberts*, 48 Me. 548, *Travis* v. *Bishop*, 13 Metc. 304; *Bevous* v. *Bolton*, 31 Mo. 437; *McComb* v. *Meyers*, 8 Wis. 236; *Lockwood* v. *Slevin*, 26 Ind. 124. If the plaintiff in replevin alleges that the defendant, the sheriff, is in possession of goods and wrongfully detains them, he is estopped from claiming that the defendant is not in possession for the purpose of showing that the defendant has not made a valid levy or attachment. Thompson on Trials, § 197; *Derby* v. *Gallant*, 5 Minn. 119; *N. P. R. R. Co.* v. *Paine*, 7 Sup. Ct. Rep. 323. Plaintiffs rights under the mortgage were lost at time of trial because of its failure to refile its mortgage—and defendant was entitled to judgment. Wells on Replevin, § 496.

CORLISS, C. J. This litigation presents a strife for supremacy between a chattel mortgagee, the plaintiff and appellant, and an attaching creditor of the mortgagor, one of the defendants and respondents. The sheriff who made the attachment and the creditor in whose behalf it was made are both parties defendant. The nature of the action is replevin. To sustain it, the plaintiff must show a valid chattel mortgage, and that its lien is superior to that of the attachment. The mortgage has been assailed as invalid for want of a sufficient description of the mortgaged property. It was executed at Oshkosh, in the State of Wisconsin, on property in the then Territory of Dakota. The portion of the mortgage material to a proper consideration of this point reads

as follows: "The following described goods, chattels, and property, viz: 4,000 bushels of wheat, in granary on section 19, township 134, range 56; 38 horses, being all the horses on said section 19; 26 head of cattle, cows, bulls, steers, heifers, etc., being all the cattle on said section; 6 self-binders; 7 sulky 16 in. plows, (make, Flying Dutchman;) 2 Flying Dutchman gang plows; 4 Van Brunt 3-horse seeders; 1 broadcast Stowbridge seeder; 6 4-horse drags; 16 set double harness; 2 top buggies; 1 platform wagon; 7 double-heavy lumber wagons and racks; 80 tons hay; 2,000 bushels oats; and all other personal property on said section,—all said property being on said section; also 1 threshing machine, together with all the appurtenances," etc. We think that the description is sufficient, within the rule which merely requires that it should suggest such inquires as will enable a third person by the aid thereof to identify the property. The property, with an exception which will be referred to hereafter, was described as being situated on section 19, township 134, range 56. The mortgage was filed in Ransom County, Territory of Dakota, and there was found within that county a description of land corresponding with the description in the chattel mortgage. We think that the fact that neither the county nor the state in which this real estate was located was stated in the mortgage is unimportant, because, under the law requiring the mortgage to be filed in the county where the property is situated, the mortgagee filed it in Ransom County, in the then Territory of Dakota, and within that county it was shown that a piece of land known, according to the government survey, as "section 19, of township 134, in range 56," is situated, and that upon it was property answering to the description contained in the mortgage, owned by the mortgagor. There is no evidence that as to any of the classes or kinds of property described in the mortgage there was any greater number belonging to that class than the number mentioned in the mortgage. Without further discussion of this point or a review of the authorities, we refer to the extended note to the case of *Barrett* v. *Fisch*, [Iowa, 41 N. W. Rep. 310,] 14 Am.

St. Rep. 238, 239, *et seq.*, as containing a collation of the decisions, and we are satisfied that they fully sustain our view in this respect.

It was urged that the only means of identifying the property intended to be mortgaged was by its location at the time of the execution of the mortgage, and that there is no evidence which fixes its situs at the precise moment of the giving of the security. But it appears to be undisputed that all of the property, except an engine, separator, and some plows, were on this section 19 the day the property was attached, which was only three days after the execution of the mortgage. Having in view the character of the property, and the fact that the owner thereof, Mr. Morrison, also owned this tract of land, that the property seems to have been kept there constantly, and there being no proof that it was placed upon this farm after the execution of the mortgage, we are clear that there is nothing in this contention; but, as to the engine, separator, and some of the plows, we must hold that the description in the mortgage was insufficient. It appeared that they were not upon section 19, and there was no other description of them, aside from the incorrect statement as to their location, sufficient to point out the property to a third person within the rule governing such cases.

The attachment, it is claimed, was made after the execution but before the filing of the mortgage. Assuming this to be so, still the question remains whether the attachment lien is superior to that of the mortgage. That the lien of the mortgage was good as between the parties to it without the filing thereof cannot be questioned. The attaching creditor can be in no better position, unless by virtue of the statute. It provides as follows: "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith for value, unless the original, or an authenticated copy thereof, be filed by depositing the same in the office of the register of deeds of the county where the property mortgaged, or any part thereof, is at such time situated." The invalidity of the mortgage is claimed, not by a subsequent purchaser

or incumbrancer, but by an attaching creditor, who attached for a debt contracted before the giving of the mortgage. It is therefore necessary to determine the meaning of the word "creditors" in this statute. It is important that there should be kept in mind a distinction between the right of a general creditor to insist that an unfiled chattel mortgage is void and the ability to enforce this right. While an unfiled chattel mortgage may be void as to a general creditor, he cannot avail himself of the statute until he has armed himself with attachment or execution and levied on the property, or has in some other way secured a lien thereon. Before he has seized the property covered by the chattel mortgage, or secured some lien thereon, he is in no position to raise the question that the mortgage is void as to him. *Bank* v. *Bates*, 7 Sup. Ct. Rep. 679; *Kitchen* v. *Lowery*, (N. Y. App.) 27 N. E. Rep. 357, *Thompson* v. *Van Vechten*, 27 N. Y. 568; *Dempsey* v. *Pforzheimer*, (Mich.) 49 N. W. Rep. 465. The statute does not, however, require that he should be armed with process or have a lien on the property to entitle him to come within the category of "creditors," as to whom the unfiled instrument is a nullity. The mortgage is not void as to creditors who have seized the property, or who hold process under which they can seize it. This is not the language of the statute. The mortgage is void as creditors, and nothing is said in the statute about the necessity of a creditor's having secured a lien on the mortgaged property. The fact that the creditor cannot assail the mortgage until he has seized the property is of no moment in determining whether he belongs to the class of persons as to whom the mortgage is void. Whether he belongs to that class is one question; whether he is in a position to derive benefit from belonging to that class is another, and entirely different question. The two inquiries are distinct, and each is independent of the other. When he arms himself with process, and seizes the mortgaged property, the court will then inquire whether he is a "creditor," within the meaning of the statute which declares void the mortgage as against "creditors." The facts which determine this point are

independent of the fact of seizure, and can derive no aid therefrom. The inquiry is whether he is a "creditor" within the spirit of the law, and not whether he is a creditor with process which he has levied on the property covered by the mortgage. If it were necessary that he should have seized the property before he can be regarded as a creditor within the statute, great wrong could be done the public by the withholding of a chattel mortgage from record, for which those wronged would have no redress. After a chattel mortgage had been given, and while it was withheld from record, a loan might be made to the mortgagor, or credit might be extended to him on the sale of property, the creditor relying upon the apparent freedom of the debtor's property from liens. All the harm that could be done the creditor has now been consummated. The subsequent filing of the chattel mortgage cannot undo it. It would be a gross perversion of the statute requiring chattel mortgages to be filed to assert that the right of this creditor successfully to attack the unfiled mortgage depends on his seizing the property under process before the mortgage is filed; that until then he cannot be considered a creditor as to whom the mortgage is void. It is true that he must seize the property before he can raise the point, but he need not seize it before the instrument is filed. Whenever he does seize it, whether before or after the filing of the mortgage. he is then in a position to urge that he was before the mortgage was filed a "creditor," within the meaning of the statute. Strong authority exists to support this proposition, that the fact of a levy under process does not enter into the question whether the creditor is one whom it was the purpose of the law to protect as against unfiled chattel mortgages. *Thompson* v. *Van Vechten*, 27 N. Y. 568. In this case the court say: "But, when they [creditors] present themselves with their process, they may, I think, go back to the origin of their debt, and show, if they can, that, when it was contracted, the incumbrance with which they are now confronted existed, and was kept secret by being withheld from the proper office." See also, *Feary* v. *Cummings*, 41 Mich. 376, 1 N.

W. Rep. 946; *Bank* v. *Bates*, 120 U. S. 556, 562, 7 Sup. Ct. Rep. 679. If the word "creditors" is to have its widest significance, then no chattel mortgage can ever be valid as against the creditors of the mortgagor unless it is filed simultaneously with its execution. If, when the mortgagee hurries to the proper office to file his security, he is to be deprived of its protection because a creditor, intermediate its execution and its filing, has seized the mortgaged property under attachment, it must be because the creditor so seizing it is a "creditor," within the meaning of the statute. He is not such because he has seized the property before the filing of the mortgage. This element, as we have seen, is entirely unimportant. The fact of levy prior to the filing of the mortgage has no bearing upon the question whether he is such a creditor as the statute protects. We must therefore eliminate this element from our consideration. He would be a creditor within the law just the same although he should not secure a levy on the property until after the filing of the mortgage. If, then, the mortgage is void as to him when he seizes it five minutes after the execution and before the filing of the mortgage, it is void as to him without such previous seizure. He may seize the property after the mortgage is filed, and then insist that he is a "creditor," within the law, just as fully as when the seizure is made before the filing of the instrument. That the fact whether the seizure is or is not before the filing of the mortgage is of no moment in determining whether the person is a creditor within the law is made apparent from the silence of the law as to this fact, in connection with the injustice and absurdity of such an interpretation of the law. If the date of seizure is controlling, a creditor whose claim antedates the execution of the mortgage, and who therefore extended no credit while the mortgage was withheld from record, could destroy a mortgage filed one minute after the execution thereof by seizing the mortgaged property after the mortgage had been delivered, but before it could be filed, no matter how great the diligence of the mortgagee in filing it, and despite the fact that he parted with value on the

security of the mortgage; and, on the other hand, a creditor who had trusted the mortgagor after the execution and delivery of the unfiled mortgage, relying on the apparent freedom of the property from liens, would lose all right to protection by the subsequent filing of the mortgage, although not filed until after the expiration of a year perhaps, provided it were filed before such creditor should seize the property. The language of the statute is not that the mortgage is void as against creditors "until" it is filed. This would warrant the construction that the property could be seized by creditors and the mortgage ignored until it had been filed. The statute make the mortgage void "unless" it is filed. This indicates a purpose to fix the rights of those who in the future shall deal with the owner on the faith that the property is unincumbered. As to those persons it is not merely void until it is filed; it is void for all time,—void just the same whether they seize the property before or after the mortgage is filed. We have seen that the word "creditors" cannot have its broadest significance in this statute. No court has pretended to hold that the mere fact that the person was a creditor during the interval between the execution and filing of the mortgage would entitle him to claim the benefit of the act. It is unjustifiable to place upon the statute the construction limiting the meaning of this word to those who have actually seized the property before the mortgage is filed. It would not be in harmony with the spirit of the law. It would defeat its purpose, which is protection to those who act in ignorance of the unfiled security, by taking that protection from those who, having dealt with the mortgagor after the execution and before the filing of the mortgage on the theory that the property was unincumbered, should fail to seize the property before the mortgage should be filed; and, on the other hand, it would extend the protection of the statute to those who have no claim to its protection because they did not act after its execution, but before,—who have not been prejudiced in the least by its being kept from record; it would extend to this class protection should such creditors levy upon the mortgaged property

before the filing of the security. We cannot give the word "creditors" in this statute its broad, comprehensive meaning; neither can we attach a qualification which leads to such absurd, unjust results, which runs counter to the manifest policy of the law. In what light, then, should this word be interpreted? The answer seems obvious. We must look to the purpose of the law. We find it is a law designated to protect those who deal with the owner of mortgaged property under circumstances indicating that they relied on the freedom of the property from incumbrances, because there was no record thereof. Its policy as to such persons is to protect them against all secret chattel mortgage liens. To bring themselves within the spirit of the law, they must show that such mortgage existed and was unfiled when they dealt with the owner of the property. This statute intends to protect creditors in the same spirit, and in only the same spirit, in which it protects subsequent purchasers and mortgagees. Purchasers and incumbrancers, to be entitled to protection, must be purchasers and incumbrancers in good faith for value. Section 4379, Comp. Laws. Whether those words "in good faith for value" are used in such a statute is unimportant. They are often interpolated into such a law by construction because of its obvious policy. Now, it is well established that one who purchases or takes security for an antecedent debt is not entitled to the protection of such a statute. The reason is that he has not altered his position to his detriment on the strength of the apparent freedom of the property from incumbrance. The cases are unanimous on this point. *Bank* v. *Bates*, 120 U. S. 556, 7 Sup. Ct. Rep. 679; *Button* v. *Rathbone, Sard & Co.*, (N. Y. App.) 27 N. E. Rep. 266; *Cassidy* v. *Harrelson*, (Colo. App.) 29 Pac. Rep. 525, and authorities there cited.

Again, notice of the unfiled chattel mortgage destroys his right to protection. The reason is that he has not altered his position to his detriment relying on the apparent freedom of the property from incumbrance. He knows that it is incumbered. Why should not the word "creditors" be interpreted in the light of this

same policy of the law? Why should general creditors receive unreasonable protection, on the one hand, or be denied reasonable protection, on the other hand? Why should they be more favored than creditors who have taken security on the property? It is no answer to say that the words "in good faith for value" do not relate to the word "creditor." They would be meaningless if they did. When they refer to a mortgagee, they mean the parting of value on the strength of the security without notice. But it would be idle to talk about a credit or "in good faith for value," except to indicate that he had a bona fide claim against the debtor. These words would not mean that the creditor had extended the credit relying on the silence of the record as to the existence of a chattel mortgage. It is true that language might have been employed in the statute which would have expressly indicated what this court regards as the purpose of the statute. But the act then would not have shown more clearly what was its object. Its policy is protection, and we know that the lawmaking power had no thought of protecting those who did not need protection,—those who had not changed their position to their disadvantage because of the failure to file the security. The word "subsequent," as applied to purchasers and incumbrancers, does not relate to creditors. But this gives no warrant to the inference that all creditors, existing as well as subsequent, were intended to be protected. It would have defeated in part the policy of the law had only subsequent creditors been included in the statute. It would have cut off from the protection of the law those existing creditors who, while the default in filing the mortgage continued, should altar their position to their detriment, as by releasing security, or by extending the time of payment. The language of the court in *Brown* v. *Brabb*, 67 Mich. 17, 34 N. W. Rep. 403, on this point meets our approval. Said the court: "To my mind the reason why the word 'subsequent' was not inserted in the statute before the word 'creditors' was to meet just that contingency where an existing creditor might suffer injury by relying upon the

apparent situation, and so be damnified by postponing action, or extending the time of credit already given, or possibly in some other manner." Unless we interpret the word "creditors" in the light of the spirit of the statute as applicable to purchasers and mortgagees, we will ultimately find ourselves involved in the most absurd distinctions. One who takes a second mortgage to secure an existing debt is not entitled to protection as against a prior unfiled mortgage of which he had no notice, although he puts his mortgage on file before the first mortgage is filed; but, if the same creditor will refuse to accept what would seem to be a good security, he may, by suing upon his debt, and by levying upon the property before the mortgage is filed, secure a lien which will be paramount to that of the mortgage. This result is inevitable unless we look at the spirit of the law in construing the word "creditors."

Again, a subsequent mortgagee for present value is not protected if he has notice of the existence of the unfiled mortgage when he takes his security and extends the credit; but if he will lend on the general credit of the mortgagor, and refuse the proffered security, he may, it is contended, by suing on his claim, and attaching the mortgaged property before the filing of the mortgage, obtain a superior lien. Some of the courts seem to hold that notice of the chattel mortgage at the time of the making of the seizure will defeat the creditor's right to assail it as void. But why should this notice work to his prejudice if he gave credit while the mortgage was withheld from record? The criticism on this doctrine in *Crooks* v. *Stuart*, 7 Fed. Rep. 800-803, meets our approval. Said the court: "One who gives credit to a merchant in the open and exclusive possession of a stock of merchandise upon which there is no recorded lien has a right to assume that he is dealing with the owner of such stock, and to rely upon such ownership in extending credit. If he is to be affected by any secret lien upon such stock which may be recorded before he secures a lien by levy or otherwise, it will generally happen that the first notice to him upon which he can make an affidavit for

attachment will be the recording of the lien, so that the circumstance that gives him the right cuts of the remedy." The absence of any express qualification of the word "creditors" is not significant of an intent to use that word in its broadest sense, unlimited by the spirit of the statute. It has frequently been held that a registration or a recording law affords no protection to purchasers or mortgagees who take with notice of the unfiled or unrecorded instrument, or who part with no value on the strength of the silence of the record, although there is nothing in the statute to qualify the words "purchasers or mortgagees;" such as the phrases "in good faith," or "for value," or "without notice." The manifest spirit of the law makes the employment of any such language unnecessary. *Allen* v. *McCalla*, 25 Iowa, 464; *Le Neve* v. *Le Neve*, 2 Lead. Cas. Eq. 182-184, and cases in note; *Tolbert* v. *Horten*, (Minn.) 18 N. W. Rep. 647, 650; *Dyer* v. *Thorstad*, (Minn.) 29 N. W. Rep. 345. The only interpretation which can be placed on the word "creditors" to prevent decisions which will give to general creditors protection when morally they are not entitled to it, and withhold that protection when in justice it should be extended to them,—the only construction which will give to them the same measure of protection, and no more, as is accorded to creditors who take security on the property,—is the construction which regards the general creditor as standing, for the purposes of this statute, in just the same position he would have occupid had he taken security when his debt was incurred, or his position was altered to his detriment, with the single exception, of course, that he cannot be regarded as standing in that position when his debt was incurred before the unfiled mortgage was given. In such a case, having no lien, as he would have had had he taken security, he can claim no priorty of lien by virtue of a prior mortgage; and, having trusted the debtor before any default in filing the subsequent mortgage existed, he has no claim to protection as a creditor. If subsequently, while the mortgage is withheld from record, such creditor, without notice thereof, alters his position to his disadvantage, he is entitled to

protection if he would have been entitled to protection had he then taken a mortgage on the property. Knowledge of the unfiled mortgage possessed by the general creditor when he changes his position to his detriment should be as fatal to his right to protection as it would be had he taken a mortgage on the property with such knowledge. A lien under attachment should be regarded as conferring no greater rights under the same circumstances than a lien under a mortgage.

The construction which has uniformly been placed upon the word "creditors" in statutes providing for the refiling of chattel mortgages is in the direction of the interpretation which meets our approval in this case. Although the word "creditors" is used without qualification, and the mortgage declared void as to them when not refiled within a certain period, the courts have invariably held that one who seized the property before the default occurred could not, after the default, be regarded as a creditor within such a statute, although he was in fact a creditor. *Lowe* v. *Wing*, 56 Wis. 33, 13 N. W. Rep. 892; *Case* v. *Conroe*, 13 Wis. 498; *Edson* v. *Newell*, 14 Minn. 228, (Gil. 167;) *Corbin* v. *Kincaid*, 33 Kan. 652, 7 Pac. Rep. 145; *Frank* v. *Playter*, 73 Mo. 672; *Howard* v. *Bank*, (Kan.) 24 Pac. Rep. 983; *Ullman* v. *Duncan*, (Wis.) 47 N. W. Rep. 266. See language of court in *Swiggett* v. *Dodson*, (Kan.) 17 Pac. Rep. 594-598. We find express authority for or in support of our views in *Brown* v. *Brabb*, (Mich.) 34 N. W. Rep. 403; *Crippen* v. *Jacobson*, 56 Mich. 386, 23 N. W. Rep. 56; *Waite* v. *Mathews*, 50 Mich. 392, 15 N. W. Rep. 524; *Fearey* v. *Cummings*, 41 Mich. 376, 1 N. W. Rep. 946; *Dyer* v. *Thorstad*, (Minn.) 29 N. W Rep. 345; *Thompson* v. *Van Vechten*, 27 N. Y. 568; *Argall* v. *Seymour*, 48 Fed. Rep. 548; *Root* v. *Harl*, (Mich.) 29 N. W. Rep. 29; *Cutler* v. *Steele*, (Mich.) 48 N. W. Rep. 631. In *Brown* v. *Brabb*, (Mich.) 34 N. W. Rep. 403, the court say: "The language of the statute contains no qualifications as to the time the creditors become such. It does not say that the unfiled mortgage shall be void as to subsequent creditors, and this has led some courts to hold that it is void as to all creditors. But a qualification is

plainly implied from the language of the whole section, considered with reference to the object of the law. It must be remembered that the filing is designed to take the place of the delivery of the property. The object of the law is to protect persons dealing upon credit with one who is in possession of personal property as the ostensible owner, upon the reliance of such ownership, from secret conveyances by which he is enabled to obtain a fictitious credit to which he would not be entitled if the true situation were known. Until such secret conveyance is given, the law has no force. There is nothing for its provisions to operate upon, and the creditor has the protection of the ordinary remedies for the enforcement of his demands. These are not enlarged by the statute, and no new rights or remedies are conferred upon the creditor. To him it makes no difference whether the debtor sells, mortgages, or gives away his property, either secretly or openly, unless it is done with intent to defraud him. His remedy to reach the property conveyed depends entirely upon the fraudulent character and intent with which the debtor has conveyed it away. As to him, the debtor may secure another person by delivering the property to him, followed by a continued change of possession, in which case he would not be likely to extend any further credit. But suppose, instead, his debtor gives a mortgage in good faith, to secure an honest debt, to another creditor, or for a present consideration, for a loan of money; there is nothing in the quality of these acts by which he is injured. There is no legal wrong done him; nor is there any legal wrong done him if the mortgage is kept secret or unfiled, unless he has thereby been led to extend new credit or further time, or has been led to abstain from taking action to collect his debt, in ignorance of the real situation. It would seem unreasonable that without extending any new credit, or otherwise suffering loss on account of the mortgage being kept from the files, or being filed in a wrong place, he could be permitted to say that the mortgage is void as to him, and that he would attach the

property, and deprive the owner of his security, simply because he had failed to comply with the law. He has not been led to do or to omit doing anything upon the strength of such noncompliance with the statute. And herein lies the difference between his case and the innocent purchaser or incumbrancer under the recording laws. These protect subsequent purchasers and incumbrancers in good faith, who have been led to rely upon the record title. To my mind the reason why the word 'subsequent' was not inserted in the statute before the word 'creditors' was to meet just that contingency where an existing creditor might suffer an injury by relying upon the apparent situation, and so be damnified by postponing action, or extending time of credit already given, or possibly in some other manner." In *Thompson* v. *Van Vechten*, 27 N. Y. 568, the court say: "But, when they [creditors] present themselves with their process, they may, I think, go back to the origin of their debt, and show, if they can, that, when it was contracted, the incumbrance with which they are now confronted existed, and was kept secret by being withheld from the proper office." In *Kitchen* v. *Lowery*, (N. Y. App.) 27 N. E. Rep. 357, the court say of certain unfiled chattel mortgages: "They may be void as to creditors, for the reason that they were not filed at the time the credit was given."

To sum up our views as to the proper construction to be given the word "creditors" in this statute, we say that the word must have some restriction placed upon its broad meaning to prevent the most absurd consequences; that there is nothing in the language or spirit of the law which will warrant the view that the right to assail an unfiled mortgage depends entirely upon the fact whether the seizure of the mortgaged property does or does not antedate the filing of the mortgage. Such a construction would result in extending protection when it ought not to be extended, and in withholding it when the creditor has a moral right to claim it. As the word must have some limitation placed upon its meaning, the only sound limitation is one which makes the statute harmonious in all its provisions, which does not unreasonably

discriminate either in favor of or against general creditors, but places them under the same protection accorded to incumbrancers. Certainly it is unjustifiable to give the general creditor better protection under this statute than the creditor with security on the very property embraced in the unfiled mortgage. There is nothing in the words or policy of the law which lends countenance to a distinction so anomalous. We therefore hold that, as the debt for which the attaching creditor seized the property was a debt contracted before the execution and delivery of the mortgage, and while, therefore, there was no default in filing it, and, as it does not appear that the creditor, after the giving of the mortgage and before it was filed, in any manner altered his position to his detriment, the mortgage lien is paramount, even assuming that a valid levy was made before the mortgage was filed.

It is next urged that the plaintiff is not entitled to judgment for a delivery of the property, because, as it is contended, his once valid lien has been lost by his failure to renew the mortgage by refiling a copy of the same, together with a statement of the amount due, as required by chapter 41 of the Laws of 1890. This is a most peculiar law. It has certainly not answered its purpose if the object of its enactment was to settle controversies with respect to the meaning of the then existing laws regulating that subject. It provides as follows: "That a mortgage of personal property shall, unless duly renewed as provided in § 2 of this act, cease to be valid as against the original mortgagee and 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 § 2 of this act mentioned. Section 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 § 1 of this act mentioned." This statute must be construed with a view to the object of the law in requiring a chattel mortgage to be filed and to be refiled after the lapse of a certain period. Filing is a substitute for possession. Jones, Chat. Mortg. §§ 176, 178, 236, 237; *Morrow* v. *Reed*, 30 Wis. 81; *Harrington* v. *Brittan*, 23 Wis. 541; *Dolan* v. *Van Demark*, (Kan.) 10 Pac. Rep. 850; *Fromme* v. *Jones*, 13 Iowa, 474; *Janvrin* v. *Fogg*, 49 N. H. 340; *Kelley* v. *Reynolds*, 39 Mich. 467; *Nicklin* v. *Nelson*, (Or.) 5 Pac. Rep. 51. When possession is immediately delivered, it is unnecessary to file the mortgage. If possession is taken by the mortgagee before the period arrives at which the mortgage is required to be renewed, there is no reason why the failure to renew it should effect its validity. There is ample authority to support this construction of the statute. *Dayton* v. *Bank*, 23 Kan. 421; Jones, Chat. Mortg. §§ 294, 297; *Porter* v. *Parmly*, 43 How. Pr. 445, 459, on appeal, 52 N. Y. 185; *Howard* v. *Bank*, (Kan.) 24 Pac. Rep. 983, 985. See, also, *Hauselt* v. *Harrison*, 105 U. S. 401; *Applewhite* v. *Mill Co.*, (Ark.) 5 S. W. Rep. 292; *Bank* v. *Sprague*, 21 N. J. Eq. 530. The plaintiff took possession of the property, under claim and delivery proceedings in this action, long before he was required to renew his mortgage, and was in possession of the property at the time of trial. The judgment in this case required him to return the property to the defendants. Being in possession before the time arrived at which the statute requires a chattel mortgage to be renewed, there was no occasion for renewing it. We think that, upon this record the plaintiff was entitled to recover except as to the engine, separator, and some of the plows. For

the error of the court in rendering judgment for the defendants upon the findings, the judgment is reversed, and a new trial ordered. All concur.

ON REHEARING.

We have carefully considered the petition for rehearing. It has not convinced us that we were in error. It is urged that it appears that the mortgagee took its security for an antecedent debt, and that, therefore, it does not occupy the same vantage ground which it would have held had the mortgage been taken to secure a loan made on the strength of that security. This contention is founded on an utter misapprehension of the question. A mortgagee, whether for a present or an antecedent debt, whose security is prior in point of time, is entitled to priority of lien except as such priority is affected by the statute. We hold that one who attaches for a debt incurred before any default in filing the mortgage exists is not entitled to the protection of the statute; that he is not within its manifest policy and spirit. To bring himself within the act, he must show that he parted with value while the default existed. But a mortgagee who has first obtained a valid lien has a right to rely upon the priority secured by what the law regards as his superior diligence, whether the mortgage is to secure an old or a new debt. His lien is protected, unless the creditor can point to a statute which denies the mortgagee such protection. The question whether the attaching creditor comes within the statute is in no manner affected by the inquiry whether the mortgagee took his security for an existing claim or a newly created indebtedness. This inquiry only becomes important as to one whose lien is subsequent in point of time, but who claims priority of right. It is never made to determine the rights of one who has secured the first lien in point of time. He stands on his legal priority until one having a subsequent lien brings himself within some statute which will give him priority of right.

It is also urged that the attaching creditor was injured by the delay in enforcing his claim, induced by the failure to file the

chattel mortgage, creating in his mind the belief of the solvency of the debtor. It would be difficult to support such a contention under the facts in this case, the execution of the mortgage having been followed by the levy of the attachment within a few days. But considering this argument in the abstract, without reference to the particular facts of this litigation, we can see no force in it. It amounts to this: That a creditor may be as greatly prejudiced by refraining from action, relying on the silence of the record, as if by a binding agreement he had actually extended the time of payment. But how is the creditor injured by the withholding of the mortgage from the record under such circumstances? Had the mortgage been immediately filed, he must have attached subject to it. He is in no worse position if he attaches, and the mortgagee who has not filed his security claims and is allowed priority. The mortgage is simply a first lien, as it would have been had it been promptly filed. But where time of payment is extended by binding agreement, the creditor is seriously detrimented, because the mere subsequent discovery of an unfiled chattel mortgage will not entitle him to rescind the agreement extending the time of payment, there being no fraud. To hold that mere inaction entitles one to protection would be to overturn elementary principles. It would destroy the distinction which has always been recognized between subsequent incumbrancers for a newly created indebtedness and those who have merely taken security for antecedent obligations. To remain passive for a day because lulled into a sense of security by the silence of the record would as fully entitle to protection as to stand inactive for a week or a month, or even a year. Upon this theory, then, every mortgagee for an existing claim would become, at least after the expiration of a day, an incumbrancer entitled to protection as against a prior unrecorded instrument. But all authority is against this.

It is also urged that this rule will have a tendency to encourage fraud by inducing the withholding of mortgages from record. This argument, if such it can be termed, applies with equal force

to the doctrine that a subsequent chattel mortgagee for an antecedent debt is not protected as against an unfiled prior mortgage on the same property. The first mortgage may be withheld from record for a year, and yet one who was a creditor when it was given, and who has not since it was executed altered his position to his disadvantage, cannot, by taking a second mortgage on the property, although without knowledge of the unfiled lien, secure any priority, however long thereafter the first mortgage is kept from record. If the mortgage in either case is kept from record for a fraudulent purpose, a different rule would apply. Nor do we think that one who takes security for an honest debt will care to risk that security by failing without reason to file it as required by law. There can be no pretense, under the facts of this case, that the attaching creditor refrained from taking steps to collect his claim because of the silence of the record. Only three days elapsed between the execution of the mortgage and the commencement of the action in which the property was seized. He was not stirred to action by discovering that a chattel mortgage had been given. Nor is there aught to indicate that he would have enjoyed any more advantageous position had the mortgage been filed the day it was given, and had he thereafter and on the same day commenced his suit and seize the property. It is said that, if the creditor whose claim accrues while the default in filing the mortgage exists is to be protected even after the mortgage is filed, he may wait two years, and then, by attaching, surprise the mortgagee, who will be injured because he has not anticipated that his lien could be so defeated. But is the innocent creditor who parts with his money on the strength of the mortgagor's credit—a credit frequently created because of his ownership of unincumbered property—to be debarred his right to rely on the silence of the record merely by reason of the filing of the mortgage before he can seize the property for his claim? Debts are seldom payable when incurred, and, if the subsequent filing of the unfiled instrument is to destroy the innocent creditor's right to protection, the greatest injustice will be done him; for it will

be generally, if not invariably, impossible for him to sue upon his claim until some time after the debt is contracted. Moreover, to assert that the mortgagee would be surprised by a seizure after two years is to beg the question. He is not surprised if the law entitles such creditor to protection whenever he attaches. The mortgagee knows that he runs the risk of his lien being defeated by such a creditor if he fails for a time to file his mortgage; and if the right to priority has once attached to such creditor's debt, and if it can be secured by a seizure before the mortgage is filed, wherein is the mortgagee detrimented if such seizure is allowed priority when made after the mortgage is filed? We are aware of decisions which place a different construction upon similar statutes. We had examined them before the original opinion in this case was written, but could not give them our approval. To follow them would conduct us to this anomalous position: Had the attaching creditor in this case been met at the farm by an offer to give him a mortgage on the same property, and had this offer been accepted by him, there is not an adjudication which would have upheld this mortgage as a lien prior to the unfiled mortgage had the former been received merely as security without any extension of time or other act on the part of the creditor to his prejudice. And yet, by a refusal to accept security, it is contended that, under the same statute which has denied him protection as mortgagee, the creditor has actually increased his rights, and has secured protection. He has been benefited by his rejection of the proffered security. A number of Minnesota cases are cited as controlling. They are not at all in point. In *Murch* v. *Swensen*, 40 Minn. 421, 42 N. W. Rep. 290, the question arose under the Minnesota statute of frauds, providing that every sale, unless accompanied by an immediate delivery, and followed by an actual and continued change of possession, etc., is presumed fraudulent and void as against creditors, etc., unless it appears that the transfer was made in good faith. The word "creditors" as used in this statute, is expressly defined by the next section to mean all persons who are creditors of the vendor at any time

while the property remains in his possession or under his control. Gen. St. 1878, Ch. 41, § 16. There is no such definition of the word "creditors" as used in our registry law relating to the filing of chattel mortgages. Moreover, the object and construction of such a statute are different from the purpose and interpretation of a mere registry law. In *Tolbert* v. *Horton*, 31 Minn. 518, 18 N. W. Rep. 647, all that was decided was that a subsequent mortgagee who took with actual notice of a prior unrecorded mortgage is not entitled to protection. How this can be an authority for the contention of the attaching creditor in this case that he can claim protection it is difficult to see. It will be noticed that the Minnesota statute is radically different from ours. It contains an element which makes it, as to mortgages, a statute against frauds and perjury. In that state the mere filing of the instrument will not suffice. There still exists, if the property is not delivered, a presumption of fraud which must be overcome. Gen. St. 1878, Ch. 39, § 1. Our registry law contains no such feature. Section 4379, Comp. Laws. See, also, § 4657, Id. This peculiar provision of the Minnesota act is noticed by both opinions in the case, as well the dissenting as the prevailing opinion. In the construction that such statute was more than a mere registry law all members of the court agreed. Says Judge Mitchell: "Our statute on chattel mortgages is not a mere registry law, as seems to be often assumed. It is a statute declaring certain mortgages void as to certain persons unless certain things exist or are affirmatively made to appear." *Bank* v. *Ellis*, 30 Minn. 270, 15 N. W. Rep. 243, merely decides that it is not essential to the protection of a subsequent chattel mortgagee in good faith, as against an unfiled prior chattel mortgage, that the former should place his mortgage on file before the prior mortgage is filed. This decision stands firmly on the language of the statute. But the fact that the subsequent mortgagee was a mortgagee in good faith was not controverted, and it affirmatively appeared in aid of the presumption that he was a bona fide mortgagee; that the mortgagee, on taking the security for an existing debt, surrendered

a valid attachment lien on the mortgagor's crops, thus altering his position to his disadvantage, relying upon the mortgage. This, under all of the authorities, constituted him a bona fide incumbrancer. The New York cases cited to support the view that the seizure before the actual filing of the instrument gives priority fully support this position. But the highest court in that state has not passed directly on this point. *Karst* v. *Gane*, 61 Hun, 533, 16 N. Y. Supp. 385, and cases there cited. Says Mr. Jones in his work on Chattel Mortgages, (§ 245:) "But in New York it is held that a mortgage not duly filed is void as against a general creditor whose claim has accrued during the continuance of the default in filing the mortgage, although the creditor is not in a position to raise the question until he has obtained a judgment or process against the property. The object of the act is to prevent the setting up of secret mortgages against persons who may deal with the mortgagor on the faith that his property is not thus incumbered. Therefore, when a creditor has obtained judgment and execution, he may go back to the origin of the debt, and show, if he can, that, when it was contracted, the incumbrance with which he is thus confronted was kept secret by being withheld from registry;" citing *Thompson* v. *Van Vechten*, 27 N. Y. 568; *Stewart* v. *Beale*, 7 Hun. 405; *Fraser* v. *Gilbert*, 11 Hun. 634. In this condition of the decisions in that state we believe that the court of appeals will finally settle the construction of their registry law, which is the same as ours, in accordance with the views we have herein expressed.

It is also urged that the description in the mortgage was not sufficient as to third persons until the mortgage was filed. It may be that the language of the opinion was susceptible of the construction that the statement in the mortgage that the property was on a certain section, in a particular township and range, was insufficient as to attaching creditors until the mortgage had been filed. But this is not our view. Whenever a description is challenged as insufficient, we are to inquire whether the creditor, after inspecting the instrument, and aided by the inquiries it

suggested, could ascertained what property was intended to be mortgaged. Apply that rule to this case. The property was attached on a piece of real estate answering to the description contained in the mortgage of the land on which the mortgaged property was situated. Property the same as that described in the mortgage is found there. It is owned by the mortgagor. The creditor is aware of his ownership. It is seized by him as the mortgagor's property. Would a sane person entertain a doubt whether the mortgage was intended to cover the property seized? It will not do to assert that the creditor could not know of the contents of the mortgage until it had been filed. Not being within the protection of the law, he is bound to know of the mortgage and its contents without filing. If a creditor or mortgagee may insist that a description in an unfiled mortgage is not good merely because he did not know of the mortgage, he can always defeat an unfiled mortgage containing the most minute and perfect description of the property, although he does not fall within the scope of the statute which annuals the instrument as to certain classes of persons unless filed. The description, if good as to third persons when the mortgage is filed, is equally good as to them although the instrument is not filed. Whether such third persons are protected under the statute as against such unfiled mortgage is an entirely distinct and different question.

The petition for rehearing is denied.

WALLIN, J., having been of counsel, took no part in the above decision.

(54 N. W. Rep. 1034.)

PATRICK FAHEY *vs.* ESTERLEY MACHINE COMPANY.

Opinion filed March 21st, 1893.

Rescission by Buyer—Notice of Breach of Warranty to Seller.

Before the purchaser after sale can recover back the purchase price, on the theory of breach of warranty and rescission, he must fully perform all conditions precedent on his part to be performed according to the terms of the warranty. On sale of a harvester, the contract of warranty provided that the purchaser should give written notice of defects, not only to the agent from whom the machine was received, but also to the company at its headquarters. No notice to the company was given. *Held*, under the evidence, that there was no waiver of this requirement, and that therefore plaintiff could not recover back the purchase price on breach of warranty, although the machine was returned by him.

Res Judicata.

When it is not certain that the same question was determined in favor of the party, in another action, who relies on the judgment therein as conclusive as to such question, the judgment is not final on the point. *Held* that, in an action to recover the purchase price of a harvester, on the theory of a breach of the warranty and rescission of the contract, defendant herein could not rely on a judgment against plaintiff in favor of the indorsee for value of a note given by plaintiff on the purchase of such harvester, as settling the issue of a breach of warranty and rescission of the contract of sale against the plaintiff, for the reason that the judgment against plaintiff might have been rendered on the ground that, despite a breach of warranty and rescission of the contract of sale, the indorsee of the note might have recovered as an innocent purchaser thereof before maturity; such a defense not being available as against such a purchaser of negotiable paper, and there being nothing to show on what particular ground the judgment was rendered.

Transfer of Note—Recovery of Amount of Note Upon Rescission for Breach of Warranty.

Where a purchaser of property gives his note therefor, and afterwards rescinds the contract of sale on the ground of breach of warranty, he may recover the amount of the note and interest, without first paying the same, when the note was negotiated before maturity to an innocent purchaser for value. But the judgment should provide that upon the return of the note to the plaintiff, and his release from all liability thereon growing out of any judgment which has been recovered thereon, and on payment of costs within a specified time, the judgment should be satisfied.

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

Action by Patrick Fahey against the Esterley Harvesting Machine Company for a rescission of contract. Plaintiff had

judgment, and from an order denying a new trial, defendant appeals. Reversed.

McCumber & Bogart, for appellant.

Where the warranty under which machinery is sold requires written notice to be given the vendor or its agents in case of breach, no action based on such breach is maintainable unless such notice has been given. *Nicholas* v. *Wyman*, 32 N. W. Rep. 258; *Furneaux* v. *Esterly*, 13 Pac. Rep. 824; *Nicholas v. Larkin*, 79 Mo. 264; *Nicholas* v. *Hall*, 4 Neb. 210; *Miller* v. *Nicholas*, 5 Neb. 478; *Bomberger* v. *Greiner*, 18 Ia. 477; *Dewey* v. *Borough*, 14 Pa. St. 211. Where contract provides that keeping the machine during a certain season shall be conclusive evidence that it fulfills the warranty—keeping it during such time waives any defense based on the warranty. *Wendall* v. *Asborn*, 18 N. W. Rep. 709; *Bayliss* v. *Hennesy*, 6 N. W. Rep. 46.

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

CORLISS, J. The basis of this action is the rescission of a contract for the sale and purchase of a twine-binding harvester. The plaintiff purchased the property of the defendant for $110, giving his negotiable promissory note therefor. Upon the sale a written warranty was given to plaintiff by defendant. Plaintiff, claiming that the harvester was not as warranted, returned the machine, and brought suit to recover the purchase price, alleging the defendant had negotiated the note before maturity thereof. One of the defenses set forth in the answer was estoppel by record. This defense was struck out on motion at the trial. We are thus compelled to determine its sufficiency. It set up, in substance, that the note was transferred to the First National Bank of Whitewater, Wis., and that suit was brought upon it by the bank before a justice of the peace, and that in that suit the defendant therein, and the plaintiff in the case at bar, relied as a defense upon the same breach of warranty, followed by the same rescission of the contract of purchase, which constitutes the groundwork of his cause of action in this case. Judgment was

rendered in that action against the defendant therein (the plaintiff in this case) for the full amount of the note. The defendant in the present action was not a party to that suit; but waiving this point, whatever force it may have, we are clear that the trial court did not err in holding the defense insufficient. The record of the case before the justice of the peace is set forth in the answer. It appears from that record that the plaintiff therein alleged that it purchased the note, and that the same was indorsed to it by the payee before maturity for a valuable consideration and in good faith. This averment was denied. But we are unable to say that the court did not find this fact in favor of the plaintiff. Such a finding would, of course, preclude all inquiry into the questions of the breach of warranty and rescission. Even though the justice had been convinced of the truth of the defense in this regard, he must have given judgment for plaintiff because of his being a bona fide purchaser before maturity. It thus appears, upon the face of the answer in the case at bar, that the former judgment may have rested on either of these points,—that there was no breach of warranty and rescission, or that the defendant therein could not, despite such breach of warranty and rescission, sustain his defense, because the plaintiff therein was a good faith purchaser and indorsee of the note before maturity. The defendant in the case at bar should have shown, by additional allegations in his answer, that the issue as to the breach of the warranty and rescission was in fact found against the defendant in that case, the plaintiff herein. When the record does not settle the question, oral evidence is admissable to show what was in fact decided; but the answer must clearly show the ultimate fact, as to what was decided. If that fact is left in doubt by the answer the defense fails. The case we have to decide falls within that class of cases where a judgment on one cause of action is sought to be used as conclusive in a suit on another cause of action. In such cases the judgment is final only as to the matters which were in fact determined in the former case and adjudicated by the judgment. *Foye* v. *Patch*, 132 Mass. 105, and cases cited; *Stone* v. *Stamping Co.*, Mass. 29

N. E. Rep. 623; *Cromwell* v. *County of Sac.*, 94 U. S. 351; *Nesbit* v. *Independent Dist.*, 144 U.S. 610, 12 Sup. Ct. Rep. 746; *Bell* v. *Merrifield*, 109 N. Y. 202, 16 N. E. Rep. 55. The least uncertainty as to what was in fact determined in the suit before the justice of the peace is fatal to the use of the judgment as an estoppel on the question of breach of warranty and rescission. This uncertainty created by the record of the proceedings before the justice is not in any manner cleared up by allegations in the answer that the question was in fact determined by the justice against the defendant therein, the plaintiff in the case at bar. "According to Coke, an estoppel must be certain to every intent; and if upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence. It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty upon this head on this record,—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined." *Russell* v. *Place*, 94 U. S. 606. To same effect are *Bell* v. *Merrifield*, 109 N. Y. 202, 16 N. E, Rep. 55; *Stowell* v. *Chamberlain*, 60 N. Y. 272; *Stone* v. *Stamping Co.*, (Mass.) 29 N. E. Rep. 623; *Cook* v. *Burnley*, 45 Tex. 97; *McDowell* v. *Langdon*, 3 Gray, 513; *Downer* v. *Shaw*, 22 N. H. 277, *Chrisman* v. *Harman*, 29 Grat. 494; *Lea* v. *Lea*, 99 Mass. 493. If everything alleged in this part of the answer had been established on the trial, it would have been impossible to

determine what was in fact settled by the judgment given by the justice of the peace; whether the defendant was liable because there was not a breach of warranty and rescission, or because, notwithstanding such breach and rescission, the defense must fail as against the plaintiff, found by the court to be a bona fide purchaser of negotiable paper before maturity. To recover it was incumbent on plaintiff to show that he had performed all the conditions precedent of the warranty to be performed on his part. This he did not do. Mere breach of the warranty did not entitle him to rely upon its promises. He must have taken action to hold the defendant to its warranty after a breach. It is only upon giving written notice to the agent from whom he received the machine, and also to the Esterley Harvester Machine Company at Whitewater, Wis., that he is allowed to avail himself of the warranty. Failure to give such notice, it is provided, is conclusive against the purchaser's right to rely on the warranty. The same evenhanded justice which requires the defendant to keep its promise demands of the plaintiff that he perform his part of the agreement. Neither will it do to assert that notice to the company in addition to notice to the agent from whom the machine was received, was of no value to the company. The plaintiff has foreclosed all inquiry into that question by agreeing to give such notice. Nor is it difficult to conceive of good reasons for requiring this additional notice. Agents in their zeal to establish a reputation for making sales, and in their natural desire to earn commissions, may often be inclined to go to greater lengths in their endeavor to sustain a sale than the sound business judgment of the company would approve. It is necessary that the company should have direct notice of the purchaser's claim that the machine is unsatisfactory, that the company may act itself in determining what shall be done in such an exigency. If notice is to be given only to the agent, there is no certainty that the company will ever in fact know of the trouble, in time to act prudently. It may often learn of it too late to save itself from heavy loss, and many find its right seriously embarrassed by the actions and agreements

of a subordinate agent directly interested in supporting the sale. Other sound business reasons will readily suggest themselves to the mind for insisting upon such notice as will insure actual knowledge of the trouble at the headqarters of the company. In this case notice was given to the agent, but no notice, either written or oral, was ever given to the company as required by the warranty. Was the giving of such notice waived by the conduct of any of defendant's agents? We think not. We find no evidence showing any action taken by any agent of the defendant having authority to act for it in the matter of receiving such notice. Certainly, notice to the agent from whom the machine was received was not notice to the company. To hold otherwise would render meaningless that clause which provides for notice to the company in addition to notice to such agent. All the evidence of a waiver of such notice is that which relates to the conduct and words of certain experts employed by defendant, but not sent specially to fix plaintiff's machine, but placed under the control of the agent by whom it was sold, to keep the machines sold by the company in repair. These facts do not show any authority in these experts to substitute their judgment for that of the company in deciding the business proposition, what should be done when complaint should be made that a particular machine was not, when sold, in the condition warranted. They were to fix such machines as the company should conclude to fix, but there was nothing in the nature of their employment which gave them authority to substitute their judgment for that of the company in determining what should be done in any particular case in which the claim of breach of warranty should be made. It is absurd to suppose that, while notice to the agent was not to be sufficient, the company intended that these experts, exercising special powers, under the agent himself, and acting under his direction and control, were to be given complete authority to do away in any case with this explicit requirement that written notice should be sent to the home office,—a requirement so important to enable them to protect

their rights. Is there greater certainty that an expert, acting entirely under the direction of the agent, will bother himself to notify the company of difficulties of which his immediate superior has notice, and which he is setting about to remedy? The waiver of notice must come from some agent having power to waive it. The warranty expressly provides that "no agent or expert has any authority to add to or abride or change it in any manner." The power to waive notice was not in fact vested in these experts, or any one of them; there was nothing in the nature of their employment or the kind of work they were performing to justify the belief that they were authorized to decide for the company all matters it would be called upon to decide when apprised of a claim of breach of warranty; and therefore they had no power to do away with the necessity of notice. The purchaser was distinctly informed that they had no such power, and in the same connection he agreed to give notice to the company itself,—an act simple in its nature, and easy of performance. Business faith required him to send such notice, whatever the agent or other persons might say, for the very nature of the requirement informed him that the company desired and insisted upon such a notice, that there would be no uncertainty of its receipt at the center of power and responsibility,—to guard against the concealment of facts by local agents who might be tempted to withhold full information. The case is so plain that we do not feel the need of authority. But we find adjudications in harmony with our views: *Furneaux* v. *Esterly*, (Kan.) 13 Pac. Rep. 824, and cases cited; *Nichols* v. *Knowles*, (Minn.) 18 N. W. Rep. 413.

It is urged that the court erred in striking out what is designated as the equitable defense in the action. On the theory that plaintiff might be able to show, on a new trial, a waiver of the condition requiring notice to be sent to the home office, we will refer to this point. The true theory of this action is that the consideration for the $110 note failed because of a breach of the warranty, followed by the performance by the plaintiff of all the conditions of the warranty, and by a complete rescission, and that it then

become the duty of the defendant to return the note. The authorities seem to sustain the doctrine that on demand for a note, under such circumstances, the cause of action arises, and that the maker may recover the full face value thereof, although he has not paid it or been held liable upon it. *Thayer* v. *Manley*, 73 N. Y. 305; *Comstock* v. *Hier*, Id. 269; *Farnham* v. *Benedict*, 107 N. Y. 159, 13 N. E. Rep. 784; *Decker* v. *Matthews*, 12 N. Y. 313. Where the note has been negotiated before maturity for value, as in this case, there would seem to be no doubt as to the soundness of the doctrine; and when the note is still in the hands of the original party, the defendant, but is not due when the action is brought, the rule ought to be and is the same. *Thayer* v. *Manley*, 73 N. Y. 305. Neither does the fact that the maker might restrain the negotiation of such a note, and compel its surrender in an equitable action, affect his right to maintain an action at law for damages, Id. But the judgment ought not to be absolute, if the defendant requests the privilege of restoring the note, and saving plaintiff from all possibility of loss on account thereof. The plaintiff has paid nothing. His right to damages depends upon the danger of being compelled to pay the note. When that danger is removed, it would be a perversion of justice to allow him still to recover judgment for a damage he has not suffered, and cannot possibly suffer in the future. If the judgment is to stand absolute, then the note becomes valid, and another action is necessary to settle rights which ought to be adjusted in one suit. Under our system the defendant may urge as defenses matters in legal actions, which under the old system he must by appropriate equitable actions have relied on as the basis of equitable relief. The policy of the law is to settle all the controversy in a single suit. If the maker is insolvent, the defendant is powerless to compel him to disgorge what he has received without any substantial right thereto. The defendant, however, has assumed that the fact of nonpayment of the note, when coupled with the insolvency of the maker, would constitute an absolute defense. In this we think he is in error. His right is to have the

judgment contain a provision which will enable him, by a return of the note within a certain time, and the payment of the costs, and the satisfaction of the judgment obtained on the note by the First National Bank of Whitewater, to have the judgment in this case satisfied, should such a judgment on a new trial be rendered against defendant. *Thayer* v. *Manley*, 73 N. Y. 305.

For the error of the court in refusing to take the case from the jury, on the ground that plaintiff had failed to comply with the condition of the warranty requiring written notice of the defect to be given to the company at their office in Whitewater, Wis., the order denying motion for a new trial is reversed, and a new trial is ordered. All concur.

ON REHEARING.

(April 14, 1893.)

We have carefully considered the petition for rehearing, but are unable to agree to the view therein stated, and which appears to have been the view of the learned trial judge. The contention in the petition is that sending out these experts was a waiver of the provision requiring notice to the company at the home office; or that a reasonable man would be justified in construing it as a waiver. They were sent out to remedy such defects as the company should decide to remedy, and not to make that decision for the company in any particular case. It was convenient and even necessary to have them so near their field of labor that they could readily do the work which the company might decide to do. But so placing them that they would be reasonably close to whatever work they might be called upon to perform was no evidence of a purpose to do away with the provision requiring notice at headquarters. Nor could it be construed by any reasonable man as a waiver of such notice. They were not sent out as business managers to decide whether in a given case an alleged defect should be remedied,—whether the company in case of breach of warranty would furnish another machine, as it might under the contract, or remedy the defects in the one sold; they

were sent out as mere experts in the performance of the kind of work involved in making a defective machine a good one. On what principle, then, can it be said that the company intended to waive this provision touching notice, and, in effect, intrust these important business questions to the decision of those who were not employed or sent out for that purpose. The petition for a rehearing is denied.

(55 N. W. Rep. 580.)

JOHN CANHAM *vs.* PLANO MANUFACTURING CO.

Opinion filed March 21st, 1893.

Power of Agent Selling Machine to Warrant the Same.

An agent authorized to sell binders for another has power to warrant that the binders will do as good work as any other machine in the market.

Secret Restrictions—Not Binding.

His general authority to so warrant cannot be restricted as to third persons who have no knowledge of such restriction.

Holding Machine at Request of Selling Agent—Not Waiver of Right to Rescind.

Where the purchaser of a binder was induced to keep the machine by repeated promises and attempts to fix the same, made by the agent who sold the same, a return of the binder immediately after discovering that it would not work as warranted, after the last attempt to fix it, is in time to entitle purchaser to claim that he has rescinded the contract for breach of warranty promptly, within the provisions of § 3591, Comp. Laws.

After Rescission for Breach of Warranty Vendee May Sue for Value of Note.

Fahey v. *Harvesting Co.*, 55 N. W. Rep. 580, 3 N. D. 220 (decided at this term,) followed as to liability of vendor of property sold with warranty, when the contract of sale is rescinded by vendee for breach of warranty, for the amount of a negotiable note given for purchase price, negotiated to a bona fide indorsee before maturity, although such note has not been paid.

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

Action for breach of contract by John Canham against the Plano Manufacturing Company. Plaintiff had judgment, and defendant appeals.

Affirmed.

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

CORLISS, J. The defendant sold and delivered to plaintiff a twine binder. For this, plaintiff gave his three promissory notes. He subsequently returned the machine claiming that there was a breach of the warranty accompanying the sale, and, having paid two of these notes, he brings suit to recover the amount so paid, and also the amount due on the other note. If there was a valid warranty on such sale, and a breach thereof, and a valid rescission of the contract, then the consideration for these notes failed, and it was the duty of the defendant to return the note which remained unpaid, and to restore the money which had been paid by the plaintiff in satistaction of the other two notes. One of the notes was paid to the agent on his promise to remedy defects in the machine, and the other one was paid by plaintiff to one claiming to be an innocent purchaser for value. In making these payments plaintiff did not waive his right to a return of the money on failure of the consideration of these notes. The other note having been negotiated before maturity by the defendant, it is liable to plaintiff for the amount due thereon if a failure of consideration is established. *Fahey* v. *Harvesting Co.*, 55 N. W. Rep. 580, (decided at this term,) and cases there cited.

The sufficiency of the complaint was challenged, but it is clearly sufficient. It shows a breach of warranty and rescission of the contract which would entitle plaintiff to recover the amounts paid on the two notes and the amount due on the note negotiated by defendant before maturity. All these facts relating to these notes are fully set forth in the complaint. It therefore states a cause of action. The court directed a verdict for the plaintiff for the full amount claimed. From the judgment entered upon this verdict,

defendant appeals. Was it error to direct this verdict? The machine was sold by an agent of the defendant whose name was Crafts. The warranty was oral. It was, in substance, that the binder would do as good work as any other binder in the market. There is no controversy either as to the fact of this warranty, or as to the fact of a breach thereof. But it is insisted that the plaintiff did not rescind the contract promptly, after discovering the defect. This would be fatal to plaintiff's recovery unless he was induced to delay action by defendant's promise to make the machine work. Section 3591, Comp. Laws. The sale was in July, 1889, and the binder was not in fact returned until August 4, 1890. It is undisputed however, that the agent Crafts repeatedly promised to put the binder in working order, and requested the plaintiff to keep it, to enable him (Crafts) to do this. A number of efforts to fix it were made during the season of 1889, but they all proved abortive. Each time the attempt failed, plaintiff expressed his determination to return the binder, but was deterred from doing so by Crafts' repeated promises to make the binder do good work, and his often repeated entreaties that the plaintiff keep the machine, to give him (Crasts) a chance to make it fulfill the warranty. Finally, not being able to make it work during the harvest of 1889, Crafts promised plaintiff that, if he, plaintiff, would keep the binder until next season, he would agree to see that it was put in good working order for next harvest, to do as good work as any other machine in the market. Relying on this promise, plaintiff did keep the binder. It was urged on the argument that Crafts gave his mere personal guaranty that this should be done, but we do not so construe the record. It was undoubtedly understood by both the parties that he was acting for the defendant in making this promise. During all of this time Crafts was agent for the defendant in the sale of these machines. He was their general agent for this purpose, being intrusted with this business of selling generally, and not merely with the sale of this particular machine. "An agent for a particular transaction is called a special agent. All others are general agents."

Section 3962, Comp. Laws. As such agent he had authority to make the warranty on the sale already referred to. Section 3985, Id.; *McCormick* v. *Kelly*, 28 Minn. 135, 9 N. W. Rep. 675. It cannot be doubted that he had power to represent and bind the defendant by his subsequent conduct and promises, inducing plaintiff to refrain from prompt action on discovery of the defects in the machine. *Snody* v. *Shier*, (Mich.) 50 N. W. Rep. 252; *Pitsinowsky* v. *Beardsley*, 37 Iowa, 9. Defendant, through its authorized agent, by its promises and conduct, lulled the plaintiff into a sense of security against prejudice from his failure promtly to restore the property, and cannot be heard to insist that the delay until the year 1890 is fatal to plaintiff's right to rescind for breach of warranty. *Snody* v. *Shier*, (Mich.) 50 N. W. Rep. 252; *Manufacturing Co.* v. *Kelly*, 26 Ill. App. 394. In fact, there was a new warranty made in the fall of 1889 that the machine would do as good work the next season as any other binder in the market. In the month of August, 1890, after repeated efforts by plaintiff to induce Crafts to send an expert to fix the binder in accordance with his promise, one was finally sent out to plaintiff's farm. It was Saturday night before the work was finished. Early Monday morning plaintiff started the machine. It did not do good work. The same day it was returned by plaintiff to the same place from which he took it when he purchased it, and he then notified the agent Crafts that he had returned it, and demanded a return of his notes. If Crafts was agent for the defendant during the year 1890 in the sale of its machines, there can be no doubt that plaintiff acted promptly in returning the property to defendant, in view of the promises and conduct of defendant's agent inducing delay, and therefore amounting to a waiver of return until after defendant's final effort to fix the machine. That Crafts could give a new warranty, after failure to make the binder work during the harvest of 1889, cannot be doubted. There being a breach of a former warranty, plaintiff had it in his power to return the binder and have back his notes, or a new machine in place of the defective one. This new machine would be delivered upon the same

warranty which related to the old one. The parties could agree, after the return of the old one, to a new contract of sale of the old binder with warranty, and therefore the agent could make a new warranty without the formality of a return, which he could not prevent. This same reasoning leads to the conclusion that the agent could attach to the continued holding of the binder by the plaintiff a condition that if it should not do as good work the next season as any other binder in the market he would take it back. This is precisely what he did agree to. It amounted, in effect, to a keeping of the machine by the plaintiff on trial, with a right to return it next year if it should fail to work as stipulated by defendant's agent. Had the binder been returned as sold, Crafts would have had power to sell it on trial. *Deering* v. *Thom*, 29 Minn. 120, 12 N. W. Rep. 350; *Oster* v. *Mickley*, 35 Minn. 245, 28 N. W. Rep. 710. He therefore had power to promise to take back the binder if it did not work as warranted, without the necessity of a formal surrender of the machine and the cancellation of the contract of sale and the making of a new contract. Whatever view we take of the matter,—whether we regard the old warranty as undisturbed, or consider that a new warranty was made relating to the work the binder would do during the year 1890, or that an agreement was made to take back the binder if it should fail to do good work during the year 1890,—we reach the same conclusion. We hold, as a matter of law, that the binder was returned in time.

But it is urged that Crafts had no authority to give the oral warranty which he made on the sale of the binder. His employment was in writing. It restricted his power to warrant to a written warranty of a specified character, differing from the oral warranty given to plaintiff. This writing was offered in evidence but on objection of plaintiff it was excluded. In this there was no error. There is no pretense that plaintiff had notice of this restriction of the power of the agent. On the contrary, it affirmatively appears that he did not have such notice. Unless actually restricted in his authority an agent to sell has power to

warrant in the manner in which Crafts warranted this binder. Section 3985, Comp. Laws. Crafts was intrusted with the sale of defendant's binders, and had them in his possession for sale. And even if restricted in his authority he would still have such authority to warrant as to all persons who did not have actual or constructive notice of the restrictions upon his powers. Section 3980, Id. See also *Boothby* v. *Scales*, 27 Wis. 635.

It is also urged that this written employment of Crafts as agent should have been received, because it showed on its face that his employment was only for the season of 1889, and that therefore nothing done by Crafts during 1890 would bind the defendant. In the same connection it is urged that the return of the property to Crafts in 1890 would not be a good delivery to defendant if Crafts had ceased to be defendant's agent. This excluded writing, it is urged, was evidence of the fact he was not such agent for 1890. But it was not evidence of this fact. It did not show that he was not agent for 1890. It was not at all inconsistent with his employment as agent the following year. Moreover, there is another reason why it was not error to receive this writing for this purpose. It was plainly offered for another purpose, for which it was incompetent, *i. e.*, to bind plaintiff by restrictions on what would otherwise be the agent's authority, without offering to bring home to plaintiff notice of such restriction. Being rejected as evidence for this purpose, the defendant should have stated the other object for which it was desired to have it admitted in evidence. Having failed to do so, he cannot complain of the refusal to receive it as error. There was no claim on the trial that Crafts was not the agent of defendant during the year 1890, the same as the year before. We do not think that the presumption of the continuance of the agency, after the fact of agency had been once established, could be rebutted by the introduction of the written contract of employment, silent on the point as to whether the agent was employed the ensuing year, when the agent himself was put upon the stand by the defendant as a witness for defendant. A simple inquiry would have settled this question, and the fact that Crafts

was not interrogated by defendant on this point is convincing to our minds that there was no thought of raising any such point, and this confirms our belief that the written instrument under which Crafts was employed was not offered for the purpose of overthrowing the presumption of the continuance of the agency. We have carefully considered the points raised, and finding no error the judgment is affirmed. All concur.

(55 N. W. Rep. 583.)

THEOPHILUS L. TAYLOR *vs.* JOHN R. JONES.

Opinion filed April 14th, 1893.

Sufficiency of Evidence to Sustain Verdict.

The claim that a verdict is without support in the evidence cannot be maintained when the explicit and consistent testimony of one witness sustains it, even though a number of witnesses may as explicitly testify to the contrary.

Retaining Property of Another for Debt Due Does Not Constitute a Pledge.

The fact that one party, claiming under a legal right, however unfounded, declares to another party that he will hold certain property of such other party until a debt owing by such party to him is secured, and that such other party remains silent, and makes no objection thereto, does not constitute a pledge of such property as security for such debt.

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

Action by Theophilus L. Taylor against John R. Jones, for conversion. Judgment for plaintiff. Defendant appeals.

Affirmed.

McCumber & Bogart, for appellant.

The verdict was against the clear weight of the testimony and should be set aside. *Mead* v. *Courve*, 8 At. Rep. 374; *Hicks* v. *Stone*, 13 Minn. 434; *Garrett* v. *Greenwell*, 4 S. W. Rep. 441; *Sandwich Manufacturing Co.* v. *Feary*, 33 N. W. Rep. 485; *Kaemmever* v. *Hauser*, 29 Ill. App. 576; *Jones* v. *McValley*, 11 S. E. Rep. 544; *M. P. Ry. Co.* v. *Summers*, 14 S. W. Rep. 779; *Helfrick* v.

Hogden City Ry. Co., 26 Pac. Rep. 295; *Atchison & C. Ry. Co.* v. *Wagner*, 7 Pac. Rep. 204; *Cummings* v. *Winters*, 28 N. W. Rep. 303. The silence of Taylor was an assent to the proposition made by Jones. Bishop Cont. § § 284-290 and 229; 1 Parsons Cont. 476; *Abbot* v. *Herman*, 7 Me. 118; *Preston* v. *Am. Linen Co.*, 119 Mass. 400; *Leathers Mfg's Nat. Bank* v. *Morgen*, 6 Sup. Ct. Rep. 657; *Steel* v. *Refining Co.*, 1 Sup. Ct. Rep. 389.

W. E. Purcell and *L. B. Everdell* for respondent.

A court will not set aside a verdict as being against evidence, because on examination they might have come to a different conclusion from that arrived at by the jury. *Wendall* v. *Stafford*, 12 N. H. 171, *Mays* v. *Callwin*, 6 Leigh 230. A mere preponderance of evidence against a verdict is no ground for granting a new trial. 1 Graham & Watt on New Trials, 380; *Johnson* v. *R. R. Co.*, 11 Minn. 204; *De Rochebrune* v. *Southeimer*, 12 Minn. 78; *State* v. *Herrick*, 12 Minn. 132; *Canefield* v. *Bogie*, 2 Dak., 465; *Moline Plow Co.* v. *Gilbert* (Dak.) 16 N. W. Rep. 500; *King* v. *Meyers*, 35 Cal. 646; *Todd* v. *Brannan*, 30 Ia. 439; *Barret* v. *U. S.* 9 Wall, 38; *Alveron* v. *U. S.* 8 Wall. 337.

BARTHOLOMEW, C. J. Taylor, the plaintiff below and respondent herein, sued John R. Jones, the defendant and appellant, in conversion for the value of a team, harness, and buggy. There was a verdict for plaintiff, a motion for a new trial denied, and judgment on the verdict. It is uncontroverted that respondent was the owner of the property prior to bringing this action, and that it was in appellant's possession; that respondent demanded the same, and appellant refused to deliver it. The answer alleged, in substance, that on the 2nd day of June, 1891, respondent delivered the property to appellant, as a pledge to secure an indebtedness that respondent owed to appellant, and that appellant held the property under and in accordance with the terms of the pledge, and that the debt had not been paid. That the debt existed and was unpaid seems to be conceded. The case was made to turn entirely upon the truth or falsity of the allegation

that the property was pledged. Appellant presents the case in this court under three heads, which cover all his assignments of error: *First*, insufficiency of the evidence to justify the verdict, and herein error of the court in refusing to direct a verdict for appellant, and in refusing a new trial; *second*, error in refusing and giving instructions; *third*, error in admitting and excluding evidence.

From a mass of testimony we summarize the following facts as sufficient to render our rulings intelligible: Prior to June 2nd, 1891, one Holding recovered a judgment against the respondent, Taylor, and caused execution to issue thereon, under which the sheriff of the proper county seized the horses and harness in question. Taylor claimed this property of the sheriff as exempt from sale on execution, but the sheriff refused to recognize this claim, and had advertised the property for sale on said June 2nd, 1891. Taylor desired to preserve this particular property, and also to preserve his right of action against the sheriff for selling exempt property. This he could properly do. See *Northrup* v. *Cross*, 2 N. Dak. 433, 51 N. W. Rep. 718. The day before the sale the respondent saw one David Jones, the brother and agent of appellant, and one Malloy, appellant's bookkeeper. Appellant was absent. Respondent desired David Jones and Mr. Malloy to go with him the next day to Forman, where the sale was to take place. The witnesses differ as to respondent's object in having David Jones and Malloy present at the sale. Respondent testifies that he desired them to help him to raise money in case the property should be bid up at the sale to a figure in excess of what money he had. David Jones and Malloy testify that he wanted them to attach the property on his debt to appellant, in order to head off certain other creditors. Appellant was notified by telegram to be present at Forman, but it was feared he could not get there before the sale. Early on the morning of June 2nd, David Jones and Mr. Malloy went with respondent to Forman. They immediately saw Mr. Ellsworth, an attorney, and, after consultation, an attachment action was commenced by said attorney in

the name of appellant against respondent, and a writ of attachment procured and delivered to the sheriff, who immediately levied it upon the property. This was known to respondent before the hour fixed for the sale. At the sale the property was bought by David Jones, in his own name, but with money furnished entirely by respondent. Soon after the sale, appellant reached Forman. It is proper here to state that respondent's debt to appellant was for lumber purchased, and appellant had it secured by mechanic's lien. When appellant and respondent met at Forman, appellant began to upbraid respondent for getting his (appellant's) men to bring the attachment action and thus invalidate the mechanic's lien, and declared that he would hold the property until he was secured. Appellant then testifies, in detail, that respondent not wishing to have further expense, asked him to release the attachment, saying that he would turn the property over as a pledge until he got other sufficient security. To this appellant agreed, and the attachment was released, and the horses and harness, and, under the advice of Mr. Ellsworth, the buggy also, were turned over to David Jones, as pledge holder for appellant. A careful scrutiny of the testimony fails to disclose that any other witness says anything about a pledge. All of the other witnesses seem to have understood that the team and harness were held by virtue of the purchase of David Jones at the sheriff's sale. David Jones testifies: "I bid the team in for the interest of John R. Jones. I bid it in myself, in my own name." "I bid the team in for John R. Jones. I held the team by that bid. I hold the team." "I said, at the time I purchased this property, I purchased in the interests of John R. Jones." "It was to be given back by myself or John R. Jones, to him, [Taylor;] no difference which." "I held them as John R. Jones' property until the thing was settled,—until a bill of sale was made to Mrs. Taylor." Speaking of the agreement with respondent, he says: "The horses should be in my charge, or in my brother John's, himself, until he settled the account." The witness Malloy narrates the circumstances attending the sale;

that respondent gave him the money to purchase the property, and he turned it over to David Jones; that, by the subsequent agreement, the property was to remain in David Jones' possession until the account was secured, and then a bill of sale was to be made to Mrs. Taylor. Mr. Ellsworth, the attorney, was also a witness for the appellant. In speaking of what took place after the sale, and at the time when it is claimed the pledge was made, he says: "He [Taylor] said he wanted it understood that the sale, or the purchase of this property at the sale, was a bona fide purchase, and that he would arrange it with Mr. Jones in a short time." He further said that, when the account was secured, a bill of sale of the property was to be made to respondent's wife, Mrs. Taylor; that respondent wanted it done in that manner, so that no other party could seize the property; that, as the buggy had not been sold, he (witness) suggested to Mr. Jones, in Taylor's presence, that it would be better if Taylor would turn over the buggy also, to which Taylor agreed; that he then sent for the sheriff, and gave him a written order releasing the attachment. Respondent, in his testimony, claims that he furnished the money to Malloy to buy the property in for him; that instead of doing so, Malloy turned the money over to David Jones, who bought the property in his own name. He unequivocally denies that the property was ever turned over as a pledge or otherwise; claims that it was taken by appellant or his agents after the sale, without his (respondent's) knowledge or consent; and denies all knowledge that the attachment was released. He admits that appellant told him that the attachment had invalidated his lien, and that he would hold the team, but says that he made no reply; admits also, that Mr. Ellsworth advised him to turn over the buggy, but says he made no reply. Under this evidence, not only was there a conflict upon the question of a pledge, but the preponderance was clearly against it. The proof tended to show that the parties treated the purchase by David Jones at the sheriff's sale as passing the title of the property to him, which could only be divested by a resale, and that David Jones, acting

in the interest and at the instance of his brother, determined to hold the property so purchased at the sale until respondent secured the account owing to his brother, when a bill of sale was to be made to respondent's wife. The buggy had not been purchased at the execution sale, but had been attached, and the attorney testifies that he suggested to Mr. Jones that it would be well to have Mr. Taylor turn that over also, and that Taylor consented so to do. Taylor says he simply made no reply. Several witnesses testify that Taylor did, in fact, turn the buggy over. Taylor as explicitly swears that he did not. The question was for the jury. Respondent's testimony is all consistent with the theory that he did not turn the buggy over as a pledge or otherwise, and the fact that he is opposed by a number of witnesses does not render the verdict so entirely unsupported by evidence as to warrant a court in disturbing it. It may be true, as urged by learned counsel, that if respondent knew that appellant understood him to consent to turn over the property, or any portion of it, as a pledge, and if he knew that, relying upon such consent, appellant dismissed the attachment, and thus altered his condition to his prejudice, respondent would be estopped from denying his consent. The trouble in applying the proposition in this case is the fact that respondent swears he had no knowledge that appellant released the attachment. If that be true, there is no element of estoppel in the situation. We may add that respondent's statement has strong corroboration in the circumstances, as they seem to have been understood by the parties. If the horses and harness passed to David Jones by virtue of the purchase, and were to be held by him unless security was given for the account, then the attachment became a mere useless appendage, as the value of such property far exceeded the amount of the account, and it would be only natural that respondent should give no further thought to the attachment. There is a direct conflict in the evidence as to whether or not respondent consented that the horses and harness might be held even under the purchase. This discussion of the evidence demonstrates, we think, that the

verdict has substantial support, and that there was no error in refusing to direct a verdict for appellant, or in denying the motion for a new trial, on the ground that the verdict was not sustained by the evidence.

This also practically disposes of the error assigned on the refusal to give an instruction asked by appellant. This instruction, without qualification or condition, stated that if the jury found that on said June 2nd, 1891, defendant told plaintiff that he would hold said property as security for his debt, and plaintiff made no objection thereto, but allowed defendant to take the property, this would be an assent upon the part of the plaintiff to such holding, and the verdict must be for defendant. Now, without holding that mere silence and inaction could be more than evidence of assent, in any case where the other party had not been induced thereby to alter his condition to his prejudice, it yet seems too plain for argument in this case that if appellant was claiming a legal right to hold the property, either under the purchase by David Jones or under the attachment in his own name, and respondent silently acquiesced in such claim of right, such fact would fall far short of constituting a contract of pledge between the parties. Moreover, the instruction disregards respondent's testimony that the property was taken without his knowledge or consent.

It is pressed against the charge of the court that it makes unduly and unnecessarily prominent the thought that a pledge is a contract, and that it takes two persons to make a contract, and that their minds must meeet on the same line. Both must understand the transaction in the same way, and it must be voluntarily entered into. We think the criticism not applicable. There was but one issue in the case, and that was upon the allegation in the answer that respondent pledged the property to appellant as security for the debt. Appellant must succeed, if at all, upon the theory of a pledge. Possession by other means would not help him. It was entirely proper for the court to specifically define a

pledge and its constituent elements; and to guard the jury against any mistake by reason of the fact, if such it was, that respondent acquiesced in appellant's claim of legal right to hold the property, it was pertinent for the court to impress upon the jury the voluntary nature of the contract of pledge.

Numerous errors are assigned upon the admission and exclusion of testimony. Some of these have been already indirectly answered, and none of them are of sufficient general importance to warrant any lengthy notice. Some days after the transaction, on June 2nd, appellant had the property at the town of Straubville. Early in the morning, respondent and another party sought to get possession of the property by stealth or force, or both. Something of an altercation took place between appellant and respondent. It was sought to give in evidence all the details of that difficulty by appellant when on the stand. This was objected to, and the court limited the witness to "what was said in regard to your holding the team, or right to hold it, or any agreement you and Mr. Taylor had before that." Certainly, that was broad enough. Anything further could only prejudice the jury. The same remark applies to the third error assigned. The evidence excluded under the fourth and sixth assignments would necessarily have been the same whether the property was held under the purchase or the attachment or the pledge, and hence was incompetent to establish a pledge. The answer excluded under the fifth assignment was purely a conclusion of law. The seventh assignment is more difficult. The respondent, while on the stand, was asked: "Did you in any way consent to John R. Jones', or any other person for him, holding this team as security for any debt you might be owing him?" This was objected to, as calling for a conclusion, and not for a fact, and the objection overruled, and in this we think the court did not pass the bounds of discretion necessarily lodged with a trial court in excluding and admitting testimony. This was on rebuttal. Appellant's witnesses had given the facts from their standpoint, and had repeatedly asserted that respondent did so consent, and we do

not think that it was improper to permit respondent, after he had given all the facts from his standpoint, to testify that he did not consent. The objection is argued on the theory that, on his own testimony, respondent had consented as a matter of law. We have already ruled that such was not the case. The other assignments require no notice further than that they have already received. No error in the record has been shown, and the judgment below is accordingly affirmed. All concur.

(55 N. W. Rep. 593.)

STATE *ex rel* DIEBOLD SAFE & LOCK CO. *vs.* F. O. GETCHELL.

Opinion filed April 25th, 1893.

Mandamus—Illegal Claim.

The writ of mandamus is never awarded to aid in the collection of an illegal claim.

Expenditure in Excess of Revenue—Illegal.

The county commissioners of Eddy County allowed the bill of the relator, and directed a warrant to be drawn therefor in payment for corridor and cells put up in the county jail by relator at the request of such board. The question of such expenditure was never submitted to the voters of the county, and the amount of such bill and proposed warrant was greater than could be paid out of the annual revenue of the county for the current year. The defendant as auditor, refused to attest and certify such warrant, and the District Court refused to award the writ of mandamus compelling him to do so. *Held*, that the ruling of the court below was proper, as the expenditure would have been illegal, under § 607, Comp. Laws.

Assent of Voters—Benefits—Acceptance.

The voters not having assented to such expenditure, the commissioners were without lawful authority to make the same, and hence their acceptance of the benefits would not operate to bind the county.

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

Application by the Diebold Safe & Lock Company for writ of mandate to Fred O. Getchell, county auditor of Eddy County. Application denied. Plaintiff appeals.

Affirmed.

Edgar W. Camp, (*E. B. Graves* of Counsel) for appellant.

Mandamus is proper remedy to compel auditor to sign and deliver a warrant. Merrill on Mandamus § § 126, 121; *Lachauce* v. *Auditor General*, 43 N. W. Rep. 1005; *State* v. *Tarpen, Auditor*, 1 N. E. Rep. 209. In issuing warrants the auditor acts ministerially. *State* v. *Ames*, 18 N. W. Rep. 277. The petition alleges that the cells and corridor were delivered to Eddy County. The contract was one the county had power to make, consequently even if the contract was not properly made, yet by user and acceptance the informal contract might be ratified. *Bank* v. *School Dist.*, 1 N. D. 479; *Bank* v. *School Dist.*, 6 Dak. 248, 19 Am. and Eng. Enc. Law 47, 15 Id. 1102.

J. F. Keime, for respondent.

The auditor must certify that the warrant has been issued "pursuant to law" and that "it is within the debt limit." The making of this certificate involves a judicial discretion. Section 187 Const. Debates Const. Con. 439-440. Where the act sought to be coerced by mandamus involves an examination, the exercise of judgment or discretion mandamus will not lie. *Peo.* v. *Supervisors*, 12 Johns. 414; *Peo.* v. *Auditor*, 10 Mich. 307; *Tilden* v. *Supervisors*, 41 Cal. 68; *State* v. *Judge*, 53 N. W. Rep. 433, 3 N. D. 43; High. Ex. Leg. Rem. 45 to 47, 24, 80; Merrill on Mandamus 112. There could be no ratification in this case § 3972 Comp. Laws. *Capital Bank* v. *School Dist.*, 1 N. D. 486, 494. A public corporation cannot be estopped by the void acts of its agents. Bigelow on Estoppel 530; *McPherson* v. *Foster*, 43 Ia. 48; *Schaffer* v. *Bonham*, 95 Ill. 368; *Ottawa* v. *Perkins*, 94 U. S. 260.

CORLISS, J. The appeal is from an order denying relator's application for a writ of mandamus to compel defendant, as auditor of Eddy County, to attest and certify a county warrant issued by the board of county commissioners, and signed by the chairman thereof. The relator did not secure, in the first instance, an alternative writ, but applied on notice for a permanent writ. The better and more regular practice is to obtain the alternative writ on an *ex parte* application. The alternative writ constitutes

both the process and the pleading in the special proceeding. But it cannot be doubted that there are precedents warranting an application for a peremptory writ on notice without the preliminary issue of the alternative writ, and our Code recognizes this practice. Sections 5520, 5521, Comp. Laws. Accompanying the notice of application for the writ was an affidavit, and in the notice it was stated that the relator would apply for a "writ of mandamus" upon the facts set forth in such affidavit. On the hearing a petition was also filed, embodying, in substance, the same facts embraced in the affidavit. In this petition there was a prayer for a peremptory writ of mandamus. The defendant filed an answer on the return day, and also an affidavit in which were set forth the same facts which were contained in the answer. The contention of the relator in this court is that he applied on this hearing for an alternative writ, and that the court erred in refusing to issue such writ. We do not so construe the record. It is apparent from the record that the parties intended to and did submit to the court all controverted questions of fact upon the pleadings and the affidavits, and upon admissions made in open court after the answer was filed. The order denying the application for the writ recites that there was a hearing of the relator's application for a writ of mandamus at a regular term of court, and that on this hearing these affidavits were read and filed, and that certain facts were admitted by the parties to the proceeding. Why these admissions were made, if the only object was to ask for an alternative writ, it is impossible to discover. The issues to be tried would be formed by the return or answer to the alternative writ, were it intended that such writ should be issued. Why, therefore, make admissions in the application for such a writ? The time for admissions, and the use of affidavits, would be upon the trial of such issues, after the alternative writ had been granted. What possible object could the relator have had in securing an alternative writ? To this writ the same answer would have been made, and the same issues would have been presented for trial which were already before the court for trial in this more informal

manner. Section 5520 of the Comp. Laws contemplates that there may be a trial of matters of fact upon the hearing, based upon notice, instead of upon an alternative writ. It provides that when the application is upon notice the peremptory writ may be issued in the first instance. But the peremptory writ will never issue so long as a material fact is in controversy; and if it may issue in the first instance, in such a case, it must be that the court has power, upon the hearing based upon notice, to try and determine all disputed matters of fact. There is no absolute right to a jury trial. The court, in its discretion, may order the issues to be tried before a jury. Section 5522, Comp. Laws.

As we are of opinion that the parties submitted the case on the merits, and that, therefore, the relator asked for a peremptory writ, the question arises whether the court was bound, in any view of the case, to award such peremptory writ. In deciding this question we must assume that the trial judge found in favor of the defendant any and all facts necessary to support his decision, of which there was evidence before him. The county warrant which the relator is seeking to compel the defendant to attest and certify as auditor was ordered to be drawn, by resolution of the board, in payment for jail cells and a corridor furnished during the year 1891 by the relator to Eddy County, and put in place by the relator, in the jail of such county, under a contract made in 1891 with the board of county commissioners of such county to pay therefor the sum of $1,785. In the answer it is alleged "that neither said sum of $1,785 alleged in the petition, nor any part of said sum, could be paid out of the current revenue of said county for said year 1891; that to pay said sum it was necessary to create an indebtedness." And in the defendant's affidavit used upon the hearing it is stated "that the current income of Eddy County in the year of 1891 was not large enough to pay the warrants drawn in that year, and the said county was at that time owing a larger sum of money on unpaid county warrants than one year's revenue of said county; that there was no money in the county treasury, then, out of which said so called

warrant could be paid; that said sum could not not be paid out of the annual tax; that said so called warrant created, or would create, an indebtedness that Eddy County could not possibly meet for more than one year from its date." The contract was made in October, 1891, and it was admitted upon the hearing that the queston of making such expenditure was never submitted to a vote of the people of such county. It is practically conceded that under these facts the contract is void, under § 607, Comp. Laws, unless the illegal action of the board of county commissioners in making this contract was subsequently ratified. But the court had no evidence of ratification before it. It is true that it is stated in the petition and affidavit of relator that the board of county commissioners accepted the work. But this does not constitute ratification. What the board could not do in the first instance, it could not thereafter make valid by ratification. The power must come from a higher source,—the vote of the people. It is not a case where there has been some irregularity in the exercise of a power vested in the board. It is a usurpation of power by the board which the legislature, in express terms, has withheld from the board, and vested in the people, and in the people alone. The people must ratify, because ratification presupposes power to do the act ratified. Mechem, Ag. § 121; *People* v. *Gleason*, (N. Y. App.) 25 N. E. Rep. 4; *Dickinson* v. *City of Poughkeepsie*, 75 N. Y. 65; *McDonald* v. *Mayor, etc.*, 68 N. Y. 23; *Capital Bank of St. Paul* v. *School Dist. No. 53*, 1 N. Dak. 479, 48 N. W. Rep. 363. There was no evidence that the people have ever taken any action pointing towards a ratification of this unlawful agreement. Under § 3972 "a ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified," except in cases where an oral authorization would have been sufficient. In such cases, and only in such cases, will the acceptance and retention of the benefits of the act, with notice thereof, constitute a ratification thereof. As the board of county commissioners could derive their authority to make such a contract only from a vote of the people, and not

from any oral authorization of the act, it is difficult to see how anything short of such a vote, or of an act of the legislature, can render the county liable on this contract. Mere use of the property by officials should not be evidence of ratification. The people cannot prevent such use, nor are they under obligations to take steps to prevent such use. Neither are they required to cause to be removed from the county building, property which was placed there without their consent; such consent as evidenced by a vote of the people, being necessary to bind them. The legislature has prescribed the mode of ascertaining their will towards such extraordinary expenditures. It is by a vote of the people. It would be a dangerous doctrine that any other conduct of the people would be sufficient evidence of their will as to such unusal expenditures, for it would be impossible to determine by any other test whether a majority of the people were desirous of incurring such a debt. It is to such majority that the law confides the power, and the only safe rule to ascertain whether a majority of the people favor the project is by a popular vote. In the following cases the defendants retained the benefits of the void contracts, and yet it was adjudged that there was no liability on that account: *People* v. *Gleason*, (N. Y. App.) 25 N. E. Rep. 4; *Dickinson* v. *City* of *Poughkeepsie*, 75 N. Y. 65; *McDonald* v. *Mayor, etc.*, 68 N. Y. 23. The mere auditing of the claim by the board of county commissioners did not validate the contract. *People* v. *Gleason*, (N. Y. App.) 25 N. E. Rep. 4. This case is very much in point on the merits of the case at bar.

It appearing from this record the warrant was issued to pay an illegal debt, and their being no evidence of ratification thereof, the defendant was fully justified in refusing to attest the warrant under § 187 of the state constitution. See *State* v. *Hill*, 32 Minn. 275, 20 N. W. Rep. 196; High, Extr. Rem. § 40. We do not wish to be understood as deciding that the illegality of this claim is finally settled, so far as the facts are concerned, the County of Eddy not being a party to this proceeding.

The order is affirmed. All concur.

(55 N. W. Rep. 585.)

WM. N. COLER & CO. *vs.* DWIGHT SCHOOL TOWNSHIP.

Opinion filed April 25th, 1893.

De Facto Municipal Corporation.

The county superintendent of schools, under chapter 14, Laws 1879, organized a school district, school district officers were elected, and exercised the functions of their respective offices; teachers were employed by the district, and school was taught therein, and a school meeting was held in the district to vote upon the question of issuing bonds to build a school house. Such bonds were thereafter issued. In an action upon some of the interest coupons of such bonds, *held*, that the district was a *de facto* municipal corporation, and that therefore the defense could not be interposed that the bonds were void on the ground that the district had no legal existence because of failure to comply with provisions of the statute regulating the organization of such districts in matters which went to the jurisdiction of the county superintendent to organize the district.

Estoppel by Recital in Bonds.

Municipal corporations are estopped, as against bona fide holders of municipal bonds, from setting up as a defense to an action thereon that all the preliminary steps necessary to authorize the issue of the bonds were not taken, when the officers who have charge of the issue of such bonds are especially or impliedly authorized to determine whether all the conditions precedent to the issue of valid bonds have been complied with, and recite in the bonds so issued that they have been complied with. It is not necessary to estop the corporation that this statement should set forth in detail that all the preliminary steps have been taken. It is sufficient that it declare that the bonds are issued in pursuance of a certain statute, specifying it. Neither is it essential that the officers issuing the bonds should be expressly authorized to determine such questions. It is sufficient if they are given full control in the matter.

Organization of District—Liability for Debts.

A school township organized under Ch. 44, Laws 1883, becomes, immediately upon such organization, liable for debts of a district, the school house and furniture of which become the property of the school township. This liability is complete, and does not depend upon the settlement of equities between several districts included in the new school township, under § § 136, 138, Ch. 44, Laws 1883.

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

Action by William N. Coler and William N. Coler, Jr., partners under the firm name and style of W. N. Coler & Co., against Dwight School Township of Richland County, on the interest coupons of certain bonds. Judgment for plaintiffs. Defendant appeals.

Modified and affirmed.

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

CORLISS, J. The plaintiffs have recovered judgment upon a number of coupons representing the interest on bonds issued by an alleged municipal corporation known as School District No. 22, in Richland County, in the then Territory of Dakota. Defendant, not having issued them is sought to be held liable on these bonds and their interest coupons, by virtue of Ch. 44, Laws 1883. At the threshold of the case we are met with the proposition that there is no liability because there was no such corporation as School District No. 22 in existence when these instruments were executed and delivered. It is asserted that the proceedings instituted to effect the organization of such a municipality were fatally defective. It is, in the first place, insisted that there was no petition for the erection of the district presented to and filed by the county superintendent of schools, signed by a majority of the citizens residing in the territory to be effected. Such a petition is required by the statute. Chapter 14, Laws 1879, § 10. The trial judge has found that there was such petition made, and that it was filed as required by law. This finding is challenged. We think that the evidence is sufficient to sustain it. The petition itself was not produced, but we are satisfied that there was ample evidence to warrant a finding by the trial judge that it could not be found, but had been lost or taken away by some former county superintendent, either the one with whom it was originally filed or by one of his successors. There was ample evidence to justify the trial court in holding that diligent search has been made for the paper. The court therefore properly admitted secondary evidence as to the signing and filing of the petition. This evidence sustains the finding.

It is next contended that there was a failure to comply with the provisions of the statute requiring the county superintendent to furnish the county commissioners of the county with a written

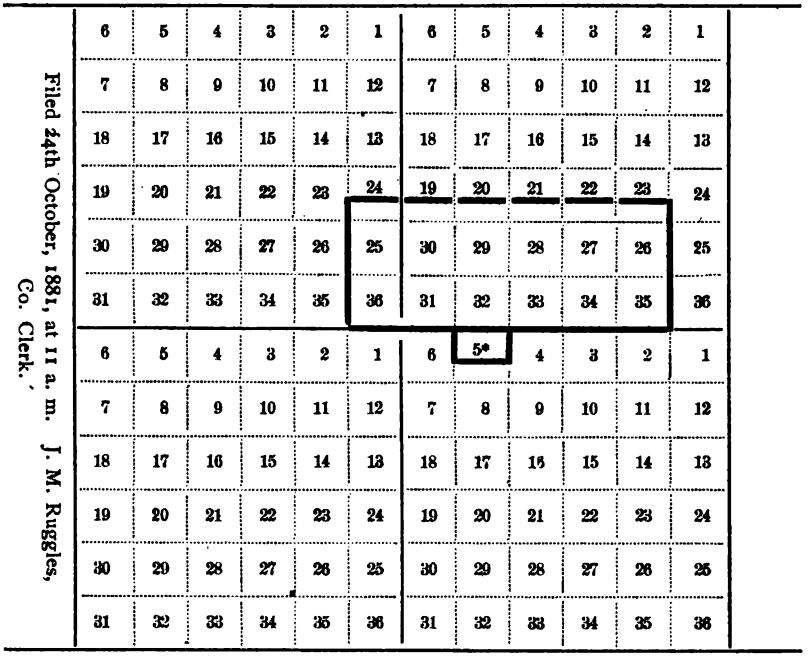
description of the boundaries of the district, and declaring that such description must be filed in the office of the register of deeds before such district should be entitled to proceed with its organization by the election of school district officers. Chapter 14, Laws 1879, § 10. It is undisputed that the only attempt to comply with this requirement was by filing a paper, which in words, figures, and form is as follows:

"On January 1st, 188 , the above named district comprised the following described lands, viz:

Description	Sec.	Town	Range	Description	Sec.	Town	Range
For subsequent changes see opposite page.							

"Plat of School District No. 22.

Township____Range____Township 132, Range 49.



Township____Range____ Township____Range____

"Organized October 24th, 1881, by J. H. Kennedy, Co. Supt. of Schools."

We are clear that this does not contain a written description of the boundaries of the district. It merely purports to be a plat of the district. Whether the district is within or without the lines of the plat is left to speculation. But does it necessarily follow that the organization of the district is thereby rendered void? The county superintendent creates the district. His decision, embodied in written form, is the act which calls the new corporation into being, provided he has been given authority to proceed by the presentation and filing of the proper petition. The statute requires him to keep a record of his official acts, (§ 12,) and it is to this record that the court must look to see if the

* Not included.

district has been formed. The record so kept by the county superintendant shows the following entry: "District No. 22, organized October 24th, 1881, and includes the following described territory: South half of sections 19, 20, 21, 22, and 23, and all of sections 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35, in township 133, range 49, and one-half of section 5, in township 132, range 49, and sections 24, 25, and 36, township 133, range 50." The statute does not declare that furnishing the county commissioners with a written description of the boundaries, and the filing thereof in the office of the register of deeds, are conditions precedent to the existence of the district. Quite the contrary. The statute refers to the district as a corporation already formed before the doing of these acts. It does not withhold corporate life until the description is furnished and filed. It merely provides that the district shall not be entitled to proceed with its organization by the election of school officers before these acts are performed. The corporation exists; the district officers exist; but no election of officers can be held until after certain acts are performed. This is the plain reading of the statute. Said the court in *School Directors of Union School Dist. No. 4* v. *School Directors of New Union School Dist. No. 2*, (Ill. Sup.) 28 N. E. Rep. 49, at page 52: "And the failure of the township trustees to file with the county a map showing the lands embraced in the new district will not have the effect to destroy its corporate existence, or to prevent the directors of a new district from levying taxes for school purposes therein;" citing *School Directors of Dist. No. 5* v. *School Directors of Dist. No. 10*, 73 Ill. 250. A municipal corporation may have life, although there are no officers in office. No claim is made that the officers who in fact signed the bonds and coupons were not at least *de facto* officers of the district, provided there was a legal organization thereof. Nor could it be successfully contended that such officers were not at least *de facto* officers, there having been an attempt to comply with the law requiring the furnishing and filing of the description before officers should be elected, and the officers being in actual possession of their

respective offices and exercising the functions thereof, and there being no other persons pretending to lay claim to such offices. Nor would we reach a different conclusion were we of opinion that the organization of the district was so defective that the proceedings would be set aside on *certiorari* or the right of the district to act as such would be denied by judgment in *quo warranto*. At the time these bonds were issued the district was acting as a *de facto* district under at least color of organization. It had elected its district officers; held its district meetings; had voted to borrow money to build a school house; and it appears to be undisputed that the proceeds of these bonds were used for that purpose, and the inhabitants received the benefit thereof. A school house has been built, and school has been taught therein. To allow the defense that the proceedings in the organization were defective to defeat the debt represented by these bonds would, under these circumstances be to sanction repudiation of an honest obligation. We are firm in the opinion that the legality of the organization of a municipal corporation cannot be thus collaterally attacked. Citizens of the district who are opposed to the formation of such a corporation are not without remedy. *Certiorari* will reach the action of the county superintendent when without jurisdiction. *People* v. *Board of Sup'rs*, 41 Mich. 647, 2 N. W. Rep. 904. The statute allows an appeal. Section 25, Ch. 14, Laws 1879. The corporate existence may be attacked by *quo warranto*. *State* v. *Bradford*, 32 Vt. 50; *People* v. *Clark*, 70 N. Y. 518; *Cheshire* v. *Kelley*, (Ill. Sup.) 6 N. E. Rep. 486; Comp. Laws, § 5348, Subd. 3; *Territory* v. *Armstrong*, 6 Dak. 226, 50 N. W. Rep. 832. The evils resulting from a doctrine which would permit the legality of the organization of a municipal corporation to be inquired into collaterally—in an action to enforce a debt, in a proceeding to collect a tax levied by the *de facto* corporation, or in a litigation over a tax title growing out of a tax imposed by such municipality—would be as great as the evils which would flow from the collateral inquiry into the title of a person to an office, the functions of which he is in fact exercising. This same argument reaches the

objection that no sufficient petition was ever presented and filed, even assuming that the record sustained the claim this requirement of the statute was not complied with. It does not follow, because the organization was illegal for want of power in the county superintendent, that at all times, in every species of litigation, and by any person, the existence of the *de facto* district can be assailed. It is no more essential to the exercise by the county superintendent of this power that a petition should be filed than that it should be signed by a majority of the citizens residing in the district. It is the fact, and not the decision of the superintendent that the fact exists, which gives him jurisdiction. A petition is filed lacking the signature of one citizen to make it a petition signed by majority of the citizens; in all other respects the organization is regular; bonds are issued, a school house built, and school taught. Is all this to be ignored, to be treated as illegal, because there was no *de jure* district? Who are the real parties interested in defeating such a debt? The taxpayers within the district. In what position are those to object who participated in the organization? They have attempted to form a district. They for a time believed that they had formed it. They elect officers; borrow money on bonds for district purposes; build a shool house therewith; and use the money for other purposes connected with the functions of the district. On what principle can the existence of the district be denied by them for their benefit? If any within the district refrained from affirmative action, still they are chargeable with passive acquiescene when they might have acted, and acted effectually, against the *de facto* existence of the district, and thus have prevented an imposition upon the innocent who were justified in taking that to be a legal district which was acting as such, and to all appearances was warranted in acting as such. Those who were silent, when in conscience they should have spoken, have no claim upon the equity of this court. They did not protest; they did not appeal; they did not resort to *certiorari*; they made no effort to have the district attorney overthrow this *de facto* district by *quo warranto*;

and when the bonds were voted for they appealed to no chancellor to protect their property from an illegal debt. Not only the considerations which lie at the foundation of the rule protecting the public in dealing with a *de facto* officer, but also a principle very analogous to that of equitable estoppel, protect these bondholders against repudiation under the forms of the law. If there cannot be a *de facto* school district, there cannot be a *de facto* city. If illegality in the proceedings to effect organization is fatal to the existence of a district, it is equally as fatal to the existence of a municipal corporation of a higher grade. Given a case where the defects in the incorporation of the city are as fatal as in this case, and then deny to that corporation any effect, although a city government is in fact inaugurated and carried on, and the consequences would be intolerable. Open and acknowledged anarchy would for some reasons be preferable. In after years tax titles would be destroyed; every officer of the city would be a trespasser when the discharge of what would be his duty on the theory of the existence of the corporation led to an interference with the property or person of others. Every police or other peace officer and every magistrate acting under the supposed authority of the city government would be liable for extortion, for assault and battery, for false imprisonment, and could be prosecuted criminally for acts done in good faith in the enforcement of the criminal law. An army of creditors whose savings have gone into the city treasury, and through the treasury into public buildings and other public improvements, find, to their astonishment and dismay, that they have received in exchange beautifully lithographed but worthless bonds as souvenirs of their abused confidence. All that has been done in good faith under color of law is only barefaced usurpation, and to be treated as such for all purposes. Such a doctrine would be the author of confusion, injustice, and almost endless litigation. The imagination cannot embrace all the gross wrong to which it would lead when pushed, as it must be, to its logical consequences. On the other hand, no great injury can result to the citizens or state by

recognizing a *de facto* corporation; one acting as such under color of organization. If the law is disregarded in the attempt to organize the municipality, the violation of law always can be nipped in the bud by appropriate judicial proceedings. We find that our views are by no means novel. The rule that the existence of a *de facto* municipal corporation cannot be collaterally assailed has frequently been recognized and applied by the courts. *Stuart* v. *School Dist.*, 30 Mich. 69; *People* v. *Maynard*, 15 Mich. 470; *Krutz* v. *Town Co.*, 20 Kan. 397; *Tisdale* v. *Town of Minonk*, 46 Ill. 9; *Geneva* v. *Cole*, 61 Ill. 397; *People* v. *Farnham*, 35 Ill. 562; *Jameson* v. *People*, 16 Ill. 257; *Sherry* v. *Gilmore*, (Wis.) 17 N. W. Rep. 252; *State* v. *Railroad Co.*, (Nev.) 25 Pac. Rep. 296; *School Dist. No. 2* v. *School Dist. No. 1*, (Kan.) 26 Pac. Rep. 43; *Railroad Co.* v. *Wilson*, (Kan.) 6 Pac. Rep. 281; *Clement* v. *Everest*, 29 Mich. 19; *Stockle* v. *Silsbee*, 41 Mich. 615, 2 N. W. Rep. 900; *Burt* v. *Railroad Co.*, 31 Minn. 472, 18 N. W. Rep. 285, 289; *Mendenhall* v. *Burton*, (Kan.) 22 Pac. Rep. 558; *School Directors of Union School Dist. No. 4* v. *School Directors of New Union School Dist. No. 2*, (Ill. Sup.) 28 N. E. Rep. 49; 15 Am. and Eng. Enc. Law, 965; 1 Dill. Mun. Corp. § 43; *President, etc.*, v. *Thompson*, 20 Ill. 197; *Town of Enterprise* v. *State*, (Fla.) 10 South. Rep. 740. See 2 Dill. Mun. Corp. § 894; *State* v. *Weatherby*, 45 Mo. 17; *Board* v. *Lewis*, 10 Sup. Ct. Rep. 286; *Austrian* v. *Guy*, 21 Fed. Rep. 500. In some of the cases time seems to have been considered an element of some importance, but the public may as effectually be deceived by a *de facto* organization the day after it is complete as a decade thereafter. The time a *de facto* officer has been in possession of an office is never regarded as controlling. He is as much an officer, as to the public, the day after he intrudes into the office as a year later. "The same rule which recognizes the rights of officers *de facto*, recognizes corporations *de facto*, and this is necessary for public and private security." *Clement* v. *Everest*, 29 Mich. 19, 23.

We have treated this power as if the action were upon the bonds themselves, because the holders of interest coupons may

recover if they could maintain an action on the bonds under the same circumstances. It is also urged that there was a failure to comply with certain conditions precedent to the valid exercise of the power conferred upon such districts by law to borrow money on district bonds. The statute regulating the issuing of such bonds provides, in substance, that they can be issued only when a majority of the electors of the district present and voting at a district meeting shall vote to issue the same. Chapter 24, Laws 1881, § 1. Section 2 of this act provides: "Before the question of issuing bonds shall be submitted to a vote of the district, notices shall be posted in at least three public and conspicuous places in said district, stating the time and place of meeting, the amount of bonds that will be required to be issued, and the time in which they shall be made payable, at least twenty days before the time of meeting; and the voting shall be done by means of written or printed ballots, and all ballots deposited in favor of issuing bonds shall have thereon the words 'for issuing bonds,' and those opposed thereto shall have thereon the words 'against issuing bonds;' and if the majority of all the votes cast shall be in favor of issuing bonds, the school board, or other proper officers, shall forthwith proceed to issue bonds in accordance with the vote; but if a majority of all the votes cast are opposed to issuing bonds, then no further action can be had, and the question shall not be again submitted to vote for one year thereafter; provided, however, that the question of issuing bonds shall not be submitted to a vote of the district, and no meeting shall be called for that purpose, until the district school board shall have been so petitioned, in writing, by a majority of the resident electors of said school district." It is contended that the school board was not petitioned to submit the question of issuing the bonds to a vote as required by the proviso to § 2. We think the defendant is not in position to raise this point. The plaintiffs are bona fide holders of the coupons. The recital in the bonds is therefore fatal to this defense. Upon their face appears the following statement: "This bond is issued on the 24th day of June, 1882,

by School District No. 22, County of Richland, D. T., for building and furnishing a school house, under and in pursuance of, and in strict conformity with, the provisions of an act of the legislative assembly of the Territory of Dakota, entitled 'An act to empower school districts to issue bonds for building school houses,' approved March 3rd, 1881, and of a vote of said district at a special meeting had on the 29th day of November, 1881." Upon the back of each bond is the following certificate signed by the clerk of the district: "I certify that the within bond is issued in accordance with a vote of School District No. 22, of Richland County, Dakota Territory at a special meeting held on the 29th day of November, A. D. 1881, to issue bonds to the amount of twelve hundred dollars." It is obvious from the statute that the officers by whom the bonds are to be issued are intrusted with duty of determining whether the statute has been complied with as to all matters necessary to give them authority to issue the bonds. Their statement embodied in these bonds therefore estops the district and its successors from showing aught to the contrary. The rule and the reason for it have been so often shown, and are so well known to the profession, that it will suffice to cite some of the numerous authorities on the point. *Inhabitants* v. *Morrison*, 133 U. S. 523, 10 Sup. Ct. Rep. 333; *Oregon* v. *Jennings*, 119 U. S. 74–92, 7 Sup. Ct. Rep. 124; *County of Moultrie* v. *Rockingham, etc., Bank*, 92 U. S. 631; *Venice* v. *Murdock*, Id. 494; *Town of Colona* v. *Eaves*, Id. 484; *Dixon County* v. *Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315; *Humboldt Tp.* v. *Long*, 92 U. S. 642; *Commissioners of Knox Co.* v. *Aspinwall*, 21 How. 539; *Fulton* v. *Town of Riverton*, (Minn.) 44 N. W. Rep. 257; 15 Am. and Eng. Enc. Law, 1295 *et seq.*; Burr. Pub. Secur. 299 *et seq.* It is not necessary that the power to determine these facts should have been expressly conferred upon the district officers by the statute. "It is enough that full control in the matter is given to the officers named." *Inhabitants* v. *Morrison*, 133 U. S. 523, 10 Sup. Ct. Rep. 333; *Fulton* v. *Town of Riverton*, (Minn.) 44 N. W. Rep. 257. For is it essential that the statement should set forth

in detail that all of the various conditions precedent have been complied with. It is sufficient if it is stated that the bond was issued in pursuance of the statute, designating it in such a manner as to identify it. This is in legal effect a statement that each and all of the necessary preliminary steps were taken to authorize the issue of the bonds. *Inhabitants* v. *Morrison*, 133 U. S. 523, 10 Sup. Ct. Rep. 333; *Dixon Co.* v. *Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315; 15 Am. and Eng. Enc. Law, 1300; *County of Moultrie* v. *Rockingham, etc., Bank*, 92 U. S. 631. But the statement went much further. It asserted that the bonds had been issued under and in pursuance of, and in strict conformity with, the act authorizing their issue, "and of a vote of said district at a special meeting had on the 29th day of November, 1881." The certificate indorsed on the bonds by the clerk was required by the statute to be indorsed thereon. Chapter 24, Laws 1881, § 4. The statute specifies what the certificate shall contain, and this provision was strictly complied with in the issuing of these bonds. This requirement indicates that it was for the protection of the purchaser of the bonds, who might implicity rely upon the clerk's certificate as conclusive evidence that all necessary preliminary steps had been legally and regularly taken.

We come now to the claim that the plaintiffs have sued the wrong corporation. The defendant did not issue these bonds. If liable at all, it must be by virtue of some statute. Chapter 44, Laws 1883, is pointed to as the act which binds the defendant to pay these bonds. This law provides for a new system. The district school system was to be abolished, and the township school system to take its place. Under this statute it was the duty of the board of county commissioners to divide all organized counties into school townships. The finding of the court is that on May 23rd, 1883, the commissioners of Richland County duly organized the school township of Dwight in that county, and that the territory within this new school township embraced nearly all of the territory of the old school district No. 22; and that the school house and school furniture belonging to the district were

received into and are owned by the defendant. There is sufficient evidence to support the finding that the school house belonging to district No. 22 is within the territorial limits of the defendant. Under these facts the liability of the defendant on these bonds would be clear, under § 144 of the act, were it not for the provisions of § 136, to which we will in a moment refer. Section 144 provides as follows: "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 had against the district that issued them." There can be no question as to the power of the legislature to impose upon a new municipality, which includes all or a portion of the territory of an old municipal corporation, liability for the debts of the old corporation, where the property of the latter is turned over to and received by the former under the law. *Mt. Pleasant* v. *Beckwith*, 100 U. S. 514; 1 Dill. Mun. Corp. § 63; *State* v. *City of Lake City*, 25 Minn. 404; *City of Winona* v. *School Dist. No. 82*, 40 Minn. 13, 41 N. W. Rep. 539; *Demattos* v. *City of New Whatcom*, (Wash.) 29 Pac. Rep. 933; *Laramie County* v. *Albany County*, 92 U. S. 307; *Schriber* v. *Town of Langlade*, (Wis.) 29 N. W. Rep. 547, and cases cited in opinion; *Knight* v. *Town of Ashland*, (Wis.) 21 N. W. Rep. 65–70. See, also, note to *State* v. *Clevenger*, [Neb., 43 N. W. Rep. 243,] in 20 Am. St. Rep. 677. Indeed, many of the cases go much further that is necessary to support this legislation. But it is contended that School District No. 22 has not ceased to exist; that the organization of the defendant is not

complete; and the argument from these premises is that District No. 22, and not the defendant, is at present liable for these bonds. The section of the statute on which the claim rests is § 136. It provides as follows: "The adoption of the system herein provided, and the passage and approval of this act, shall not have the effect to discontinue, abolish, and render null such school districts or their organization as they may now exist in any county, but they shall continue to exist, and their officers to act as such, in law and fact, until the school township organization is complete, so far as it includes any particular district or districts, or the larger part of any particular district. And such township organization shall not be deemed complete, nor such districts so cease to exist, and their officers to act as such, until all matters between the district and the township are adjusted, and the property delivered, funds paid over, and an adjustment is reached for the equalization of taxes and property between the districts which enter into the school township, so far as such taxes and property remain permanent in houses, sites, furniture, and other parts of houses and grounds." The next two sections prescribe the procedure by which the equalization of taxes is to be determined, and the rules which are to govern such equalization. Now, it is quite clear to our mind that § 136 was incorporated in the statute merely to keep the old districts alive, for the purpose of adjusting their rights among themselves, so that taxpayers living in each portion of the new township which formerly constituted a school district should not pay more of the aggregate of the old indebtedness of the several districts embraced in the township than would be equitable, considering the rights of the taxpayers of the other districts, so included, to the same treatment. The school boards of the several old districts constituted, with the county superintendent, a body to adjust these matters, and it was necessary to keep the districts alive for this special purpose after the organization of the township. The legislature intended to work an immediate, radical revolution in the school system for the whole territory. We do not believe that they contemplated that, while

a long drawn out contest was going on to settle these questions between the old districts, this new system should be held in abeyance. Moreover, there would be no reason for making the organization of the school township, and its right to carry on the school system, depend upon the determination of a matter, the prior settlement of which was not essential to the corporate existence of the school township and the administration of the school law. Settlement must inevitably come. Should those charged with the duty of making it fail to obey the law, mandamus would set them in motion. The nature of their decision could not be dictated by any court; but they could be compelled to make some decision. The discharge of this duty, whether voluntary or under compulsion, can as well go on after as before the school township becomes liable for the district debts and is authorized to carry on the schools. The township is by the statute made liable for these bonds. It is the formal party against which judgment may be recovered. When execution in the form of mandamus to compel a levy of taxes is applied for, the court will observe the decision of the board of adjustment in the apportionment of the burden. If no settlement has at that time been voluntarily reached, the court in a separate proceeding will compel the performance of this duty specially enjoined by law, and when such adjustment is consummated the writ of mandamus to compel the levy of a tax to pay the judgment must observe and follow this adjustment in the apportioning of the tax among the several old districts of the new township. The statute is not clear. The question is by no means free from doubts. If the eye is riveted on § 136 alone there is much force in the defendant's position. But we must scan the whole act to find out its spirit, and in the light of that spirit we must interpret § 136. We can discover a good reason for keeping these districts alive, after the organization of the school township, for the special purpose of adjustment of equities. We believe it would be highly inconvenient to preserve their existence thereafter for general school purposes, and that such was not the intention of the law making

power. The existence of these districts for this particular purpose is not incompatible with the existence of the school township. It in no manner interferes with the full exercise by the school township of all its powers. These districts were to be kept alive for a short period, to accomplish a special object entirely foreign to the power conferred upon school townships. Their utter extinction for all purposes contemporaneously with the creation of school townships would have left the latter no more completely in possession of all their functions as municipal corporations. Finding no error, the judgment is affirmed. All concur.

ON REHEARING.

(May 31st, 1893.)

We are asked to grant a rehearing on the assumption that we have overlooked the case of *Dartmouth Sav. Bank* v. *School Dists.* Nos. 6 and 31, 6 Dak. 332, 43 N. W. Rep. 822. We had not overlooked it. We do not regard it as in point. In that case it might be said that their was no color of organization. There was no petition ever filed, or even signed. In so far as that decision can be regarded as conflicting with our conclusions we feel constrained to differ from the court which pronounced it.

Another matter is referred to in the petition for rehearing which strikes us with much force. It is insisted that, unless we modify the judgment, it will stand as an unqualified judgment against the defendant, to be collected the same as any other judgment against it. To save any question, we will modify the judgment so that the collection of it must be enforced according to the provisions of § § 136, 141, Ch. 44, Laws 1883. The District Court will modify the judgment by inserting therein the following clause: This judgment is to be enforced subject to the provisions of § § 136, 141, Ch. 44, Laws 1883; the debt on which it is rendered being a debt subject to equalization as therein provided.

Modified and affirmed. All concur.

(55 N. W. Rep. 587.)

COLONIAL & UNITED STATES MORTGAGE CO. *vs.* ORLANDO STEVENS, *et al.*

Opinion filed May 9th, 1893.

Liability of Married Women as Surety.

A married woman is liable on a note signed by her as surety for her husband, although she does not charge her separate estate with the payment thereof.

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

Action by the Colonial & United States Mortgage Company against Orlando Stevens and Ellen A. Stevens on a note. From a judgment dismissing the case, plaintiff appeals.

Reversed.

W. J. Kneeshaw, (*Byron Abbott*, of Counsel) for appellant.

Section 2590, Comp. Laws, is a part of the Code prepared by the New York Commission. It was adopted by Dakota in 1886, by California in 1872, later by Nevada. It is the same as § 158 Cal. Code, and § 169 of Nevada Civil Code. The courts of each of these states passing upon this section have unequivocally held that a married woman is under no disability and can contract as if a *feme sole*. *Wood* v. *Orford*, 52 Cal. 412; *Marlow* v. *Barlew*, 53 Cal. 556; *Good* v. *Moulton*, 8 Pac. Rep. 63; *Burkle* v. *Levy*, 11 Pac. Rep. 643; *Cartan* v. *David*, 4 Pac. Rep. 61. A married woman makes contracts *sui juris* respecting specific property. *Yerkes* v. *Hadley*, 40 N. W. Rep. 340, 5 Dak. 324. The Supreme Court of Vermont and Minnesota upon similar statutes have held that a married woman's contracts are not affected by coverture. *Reed* v. *Newcomb*, 10 At. Rep. 539; *Dobbin* v. *Cordiner*, 42, N. W. Rep. 870. *Sandwich Mfg. Co.* v. *Zellmer*, 51 N. W. Rep. 379. Where the law gives a woman power to contract like a *feme sole*, the courts will hold her to her obligation to perform. *Orange Nat. Bank* v. *Traver*, 7 Fed. Rep. 149. Ellen A. Stevens is estopped from pleading in this case coverture and want of consideration. Pom. Eq. Jur. § 814. *Dobbin* v. *Cordiner*, 42 N. W. Rep. 870.

Charles A. Pollock, for respondents.

Statutes which have been enacted have been intended for the benefit of married women. Her incapacity to contract is a protection. *Yale* v. *Dederer*, 18 N. Y. 272. Brandt on Suretyship 5. A married woman can never be held without her contract is within the power conferred upon her by statute, and it is not the primary object of the statute to extend her liabilities, but to protect her property interests. Her general engagements having no reference at the time to her separate property, cannot be enforced against her separate estate. Wells. Sep. Prop. of Married Women, § § 319 to 323.

CORLISS J. We have to determine on this appeal a single question of law. The essential facts are few and simple. The defendant Ellen A. Stevens executed, as surety with her husband, a promissory note to the plaintiff. To secure the note, they both executed a mortgage upon the homestead of the husband. In neither the note nor the mortgage did the wife charge her separate estate with the payment of the amount of the note; nor did she in any other manner charge such estate with its payment. At the time the note was signed she owned no separate estate whatever. The action is brought against her upon the note. The only defense is that she is not liable thereon, because she was a married woman at the time the note was given. This defense was successful below. From the judgment dismissing the action the appeal to this court has been taken, and whether we affirm or reverse this judgment depends upon the question whether a married woman is liable on her contract under the circumstances existing in this case. The rule which renders her liable must be found in the statute, or it does not exist. At common law, and even under equitable rules, this contract would be void. It is unnecessary to restate the reasons which have been given for the doctrine which exempts married women from liability on their contracts. Neither is a citation of authorities to support this rule necessary. The reasons which gave birth to this rule, and the rule itself are familiar to bench and bar.

Whenever it is claimed that a married woman is liable upon

her contract, and the case does not fall within any exception to the general doctrine of nonliability known to courts of law or equity, we must return to statutory law for our guide. Several sections of our statutes are referred to by counsel for plaintiff as sustaining his contention that the defendant Ellen A. Stevens is liable upon the note which she signed as surety for her husband. The one which bears most directly upon the question is § 2590 of the Comp. Laws. It declares that "either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried, subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts." This statute is very broad in its language. It is true that the contract must be one respecting property; but we cannot assent to the view that it must relate to the married woman's separate property. It would have been easy to have said so in express terms had such been the purpose of the lawmaking power. When the legislature has established the single and simple test that the contract must be one respecting property generally, we have no right to amend the law, and thereby inject into the act a further limitation which will exclude many contracts respecting proper. To add another limitation by interpretation would ignore the drift of legislation on the subject of the rights and liabilities of married women. The current runs steadily and strongly in the direction of emancipation of the wife, and of the imposition of responsibility commensurate with her increased rights. Why the words "respecting property" were inserted in the law it is not necessary to determine. It is sufficient for the purposes of this case to give full effect to them. This we do by holding that any contract respecting property is binding upon the wife, whether the agreement does or does not relate to her own separate estate. Some courts have looked upon the married women as needing protection from her husband in matters relating to property. We are not in accord with these

views, which regard the state as more friendly to the wife than her own husband, especially under the system which here prevails,—a system which recognizes her legal independence so far, at least, as property and the right to enter into contracts are concerned. Increased rights bring increased responsibilities. It is quite significant that in several of the states the married woman's power to contract is expressly limited to contracts relating to her separate property. Here we have no such limitation in terms, and yet it is urged that these dissimilar statutes are to have the same interpretation. On what principle this contention is based we are unable to discover. A contract to pay money is a contract respecting property. If it does not relate to property, then money is not property. And to what else does such a contract relate if not to property? But we are not without authority on this point. Section 158 of the Civil Code of California is identical in its language with our § 2590 of the Comp. Laws. In *Good* v. *Moulton*, (Cal.) 8 Pac. Rep. 63, the Supreme Court of that state held that a wife was liable upon a note signed by her as surety. We quote briefly from the opinion to show the scope of the decision. After referring to an instruction which the trial judge had given, the court said: "The instruction, in effect, told the jury that if Mrs. Moulton was a married woman, and, without consideration, executed the note for the accomodation of D. L. Moulton, and the plaintiff knew these facts, then their verdict must be for the defendants. This was error. In this state a married woman may enter into any engagement or transaction respecting property which she might if unmarried. Section 158, Civil Code. A promissory note is an engagement respecting property which a married woman may make, though it can be enforced only as against her separate property. *Marlow* v. *Barlew*, 53 Cal. 456; *Alexander* v. *Bouton*, 55 Cal. 15. If Mrs. Moulton had been unmarried, she could have made a promissory note for the accomodation of her father without receiving any consideration for so doing; and the note so made, in the hands of one who received it for value, would, beyond question, have been valid

and binding upon her, though the holder knew how and why it was made. But the fact that she was married does not at all change the rule, or limit her power in this respect." The case is directly in point. No authority to the contrary can be found. The decision is in harmony with advanced ideas upon the subject. It accords with the spirit of our legislation touching married women. By various statutes her property has been rested from the control of her husband. He is no longer liable for her debts. She is made responsible for her own engagements. Sections 2589, 2593, 2594, Comp. Laws. The policy disclosed by all the legislation in this state upon the subject is to place the married woman upon the same footing as a *feme sole* with respect to her property and to her rights to make binding contracts. See, also, as tending to support our views, *Wood* v. *Orford*, 52 Cal. 412, and *Marlow* v. *Barlew*, 53 Cal. 456. We have no fear that, under the construction we have placed upon the statute, the wife will become the victim of the husband's machinations to strip her of her property for his own benefit. Nor would the denial of her power to bind herself for the payment of his debts afford her any protection as against her husband. It is always in her power to give him her entire estate, or to pay all his debts out of her separate property. The judgment is reversed, and the District Court is directed to enter judgment for plaintiff for the amount due upon the note, with costs. All concur.

(55 N. W. Rep. 578.)

PAUL HUTCHINSON *vs.* JOSEPH CLEARY.

Opinion filed May 31st, 1893.

Evidence of Transactions with Decedents.

Under § 5260, Comp. Laws, a party to an action is prohibited from testifying to a conversation with plaintiff's intestate, notwithstanding the fact that an agent of the decedent was present at the time the conversation took place.

Parole Evidence Contradicting Written Contract.

Parol evidence *held* incompetent because it contradicted the terms of a written agreement between the parties; and the error in admitting the evidence *held* prejudicial because the court submitted to the jury a question of fact, as to which there was no controversy under the evidence, except on the theory that the jury had a right to base a finding upon such parol evidence.

Suspension of Agents Power—Presence of Principal.

So long as the principal acts for himself in a matter, in the presence of his agent, the agent, as to such matter, does not represent the principal. His power is suspended for the time being.

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

Action on a contract by Paul Hutchinson, administrator of the estate of Charles Hutchison, deceased, against Joseph Cleary and others. Defendants had judgment, and plaintiff appeals.

Reversed.

E. W. Camp, for appellant.

The court erred in admitting proof of the talk between defendant's and plaintiff's intestate. Because it was offered for the purpose of varying the terms of a written agreement. *Dean* v. *Bank*, 6 Dak. 222; *Hennessy* v. *Griggs*, 1 N. D. 52; *Fuel Co.* v. *Bruns*, 1 N. D. 137. It was also inadmissable under § 5260 Comp. Laws; *Taylor* v. *Bunker*, 36 N. W. Rep. 66; *Reherds Admr.* v. *Clem*, 10 S. E. Rep. 504; *Harris* v. *Bank*, 1 So. Rep, 140; *Bragne* v. *Lord*, 67 N. Y. 495; *Heyne* v. *Doerfler*, 26 N. E. Rep. 1044; *Holcomb* v. *Holcomb*, 95 N. Y. 316; *Ebert* v. *Roth*, 24 At. Rep. 685.

S. L. Glaspell, for respondents.

Parol testimony was offered to show the understanding of the

parties of the meaning of the technical words used in the contract—towit: "custom work." There was no attempt made to change or vary the agreement, simply to ascertain what it was. *Chandler* v. *Thompson*, 30 Fed. Rep. 38–43. The admission of evidence objected to, if error was without prejudice. *Spencer* v. *Robbins*, 5 N. E. Rep. 726.

CORLISS, J. This suit was commenced by Charles Hutchinson. Before the trial he died. The action is continued in the name of the administrator of his estate. The deceased was a proprietor of a flour mill in South Dakota. To induce him to move his plant to New Rockford, N. D., the defendants entered into a written contract with him. This agreement, omitting the signature, was in the following words and figures: "This contract is entered into this thirteenth day of August, A. D. 1885, by and between Charles Hutchinson, of Oskaloosa, Iowa, on the first part, and Joseph Cleary, J. M. Patch, Frank A. Brown, E. E. Henderson, T. R. Palmer, Frank S. Dunham, John R. Winslow, H. M. Clark, John G. Frankland, *et al* of New Rockford, Eddy County, Dakota Territory, on the second part. And this contract witnesseth that said party of the first part agrees to bring to New Rockford, Eddy County, Dakota Territory, the machinery, engine, and boiler now in his mill at Mt. Vernon, Dakota Territory, and to add thereto new roller machinery, of the best pattern and workmanship, to constitute and complete a mill of seventy-five barrels capacity, and to erect the same at New Rockford, D. T., as quickly after the date hereof as practicable, and to operate the same as steam flouring mill, doing custom work at said place, for a period of five years from date hereof, unless prevented by inevitable necessity, or transfer of ownership, In consideration whereof the parties of the second part agree to provide and guaranty the following privileges: *First.* A deed for five acres of land contiguous to James river, with a right of way for a spur track from the Northern Pacific R. R. track, as a site for said mill; said deed to be given on arrival of lumber on the ground. *Second.* Nine cords of building rock for the foundation

of the mill, to be deposited on the site at once, on execution hereof. *Third.* Free transportatation for four car loads of lumber from Minneapolis, and two car loads of machinery from Fargo. *Fourth.* The sum of five hundred dollars, to be paid in cash on arrival of lumber on the ground. *Fifth.* A deed for town property of present value of one thousand dollars, when the mill is completed and running. *Sixth.* Subscriptions of wheat and cash of the value of one thousand dollars, to be paid by November 1st, 1885, if mill is completed and running by that time; and if not, as soon as it is completed and running. *Seventh.* It is hereby agreed and understood between the parties that any or all of the cash subscriptions in this section above mentioned may be paid in carpenter and other work in the construction of said mill, at the usual wages for such labor, provided such labor is needed by, and can be rendered satisfactorily to, said Charles Hutchinson or his agent; but the first five hundred dollars subscription specified in fourth section shall, as therein stated, be paid in cash, on the arrival of lumber on the ground. And it is further understood and agreed between contracting parties that said Charles Hutchinson shall not sell or transfer ownership of said mill without causing the new proprietor to assume all liabilities under this contract and especially the one to operate the mill as a custom mill for five years from the date hereof, at said town of New Rockford, D. T., and that when such new proprietor shall thus assume this contract the said Charles Hutchinson shall be fully released therefrom. Witness our hands this thirteenth day of August, A. D. 1885." The action was brought to recover the balance due under this agreement, the plaintiff averring that he had performed all the conditions on his part which are conditions precedent to a recovery. It is undisputed that the defendants had performed the 1st, 2d, 3d, and 4th conditions of the agreement, and that they had partially performed the 5th and 6th conditions. It is to recover the balance due under these two conditions that the action was brought. It was claimed that the town property deeded to plaintiff's intestate was of the value of

only $500 instead of $1,000, and, instead of securing subscriptions of wheat and cash of the value $1,000, they had furnished such subscriptions of the value of $200 only. The defendants allege that plaintiff failed to perform his part of the agreement, in several particulars, and seek to recover back the money paid him.

The conclusion we have reached makes it necessary for us to refer to only one of these matters. The contract provides that plaintiff is to operate this mill as a steam flouring mill, doing custom work. The defendants aver plaintiff had not, up to the time the answer was interposed, operated a custom flour mill at New Rockford. The mill which plaintiff was to operate was a roller mill. It is undisputed that the words "custom work," when used with reference to such a mill, have a meaning different from that which attaches to them, as applied to the old fashioned grist mill. One of the witnesses who was sworn on this point said that "a custom mill is a mill that takes in farmer's grain, and grinds it, for a certain amount of toll. A roller mill gives the farmer back the equivalent of the flour from his own grain. The small old fashioned mill grinds the farmer's grain. The large mill, even if it is stone mill, exchanges. The meaning of 'custom work,' as applied to roller mill, is that the farmer gets a certain amount of flour, bran, and shorts for a given number of bushels of wheat. A roller mill gives the equivalent, instead of the flour, from the identical grain. A roller mill gives the equivalent, instead of the flour from the same grain, because there are too many machines for the different products of grain. The mill is too complicated." It was undisputed that, in the operation of this mill, custom work was done, according to the significance of these words as applied to a roller mill. There was therefore nothing to submit to the jury on this point; and yet the court, after stating to the jury the fact that the defendants had put in issue the fact whether custom work was done by the mill, submitted to the jury the question whether the mill was operated as a custom mill. To this portion of the charge the plaintiff

excepted. This action of the court renders it impossible for us to determine whether the jury did not decide against the plaintiff upon the strength of certain incompetent testimony, to which we will now refer. E. E. Henderson, one of the defendants, was asked to testify to a conversation which took place between himself and the deceased, in his lifetime, prior to the time when the written contract was executed. The question was objected to as incompetent under § 5260, Comp. Laws, and as generally incompetent and immaterial. The answer was as follows: "Mr. Hutchinson said he would build a roller mill at New Rockford under certain conditions. We asked what a roller mill was, and it was defined, to some extent, by Mr. Hutchinson. His definition was a machinery mill for exchange, and grinding flour for sale. Our reply was, we wanted a mill for the benefit of the farmers, where we could take our own wheat, and get it ground, and get our flour from our own wheat; and we said: 'We will have that, if we put our money into it. We will have the kind of mill we want.'" This evidence was immaterial, except as it tended to throw light upon the agreement between the parties; and it was incompetent for that purpose, as it was directly contrary to the terms of the written contract subsequently entered into. Under the written contract, plaintiff agreed, not to give the defendants a grist mill, but a custom mill, according to the meaning of the word "custom," when applied to a roller mill, *i. e.* a mill where an equivalent in flour, etc., is given for wheat. It was improper to allow the jury to hear evidence contradicting the contract the parties had made; and it was error to submit to them the issue whether the mill was operated as a custom mill, when there was no such issue before the jury, under the evidence, except on the theory that this incompetent evidence created such an issue, and the jury had a right to consider it, and even to base a finding upon it, directly against the clear and explicit terms of the written agreement. It is by no means certain that the jury did not find against the plaintiff upon the sole ground that the mill was not operated as a custom mill, and when it is undisputed that it is was so operated.

The evidence of the witness Henderson was incompetent, also, under § 5260, Comp. Laws: "In civil actions or proceedings by or against executors, administrators, heirs at law, or next of kin, in which judgment may be rendered or order entered for or against them, neither party shall be allowed to testify against the other as to any transaction whatever with, or statement by, the testator or intestate, unless called to testify thereto by the opposite party. But if the testimony of a party to the action or proceeding has been taken, and he shall afterwards die, and after his death the testimony so taken shall be used upon any trial or hearing in behalf of his executors, administrators, heirs at law or next of kin, then the other party shall be a competent witness as to any and all matters to which the testimony so taken relates." The defendants endeavor to escape the force of the statute by the assertion that, the agent of the deceased being present at the time the conversation took place, the case does not fall within the spirit of the law. We find no such exception in the act itself, nor do we agree with counsel for defendants that such a circumstance takes the case without the spirit of the law. The theory and philosophy of the act are that one party to a conversation or transaction shall not secure an undue advantage in proving what took place because the lips of the other party are sealed by death. If a third person was present, the surviving party to the conversation or transaction can call him as a witness The authorities are numerous in support of the doctrine that the presence of a third person at the conversation does not render the surviving party a competent witness against the representatives of the deceased, under statutes similar to ours. *Taylor* v. *Bunker*, (Mich.) 36 N. W. Rep. 66; *Heyne* v. *Doerfler*, (N. Y. App.) 26 N. E. Rep. 1044; *Holcomb* v. *Holcomb*, 95 N. Y. 316; *Harris* v. *Bank*, (Fla.) 1 So. Rep. 140. See, also, *Ebert* v. *Roth*, (Pa. Sup.) 24 At. Rep. 685; *Reherd's Adm'r* v. *Clem*, (Va.) 10 S. E. Rep. 504. Nor can we see why the principle should be any different where the agent of the deceased is present at the conversation. No case has been cited which holds that such a fact makes any difference;

and, even if such a distinction could be made, it would not control this case, for the person present at the talk between Henderson and the deceased, conceding him to have been the agent for the deceased in the transactions connected with the matters discussed, could not be agent for his principal, and act for him, in a transaction, when the principal himself was present, and carrying on the negotiations, and conducting the business. The case is therefore assimilated to a case where a third person is present, and under such circumstances the decisions are unanimous that the evidence of the surviving party to the conversation or transaction is incompetent. Of course, if the talk had been had with the agent alone, it would not have been a conversation with the deceased, and therefore the case would not have fallen within the statute. But no such question is presented on this appeal. For the errors to which we have referred, the order and judgment are reversed, and a new trial is ordered. All concur.

(55 N. W. Rep. 729.)

JOHN COMASKEY *vs.* NORTHERN PACIFIC R. R. CO.

Opinion filed May 31st, 1893.

Personal Injuries—Damages—Effect Upon Mental Powers—Instruction.

In an action to recover for personal injuries, where there is no claim in the complaint or in the evidence that plaintiff's mental powers were in any manner impaired by the injury, it is error for the trial court to instruct the jury that in estimating the damages they may take into account the effect of the injury upon plaintiff's mental powers.

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

Action for personal injuries by John Comaskey against the Northern Pacific Railroad Company. Plaintiff had judgment, and defendant appeals.

Reversed.

Ball & Watson, for appellant.

To recover damages for the impairment of the mental faculties, plaintiff must both allege and prove such injury. There being no such allegation or proof in this case, the court's instruction that if the jury found for the plaintiff they should allow him damages for the effects of the injury on his mental powers—was clearly wrong. The rule laid down by the court was in-applicable to the facts proven, and was prejudical to defendant. *Michigan Bank* v. *Eldred*, 9 Wall. 544; *Chicago* v. *Robbins*, 2 Black. 418. Thompson on Charge to Jury § § 62, 63; *Willis* v. *Railroad Co.*, 17 A. and E. R. R. Cases, 542.

It will as a rule be regarded as error in the court to give to the jury instructions, which are unsupported by evidence in the case for the reason that they tend to mislead the jury, even though abstractly correct in principle and law. *Insurance Co.* v. *Baring*, 20 Wall. 158; *Webster College* v. *Tyler*, 35 Mo. 268; *Achltree* v. *Carl*, 23 Ia. 394; *Beaver* v. *Taylor*, 1 Wall. 644; *Clark* v. *Dutcher*, 9 Cowan 674; *Cane* v. *People*, 3 Neb. 357. See, also, *Battles* v. *Tallman*, 11 So. Rep. 247; *Coal Creek, etc.* v. *Davis*, 18 S. W. Rep. 387; *Perot* v. *Cooper*, 28 Pac. Rep. 391.

Taylor Crum, for respondent.

Respondent contends that "mental suffering" and "effects on mental powers," mean practically the same thing. That damages may be recovered for pain of mind. Citing *Farchild* v. *Cal. Stage Co.* 13 Cal. 601; *Railroad Co.* v. *Barron*, 5 Wall. (U. S.) 90; *Masters* v. *Warren*, 27 Conn. 293; *Penn. & O. Canal Co.* v. *Graham*, 63 Penn. St. 290; *Sherwood* v. *Ry. Co.*, 46 N. W. Rep. 773.

BARTHOLOMEW, C. J. This is a personal injury case, and involves but a single point. There was a verdict and judgment for the plaintiff. The court, in its general charge to the jury, used the following language: "If you find for the plaintiff, he is entitled to a verdict for the full amount of damages suffered by him on account of his injuries, not exceeding ten thousand dollars; and in considering the extent of his injuries you will take into account the extent of injury, of bodily pain and suffering which

he may have suffered, according to its degree, and the bodily injury, taking into account the loss of time, the effects of the injury on plaintiff's health, its effects on his mental powers, its effect on his bodily powers, upon his capacity for labor, the pursuit of an occupation, and the earning of money." Exceptions to this instruction were saved, and it is urged that it assumes the existence of the facts therein stated, instead of leaving them to be determined by the jury. This is hypercritical. The court had already instructed the jury as to what facts they must find to exist before they could return a verdict for plaintiff. The court then said: "If you find for plaintiff he is entitled," etc., which was exactly equivalent to saying, "if you find the facts to exist as hereinbefore stated, plaintiff is entitled," etc. The instruction assumed nothing.

It is next urged that there is no evidence in the case tending to show that plaintiff's capacity to earn money was in any manner impaired by the injury he received. We think otherwise. The testimony, as a whole, clearly tends to establish that plaintiff's ability to earn money was actually impaired by the injury he received.

But the third objection urged against the instruction is fatal. There was no claim in the complaint or in the evidence that plaintiff's mental powers had been in any manner affected by the injury, yet the court directed the jury to take into account, in estimating plaintiff's damages, the effect of the injury on his "mental powers." It is conceded that mental suffering is a proper element of damages, and that the impairment of mental faculties is also a proper element, when claimed and proven, but it is neither claimed nor proven in this case. This position is not controverted by plaintiff. His contention is that the instruction did no more than to direct the jury to take into account plaintiff's mental suffering. We cannot so construe this language. It would be idle to follow counsel in his metaphysical dissertion upon abstract mental qualities. This language was addressed to men of average business intelligence, and must be construed in its

general acceptation. We speak of physical suffering, and of effect upon physical powers, and no one would claim for a moment that the two things were identical. Physical suffering may exist, and be an element of damage, and yet there be no impairment of the physical power to earn money; and the physical power to earn money may be greatly impaired, and an element for substantial damage, and yet there may exist no suffering whatever. True, the two, for a time at least, after an injury, are usually present together, but there is no necessary connection between them. The same is true in the mental domain. Mental suffering may exist, and the mental powers—that is, the power to exercise the mental faculties for the purpose of earning money or otherwise—be in no manner affected. On the other hand the power to thus exercise the mental faculties may be impaired or destroyed, and yet there may be no mental pain. What the court intended is clear from the context. The jury were directed to consider "the effects of the injury on plaintiff's health, its effects on his mental powers, its effects on his bodily powers, upon his capacity for labor, the pursuit of an occupation, and the earning of money." The effect upon the mental powers, and the effect upon bodily powers,—and the one just as much as the other,—were to be considered directly as bearing upon plaintiff's capacity to labor and to earn money. But as to the mental powers there was nothing of the kind in the case. Nor can we say this error was harmless, coming as it did; and, under the medical expert testimony in this case, its effect upon the jury is purely conjectural. It may not have been prejudicial to defendant, and it may. We cannot determine. Under these circumstances our duty is clear. The District Court is directed to reverse its judgment, and order a new trial.

Reversed. All concur.

(55 N. W. Rep. 732.)

JAMES C. CLARK *vs.* J. O. SULLIVAN AND H. G. VOSS, INTERVENER.

Opinion filed June 9th, 1893.

Attorneys Lien for Compensation.

The lien of an attorney for money due his client, in the hands of the adverse party, under § 470, Comp. Laws, when secured by compliance with the requirements of that section, gives the attorney an interest in such moneys, similar to that of an equitable assignee thereof.

Lien Extends to Undertaking for Payment of Judgment.

His interest extends to and embraces the judgment rendered in the action to recover such moneys, and also the undertaking to pay such judgment, given by the defendant in such action on appeal, and also the cause of action on such undertaking against the surety thereon. The attorney has the same equitable interest in such judgment, undertaking, and cause of action upon the undertaking that he has in the money due his client from the adverse party.

Surety—Right to Set Off—Priority.

When, however, the surety on such undertaking, after the attorney had secured his lien, but before the surety had notice thereof, purchased a judgment against the client, *held* that, in an action upon the undertaking, on appeal, the surety's right to set off such judgment was absolute, and was unaffected by the attorney's lien.

Notice of Lien—Upon Whom Binding.

The entry of notice of lien under Subd. 4 of § 470 is not notice to any except the judgment debtor.

Rights of Assignee of Judgment.

One who buys a set off to a claim against him, without notice of a prior assignment of such claim, may use the set off as a defense, the same as though the claim against him had not been assigned.

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

Action on a bond by James C. Clark against James O. Sullivan. Henry G. Voss intervened, claiming an interest in the controversy. From the order sustaining a demurrer to the complaint in intervention, intervener appeals.

Affirmed.

H. G. Voss, for appellant.

Interveners lien for attorneys fee's upon the judgment and the

proceeds thereof is superior to the set off pleaded by the respondent. *Kinne* v. *Robinson*, 29 N. W. Rep. 86; *Rice* v. *Day*, 49 N. W. Rep. 1128; *Wards* v. *Watson*, 44 N. W. Rep. 27; *Brainard & Johnson* v. *Elwood*, 3 N. W. Rep. 799; *Reynolds* v. *Reynolds*, 7 N. W. Rep. 322; *Rooney* v. *Second Ave. R. R. Co.* 18 N. Y. 368, 3 S. E. Rep. 7. An attorney has a lien for his costs upon a fund recovered by his aid paramount to that of the person interested in the fund or those claiming as creditors. The reason for the rule is that the services of the attorney have in a certain sense created the fund and he ought in good conscience to be protected. *Puett* v. *Beard*, 86 Ind. 172, 44 Am. Rep. 280; *Justice* v. *Justice*, 16 N. E. Rep. 615; *Anderson* v. *Morse*, 12 Conn. 444; *Stratton* v. *Hussey*, 62 Me. 286; *Boyle* v. *Boyle*, 106 N. Y. 654, 12 N. E. Rep. 709.

F. H. Register, for respondent.

The lien given by statute is on money in the hands of the adverse party and not on the judgment. Subdivision 4, § 470, Comp. Laws. *Seevers*, J. in *Brainard & Johnson* v. *Kinsey Elwood*, 3 N. W. Rep. 799. The lien of the attorney is upon the interest of his client in the judgment and is subservient to the right of set off in the other party. *Mohawk Bank* v. *Smith*, 6 Johns. Ch. 317; *Tiffany* v. *Stewart*, 14 N. W. Rep. 241; *McDonald* v. *Smith*, 57 Vt. 502; *Bosworth* v. *Tallman*, 29 N. W. Rep. 542; *Nat. Bank* v. *Eyre*, 8 Fed. Rep. 733; *Yorton* v. *Milwaukee, etc., Ry. Co.*, 23 N. W. Rep. 401; *Porter* v. *Lane*, 8 Johns. 277; *Nicoll* v. *Nicoll*, 16 Wend. 446, 1 Am. and Eng. Enc. Law, 972.

CORLISS, J. The contest before us is between the defendant, Sullivan, and the intervener, Voss. The action is upon an undertaking executed by defendant, Sullivan, to plaintiff, Clark, as surety for one Mead, against whom Clark had recovered judgment before a justice of the peace. From this judgment, Mead appealed to the District Court, and on this appeal the undertaking sued upon was executed by Sullivan, as surety for Mead. In this undertaking, Sullivan, in substance, agreed that he would pay the

amount of any judgment which should be rendered against Mead, in and by the District Court, on such appeal. Judgment having been recovered by Clark against Mead in the District Court, he (Clark) brought this suit against defendant, Sullivan, upon the undertaking.

As a counterclaim to the plaintiff's cause of action, defendant, Sullivan, interposed a judgment recovered against plaintiff, Clark, in favor of Fairbanks, Morse & Co., which judgment was assigned to Sullivan before the commencement of this action. That such judgment constitutes a valid counterclaim, as against Clark, cannot be disputed. *Wells* v. *Henshaw*, 3 Bosw. 625; *Clark* v. *Story*, 29 Barb. 295; Pom. Rem. & Rem. Rights, § 799. But the intervener, Voss, who was allowed to serve a complaint in intervention, insists that the judgment can be interposed as a counterclaim against plaintiff's cause of action on the undertaking only to the extent of plaintiff's interest in that cause of action, after deducting therefrom the amount of an alleged attorney's lien which he (Voss) insists he had upon the plaintiff's cause of action against Sullivan, and upon the undertaking at the time Sullivan purchased the judgment against Clark. Had the attorney such a lien? And, if so, what is the nature of that lien? These are the questions which it is important for us to determine.

The attorney's claim to a lien grows out of the following fact: Mr. Voss was attorney for Clark in the action against Mead. In that action he rendered services for Clark in both courts, worth the sum of $45. After the recovery of the judgment against Mead in the District Court, Mr. Voss entered his notice of lien to the sum of $45 in the judgment docket, opposite to the entry of the judgment. Under our statute, this gave him a lien, but what did it give him a lien upon? The language of our statute leaves no room for construction upon this point. The statute, so far as it is material to this inquiry, provides as follows: "An attorney has a lien for a general balance of compensation in and for each case upon: * * * *Third.* Money due his client, in the hands of the adverse party, or attorney for such party, in an action or

proceeding in which the attorney claiming the lien was employed, from the time of giving notice in writing to such adverse party, or attorney for such party, if the money is in the possession or under the control of such attorney, which notice shall state the amount claimed, and, in general terms, for what services. *Fourth.* After judgment in any court of record, such notice may be given, and the lien made effective against the judgment debtor, by entering the same in the judgment docket, opposite the entry of the judgment." Comp. Laws, § 470, subds. 3, 4. It is plain from this language that the lien is not upon the judgment, as the principal thing. The lien is upon the money due the client, in the hands of the adverse party. That lien, before judgment, can be secured by serving notice as prescribed by subd. 3 of the section. After judgment it can be secured by making the entry therein provided for. But the lien is the same in either case. It is a lien upon the money due, and not upon the judgment itself. After judgment has been recovered, that lien can be secured only by making this entry, unless the notice required by subd. 3 has already been given. In case that notice has been given it is possible that no further notice would be necessary, so far as the judgment debtor is concerned. Whether it would suffice, as against a third person, having no actual notice, it is not proper to determine in this case. But whether notice is given under subd. 3, or an entry is made under subd. 4, of § 470, the lien is primarily upon the money due, and not primarily upon the judgment itself. *Winslow* v. *Railroad Co.*, (Iowa,) 32 N. W. Rep. 330. In this case, however, the intervener is compelled to insist that he has a lien upon the judgment, and upon the undertaking signed by Sullivan, and upon the cause of action upon such undertaking. Defendant, Sullivan, is seeking to set off the judgment against plaintiff, which he has purchased, against plaintiff's claim arising out of the undertaking. It is obvious that Sullivan's right to have this set off allowed is absolute, if the undertaking is owned by plaintiff, and no one else has any interest in it. The statute confers upon him a legal right to defeat plaintiff's cause of action by

interposing this judgment as a counterclaim. Sections 4914, 4915, Comp. Laws. The intervener can maintain his claim to priority, as against this judgment, in one way only. He must show that to the extent of his lien for services he is, in equity, the owner of plaintiff's cause of action on the undertaking. If he became such owner before Sullivan's right to set-off the judgment accrued to him, and Sullivan had notice of his rights at the time he (Sullivan) bought the judgment against plaintiff which he seeks to set off, then we are of opinion that, to the extent of the intervener's lien, the judgment does not constitute a proper counterclaim.

What were the rights of the intervener with respect to this undertaking, and the cause of action thereon against Sullivan? We are clear that he had all the rights with regard to this instrument that he had with respect to the judgment against Mead in favor of the plaintiff. This undertaking was executed by Sullivan in the very case in which the judgment was rendered, and in the undertaking Sullivan promised to pay any judgment which the District Court might render in the case. The undertaking is but an additional security, provided for by the law, for the payment of the money due from Mead to the plaintiff. The lien which attaches to the money must necessarily attach to the undertaking. The money which Sullivan is to pay under this undertaking is the money which the attorney has secured for his client by the labor he has bestowed upon the original case. Nor is authority wanting to support our views. *Newbert* v. *Cunningham*, 50 Me. 231; *Hobson* v. *Watson*. 34 Me. 20; *Martin* v. *Hawks*, 15 Johns. 405; *Wilkins* v. *Batterman*, 4 Barb. 48. The reasoning upon which these cases rest is that the rights of an attorney, under his lien, are those of an equitable assignee of the judgment, to the extent of his lien. Under our statute he would be the equitable assignee of the money due from the debtor to the creditor. Of course, as such assignee, he would have the same interest in any undertaking or cause of action which the creditor, his client, might have, as security for the payment of such money. The

intervener being, to the extent of his lien, the equitable assignee of the plaintiff's claim for money due him from Mead, he was also, to the same extent, the equitable assignee of the undertaking given by Sullivan on the appeal. It is a familiar principle that the assignment of the principal thing carries with it all incidents. Our Code so declares, in express terms. Section 3243, Comp. Laws. In *Hobson* v. *Watson*, 34 Me. 20, the attorney had recovered a judgment for his client. Upon this judgment he had a lien for his services. The debtor in the judgment gave a poor debtor's bond, under the statute, to secure his release from execution issued upon the judgment. The client claimed the right to discharge the bond without the consent of the attorney. This the attorney contested, and it thus became necessary to determine whether the attorney had the same lien upon the bond which he had upon the judgment. The court decided that he did have such lien upon the bond, saying: "Does the lien extend to the bond in suit, and embrace it? The attorney has an interest in the judgment, to the amount of more than half of it. What is the nature of that interest? It is the property in it, to the extent of such interest, as much as if the creditor had assigned it to him as collateral security for his fees and disbursements; and, it being the property of the attorney, he has all the legal incidents which attach to it, and which by law may arise from it. He could not claim a right to the benefit of any contract made between the creditor and debtor in relation to the mode of satisfying the judgment, when it was voluntarily entered into, and not prescribed by law. The debtor has the right, without the consent of the creditor, to give a bond to release himself from arrest in execution. It does not depend upon the will of the creditor. It is a legal incident attached to the judgment and execution. The creditor is compensated by the bond for the liberation of the debtor. The bond belongs to the owner of the judgment. If the whole amount due upon the judgment was costs, upon which the attorney had a lien, would not he be entitled to the control of the bond? It would be his property, in equity, and he would have a

right to use the name of the nominal party in a suit upon it." In *Newbert* v. *Cunningham*, 50 Me. 231, the defendant in a replevin suit recovered judgment for return of the property. The execution upon this judgment being returned unsatisfied, the defendant who had recovered the judgment brought suit upon the replevin bond. He obtained a judgment upon this bond, but, the sureties being insolvent, he sued the sheriff for taking an insufficient bond. This last action was settled by the plaintiff therein without the consent of his attorney in the original replevin suit, in which the plaintiff recovered judgment. The attorney, claiming a lien for his services upon the original judgment in the replevin action, insisted that he had a lien to the same extent upon the cause of action against the sheriff for taking an insufficient bond, and that, therefore, the action could not be settled without his consent, to the prejudice of such lien. The court sustained him in this contention, saying: "The attorney, being regarded as an equitable assignee of the judgment, has a right to the same remedial processes as his client to obtain satisfaction to the extent of his lien. The replevin bond is a substitute for the property replevied, and a security for the damages and costs arising in the prosecution of the suit. The right to enforce it is one of the fruits of the judgment. It accrues after its rendition. It is by its enforcement that the judgment is made available. The attorney, as incidental to the jugment, has a right to enforce it, which his client cannot defeat. The bond is made running to the defendant in replevin. The attempt to collect it was ineffectual. The sureties were insolvent. But this will not discharge the sheriff. Until the attempt was made, and failed, he might have insisted it would have been successful. It being the duty of the sheriff to take a replevin bond with sufficient sureties, he is liable in case of their insufficiency. But to whom? Manifestly, to the person to whose benefit the bond, if good, would accrue. The damages awarded for taking an insufficient bond are the compensation for the loss arising therefrom. The person holding the bond is the one who suffers from the insolvency of the sureties.

The defendant in replevin would primarily be entitled to the damages arising from an insufficient bond, if he obtained judgment, and as a consequence thereof. But the lien of the attorney is equivalent to an assignment of the judgment. The attorney, having a right to enforce the bond, has a right to the damages which may be given for and on account of its insufficiency. The assignment of the judgment carries with it the replevin bond, and the right to enforce it, and, in case of failure to collect, the right of action to damages by way of compensation for such failure. The assignor has no right to the suit. The action exists by virtue of the judgment, and as a mode of making it available, or of affording an adequate remedy to the party suffering through the neglect of the officer; and that judgment, to the extent of his lien, belongs to the attorney."

That the rights of the attorney, under his lien, are those of an equitable assignee, is supported by many decisions, and is sound on principle. *Warfield* v. *Campbell*, 38 Ala. 527, 534; *Ely* v. *Cooke*, 28 N. Y. 365; *Perry* v. *Chester*, 53 N. Y. 240; *Marshall* v. *Meech*, 51 N. Y. 140; *Rooney* v. *Railroad Co.*, 18 N. Y. 368. The intervener therefore became an equitable assignee of this undertaking, to the extent of $45, his bill for services, several days before the defendant, Sullivan, had secured the right to set off the judgment against Clark. He (Sullivan) did not purchase this judgment until about a week after the intervener entered notice of his lien upon the judgment docket. But unless Sullivan had notice of this equitable assignment at the time he bought the judgment against Clark, his right to set off such judgment against his liability on the undertaking cannot be defeated by such assignment. Section 4871, Comp. Laws, provides: "In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set off or other defense existing at the time of, or before notice of, the assignment; but this section shall not apply to negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due." Under the terms of this section the right to set off a claim

purchased by the debtor before notice of the assignment of the claim against the debtor, is unaffected by the assignment, although the assignment is made before the right of set off accrues to the debtor. *Natchez* v. *Minor*, 9 Smedes & M. 544; *Lockwood* v. *Bates*, 1 Del. Ch. 435; *Bank* v. *Balliet*, 8 Watts & S. 311; *Martin* v. *Wells, Fargo & Co's Express*, (Ariz.) 28 Pac. Rep. 958. The statute only embodies a well established doctrine of the common law.

That defendant, Sullivan, had actual notice of the equitable assignment of the cause of action against him on the undertaking to Voss before he (Sullivan) purchased the set off, is not pretended. It only remains to be considered whether the entry of the lien in the judgment docket constituted notice to him. When we examine the statute, we find that it limits to the judgment debtor the effect of this entry as notice. It says that by this entry the lien is made effective against the judgment debtor. It is apparent that the statute does not mean that any lien is created against the judgment debtor, or against his property, but merely that the entry of the notice constitutes notice to him, so that he cannot thereafter disregard the interests of the attorney in the moneys which he (the debtor) owes the client The legislature has so restricted the operation of this entry of notice that only the judgment debtor is affected by it. His surety on an appeal undertaking is not within the statute. The attorney can protect himself by giving such surety actual notice of his lien, and from that moment the surety pays the client, or purchases a set off against him, subject to the attorney's rights. The case of *Hroch* v. *Aultman & Taylor Co.*, (S. D.) 54 N. W. Rep. 269, has been cited to support the priority of the attorney in the case. But in that case the right of set off was held by the court not to be absolute, as in the case at bar. Here the defendant is relying upon a legal set off which he purchased against the plaintiff's cause of action against him, without notice that an equitable assignment of the defendants claim had been made to the attorney, whereas in that case the court was dealing with the question

of the right of a judgment debtor to set off against the judgment obtained against him another judgment recovered by him against the plaintiff in the first named judgment. The court held the right to set off one judgment was not an absolute right, under the statute, but that the court would be governed by circumstances in granting or denying the application to set off mutual judgments. That the right was not absolute, under the decisions, cannot be doubted. The application to have judgments set off was in the nature of an appeal to the equity of the magistrate. When it would defeat justice to grant the application, it was refused. To the extent that the setting off of one judgment against another would affect the rights of third persons—rights which have equitable claim to superiority—the court will refuse to compel the payment of one of these judgments with the other. *Puett* v. *Beard*, 86 Ind. 172; *Thropp* v. *Insurance Co.*, 125 Pa. St. 427, 17 Atl. Rep. 473; *Diehl* v. *Friester*, 37 Ohio St. 473; *Brown* v. *Hendrickson*, 39 N. J. Law, 239. See cases cited in note to *Duncan* v. *Bloomstock*, 13 Am. Dec. 730. Our statute regulating this matter is the same as that of South Dakota. It provides that "mutual final judgments may be set off *pro tanto*, the one against the other, by the court, upon proper application and notice." Section 5109, Comp. Laws. Whether we should agree with the Supreme Court of that state in the view that this statute works no change in the former doctrine, it is not necessary now to decide. It is sufficient to distinguish the case from that state, relied on by the intervener, that the court held that in that jurisdiction the court will exercise its discretion on an application to set off judgments, and will grant or withhold relief according to justice, having regard to those rights of third persons which will be affected by the granting of such relief. The right of the defendant to interpose this judgment against plaintiff as a counterclaim is absolute, under the statute, he having purchased the same before notice of the intervener's equitable interest in the undertaking. The order

sustaining the demurrer to the complaint in intervention is affirmed. All concur.

(55 N. W. Rep. 733.)

NOTE—For right of offset by surety, see *Clark* v. *Sullivan*, 2 N. D. 103.

HENRY C. BRANSTETTER *vs.* WILLIAM H. MORGAN.

Opinion filed May 31st, 1893.

Evidence to Refute Inference or Presumption of Fact.

A plaintiff may properly introduce evidence to refute an inference or presumption of fact that might arise from matters drawn from himself on cross-examination, even though such evidence has no direct bearing upon the issues, and the time of the introduction of such evidence is peculiarly within the discretion of the trial court.

Claim and Delivery—Ownership—Verdict.

In claim and delivery, where each party claims the right of possession by virtue of absolute ownership, and in no other manner, a verdict which finds the plaintiff entitled to the possession of the property, and fixes its value, will support a judgment for plaintiff for possession of the property, or its value as found by the jury.

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

Action by Henry C. Branstetter against William H. Morgan for the recovery of six horses. Plaintiff had judgment, and defendant appeals.

Affirmed.

M. A. Hildreth, for appellant.

G. K. Andrus, for respondent.

BARTHOLOMEW, C. J. The judgment in favor of the plaintiff in this case must be affirmed. There was practically no defense to the action. The case was claim and delivery for six horses. Both parties claimed by absolute ownership. Plaintiff's evidence showed that he raised the horses on his ranch in Umatilla County, Or.; that they were branded when young colts with a Y brand on the left shoulder; that these horses, with 25 or 30 more, were

stolen from his ranch about August 5th, 1891, and that they were shipped east over the Northern Pacific Railroad by a party by the name of C. McCullom. Plaintiff positively identified the horses, both by the brand and by general appearance. The branding iron with which these horses were branded, and which plaintiff swore he had used for more than 12 years, was put in evidence, over defendant's objection. It might have been of assistance in identifying the horses, and was thus material. Plaintiff's neighbors who had assisted him in branding swore positively to the branding iron, and to plaintiff's loss of horses, but these witnesses were not permitted to see the horses in controversy, they being still in defendant's possession. Defendant's claim of title rested exclusively upon the fact that he purchased the horses in August, 1891, from one Charles McCullom, at Tower City, in this state, and paid full value therefor. This was consistent with and corroborative of plaintiff's evidence. No effort whatever was made by defendant to show that McCullom had any title to the horses. But it was sought on cross-examination of plaintiff to draw out matter on which to base an argument to the jury that plaintiff and McCullom were in collusion, because plaintiff had not taken active measures to apprehend and punish McCullom. In rebuttal of this idea, plaintiff was permitted to introduce, over defendant's objection, a subscription paper signed by thirty citizens of Oregon, and to which plaintiff was its largest subscriber, which was gotten up to raise funds to capture and convict parties implicated in stealing horses, and which paper stated that "H. C. Branstetter is a heavy loser." Plaintiff was also allowed, over objection, to show, by the district attorney of Barnes County, that he applied to that officer to prosecute said McCullom, and by a justice of the peace that a warrant was issued for said McCullom, and by the deputy sheriff that said warrant was placed in his hands, and he went to New Rockford to arrest said McCullom, but did not find him. This was all proper to rebut the claim that plaintiff was in collusion with McCullom, and was properly admitted. See *State* v. *McGahey*, 55 N. W. Rep. 753, 3 N. D. (decided at

this term,) and cases there cited. The order in which the proof was offered might be open to criticism, but that matter is peculiarly in the discretion of the trial court. The verdict finds the plaintiff entitled to the possession of the property, and the value thereof. It is urged that this is entirely insufficient to support the judgment for plaintiff, in that it does not pass upon the question of ownership. Some early Wisconsin cases are cited to support the claim. These cases for the most part were decided when the practice in replevin cases was *quasi* criminal, and the plea of "not guilty" put in by defendant put in issue every material allegation in the complaint. Ownership, both general and special, was thus put in issue; also the right of possesion, as well as the wrongful taking or wrongful detention. It is elementary that the verdict must respond to all the issues; and this is the same whether the issues are raised by plea of "not guilty" or specifically by answer. But in this case there was, under the pleadings, but the one issue. Each party claimed absolute ownership. Neither claimed any right, except such as flow from and are incident to such ownership. Under the pleadings, ownership necessarily carried with it the right of possession, and the party entitled to possession was necessarily the owner. The verdict settled the only issue in the case, and was sufficient. *Krause* v. *Cutting*, 32 Wis. 688; *Everit* v. *Bank*, 13 Wis. 468; *Faulkner* v. *Meyers*, 6 Neb. 415; *Underwood* v. *White*, 45 Ill. 438; *Clark* v. *Heck*, 17 Ind. 281; *Payne* v. *June*, 92 Ind. 253.

Judgment affirmed. All concur.

(55 N. W. Rep. 758.)

STATE *vs.* ARTHUR MCGAHEY.

Opinion filed July 7th, 1893.

Redirect Examination of Defendant.

It is proper upon the redirect examination of a witness in a criminal case to permit him to state facts and circumstances that tend to correct or repel any wrong impressions or inferences that arise from the matters drawn out on cross-examination, and this rule is not changed because such facts and circumstances may be of such a character as to prejudice the defendant in the minds of the jury.

Harmless Error—Not Ground for Reversal.

An error of the court in ruling upon the admission of evidence that conclusively appears to have been innoxious, and could have worked no prejudice to the party objecting, is no ground for reversal.

Striking Out Testimony—Caution to Jury.

Where, in answer to proper questions, a witness volunteers incompetent and irresponsive matter in his answers, and which matter has but an indirect bearing upon the issue upon trial, and is promptly stricken out by the court, in the presence and hearing of the jury, on motion of opposing counsel, such action amounts to a withdrawal of such matter from the jury, and no duty rests upon the court, in the absence of any request thereunto, to further caution the jury, either at that time or in the general charge, to disregard such matter.

Prosecution Need Not Call all Eye Witnesses.

No duty rests upon the prosecution in a criminal case to produce and swear as witnesses for the state all the eyewitnesses to the transaction, where the testimony of the witnesses called, or some of them, is direct and positive, and apparently covers the entire transaction.

Remarks of Counsel for State—Caution by Court.

The control of the remarks of counsel for the state during a criminal trial is a matter largely in the discretion of the trial court; and where the objectionable remarks are of a general character, and such as would not be likely, under the attending circumstances, to prejudice the cause of the accused in the minds of honest men of fair intelligence, the failure of the court to strike out such remarks, or caution the jury against them, is not such an abuse of discretion as will constitute error.

Cross-examination—Collateral Matters.

While a party to an action cannot object to questions asked a witness upon cross-examination, tending to elicit proof that the witness had been guilty of practices that would affect his credit before the jury, yet, where such matters are purely collateral to the issue, the answer of the witness is final, and it is not proper to introduce contradicting evidence.

Cross-examination—Witness—Criminal Relations with Defendant.

The state has the right, on cross-examination, to show the nature of the relations existing between the witness and the accused, so far as their relations are such as would create a bias on the part of the witness that might reasonably be supposed to affect his testimony, and this rule cannot be changed by the fact that these relations may be such as to prejudice the accused in the minds of the jury.

Request Refused When Covered by General Charge.

It is not error to refuse an instruction requested that correctly states the law, and is applicable to the case, when the court, in its general charge, has fully and specifically covered the same points.

Error to District Court, Grand Forks County; *Templeton*, J.

Arthur McGahey was convicted of shooting at another with intent to kill, and brings error.

Affirmed.

John M. Cochrane, for plaintiff in error.

Failure of the court to rule on objections of defendant, when the objections were properly made—was error. Elliott. Ap. Pro. § 727; *Conning* v. *Woodin*, 8 N. W. Rep. 572. The re-examination of complaining witness as to cause of animosity between himself and defendant, was prejudicial error. 1 Thomp. on Trials, § 484; *Schaser* v. *State*, 36 Wis. 432, 11 Alb. Law Jr. 224. Questions assuming facts not in evidence were improperly allowed. *Cornwell* v. *Cogwin*, 17 N. Y. Sup. 299; *Peo.* v. *Cahoon*, 50 N. W. Rep. 384; *State* v. *Smith*, 49 Conn. 376; *People* v. *Mather*, 21 Am. Dec. 122. The conversations between complainant and his wife in the absence of defendant were improperly admitted. *Barbee* v. *State*, 4 S. W. Rep. 584; *Taylor* v. *State*, 11 S. W. Rep. 462; *Maines* v. *State*, 5 S. W. Rep. 123; *Tyler* v. *State*, 11 Tex. App. 388; *Washington* v. *State*, 17 Tex. App. 197; *Favors* v. *State*, 20 Tex. App. 155. The court having admitted irrelevant testimony over objection of counsel—should upon striking the same out thereafter have instructed the jury to disregard such testimony even without being specially requested so to do. 2 Thomp. on Trials § 2339; *Yeo.* v. *Peo.* 49 Ill. 412; *Peo.* v. *Wheeler*, 60 Cal. 589. The swearing of William Brittan for the state—his name not

appearing upon the information—was error. *Peo.* v. *Hall*, 12 N, W. Rep 665; *Peo.* v. *Moran*, 4 Am. Crim. Rep. 470. Defendant's request should have been granted to have Mrs. Hill an eye witness of the shooting, sworn as a witness for the state. *Thompson* v. *State*, 17 S. W. Rep. 448; *Territory* v. *Hanna*, 5 Pac. Rep. 252; *Weller* v. *Peo.*, 1 Am. Crim. Rep. 283; *Maher* v. *Peo.*, 10 Mich. 212; *Hurd* v. *Peo.*, 25 Mich. 405; *Peo.* v. *Gordon*, 40 Mich. 716; *State* v. *Magoon*, 50 Vt. 338; *Thomas* v. *Peo.* 39 Mich. 309; *State* v. *Middleham*, 17 N. W. Rep. 446; Whart. Cl. Ev. § 448; Chapmans Case, 8 C. & P. 558; Orchards Case, 8 C. & P. 559; *Peo.* v. *Dietz*, 49 S. W. Rep. 296; *Peo.* v. *Eller*, 45 N. W. Rep. 1109. And the objection that the witness is not favorable to the prosecution is no excuse for not calling her. *Weller* v. *Peo.*, 1 Am. Crim. Rep. 283; *Hurd* v. *Peo.*, 25 Mich. 415; *Territory* v. *Hanna*, 5 Pac. Rep. 252. The statement of the prosecuting attorney in answer to defendant's request that Mrs. Hill be called for the state should have been stricken out. *Hardtke* v. *State*, 30 N. W. Rep. 726; *Hall* v. *Wolf*, 16 N. W. Rep. 711; *Peo.* v. *Dane*, 26 N. W. Rep. 781, Cross-examination of Mrs. Hill a witness for defendant as to acts of adultery with defendant on the pretense of impeaching her testimony, but in fact proving another crime against the defendant was highly prejudicial and improper. *Hoberg* v. *State*, 3 Minn. 181; *State* v. *McGee*, 46 N. W. Rep. 764; *State* v. *Starrett*, 32 N. W. Rep. 387; *Peo.* v. *Thurston*, 2 Parker Crim. Rep. 130; *State* v. *Gordon*, 3 Ia. 415; *State* v. *Hoyt*, 13 Minn. 125. The rule permitting cross-examination of a witness upon irrelevant matters affecting character as going to the creditability of the witness has never been extended to permit the repeated asking of questions upon the same line, all of which questions impute crime. *Peo.* v. *Cahoon*, 50 N. W. Rep. 384; *Sullivan* v. *Dieter*, 49 N. W. Rep. 263. When evidence tends to prove two things, one of which it may properly be admitted to prove but not the other, it should go to the jury, with an explanation from the court of its legitimate bearing. *Webster* v. *Enfield*, 10 Ill. 298; 2 Thomp. on Trials § 2416; *Kelley* v. *State*, 18 Tex. App. 262; *Holmes* v. *State*, 20 Tex. App.

509; *Alexander* v. *State*, 21 Tex. App. 410; Whart. Cr. Ev. § 46.

Bangs & Fisk, (*W. H. Standish, Atty. Gen'l* of Counsel) for the defendant in error.

Upon re-examination of a witness it is proper to ask him questions for the purpose of drawing forth an explanation of a sense and meaning of expressions used by him on cross-examination. 1 Thompson on Trials, § 486; *Schaser* v. *State*, 36 Wis. 432; *Goodman* v. *Kennedy*, 10 Neb. 270; *State* v. *Hopkins*, 50 Vt. 316; *People* v. *Smallman*, 55 Cal. 188. A witness may be permitted to to state in his own language what may be necessary by way of introduction to make his narrative intelligable and thus may state what others told him. *Shultz* v. *State*, 1 Crim. Law Mag. 140. The extent to which a re-direct examination will be allowed to proceed rests in the discretion of the trial court. *Slinkler* v. *State*, 9 Neb. 241; *Towers* v. *Leach*, 26 Vt. 270. Where improper testimony has crept in but is promptly ordered stricken out by the court, the defendant cannot predicate error on account of the neglect of the court to specifically charge the jury to disregard such testimony in the absence of a request so to do. *Arthur* v. *Griswold*, 55 N. Y. 408; *Hopt* v. *Utah*, 120 U. S. 430; *Zell* v. *Comm.* 2 Crim. Law Mag. 22, 25. No duty rests upon the state to produce and swear all eye-witnesses to the transaction where the testimony of the witnesses called, is direct and positive and apparently covers the entire transaction. *Comm.* v. *Haskell*, 140 Mass. 128; *State* v. *Middleham*, 62 Ia. 150, S. C. 14 N. W. Rep. 446. Where objectionable remarks of counsel are of a general character and not likely to prejudice the case of the accused in the minds of honest men of fair intelligence the failure of the court to strike out such remarks or caution the jury to disregard them is not an abuse of discretion. See note to 26 N. W. Rep. 782; *Epps* v. *State*, (Ind.) 1 N. E. Rep. 492; *State* v. *McCool*, 9 Pac. Rep. 618; *Schuler* v. *State*, (Ind.) 2 West. 801. The evidence of uncommunicated threats which were offered to be proven by the defendant was inadmissible as the threats were not made by Hill against the

defendant but were made by defendant himself against the witness Hill. *State* v. *Cross*, (Ia.) 26 N. W. Rep. 64. Witnesses cannot be contradicted upon *collateral* matters brought out on cross-examination for the purpose of impeachment. Wharton's Cr. Ev. § 484; *Stokes* v. *Peo.* 53 N. Y. 175; *Kent* v. *State*, (Ohio) 6 Cr. Law Mag. 520 and note. It is well settled that witnesses who are not parties may, for the purpose of impeachment and within the sound discretion of the trial court, be required to testify as to collateral facts which may tend to degrade them. *Terr.* v. *O'Harre*, 1 N. D. 30, S. C. 44 N. W. Rep. 1007. And this may be done although the facts thus brought out may also reflect upon the character of the defendant and thereby prejudice the accused in the minds of the jury. *State* v. *Bacon*, 13 Ore. 143, S. C. 8 Cr. Law Mag. 82. Error cannot be predicated upon the admission of evidence under a general objection, a specific ground of objection be stated. *Burke* v. *Koch*, 75 Cal. 356, S. C. 17 Pac. Rep. 228; *Chicago E. I. R.* v. *People*, 120 Ill. 667. The refusal of the court to instruct the witness Mrs. Hill as to her privilege cannot be taken advantage of by defendant for the reason that the witness did not claim her privilege, and defendant's counsel could not do so for her. *People* v. *Brown*, 72 N. Y. 573. A general objection to evidence is sufficient only where the evidence is inadmissable in its nature. That a question is "irrelevant" and "inadmissable" will not raise the question of its incompetency where it is relevant to a certain point in issue. *Fozer* v. *N. Y. Cent. & H. R. R. Co.* 105 N. Y. 659; *Burke* v. *Koch*, 75 Cal. 106; 1 Rice on Ev. 920, 921. Where the law of the case is fully stated to the jury by the court error cannot be predicted on the refusal of the court to give a specific instruction. *Biefield* v. *State*, 19 N. W. Rep. 607.

BARTHOLOMEW, C. J. Arthur McGahey, the plaintiff in error, was convicted in the District Court for the County of Grand Forks of the crime of shooting at one Thomas Hill with intent to kill. It is not possible to read the record in this case without becoming strongly impressed with the belief that McGahey had also been guilty of adulterous intercourse with Hill's wife. It is

safe to say that all the evidence tending to establish or indicate such adultery was objected to by the able attorney for the plaintiff in error, and the rulings of the court upon these objections are here for review. The elementary principle which would ordinarily render such evidence inadmissable is too familiar to need mention, and the state, admitting the principle, contends that there has been no violation of it in this case. The shooting affray occurred upon one of the thoroughfares of the City of Grand Forks, in daylight. Hill, with his wife, was in a building used as a skating rink, and of which he was the proprietor. McGahey was on the sidewalk, on the opposite side of the street. It is undisputed that McGahey fired three shots from a revolver at or in the direction of Hill, and that Hill fired one shot from a rifle at MaGahey. Each party claimed that the other shot first, and on that point the case turned. The shooting occurred about 8 o'clock in the evening on May 24th, 1892. Hill as the principal witness for the state, testified that he was sitting upon a pile of lumber in the rink, talking with his wife; that the door was open, and McGahey came down the other side of the street, and, seeing witness through the door, drew his revolver, and commenced firing; that he (Hill) ran over to an open window, and returned the fire. On cross-examination it developed that, a few hours before, Hill had gone into a store, and procured a repeating rifle, and caused it to be loaded, and taking it with him, went down into the woods by the brewery, where he had been told he would find his wife and McGahey. He was asked, "How did you come to feel the necessity of having a gun just at this time?" He answered, "I knew if I ran against this man at the place I was going to look for him I might have trouble." From this language, under the circumstances, a strong inference might be drawn that Hill was the aggressor. On redirect examination the question was put, "Why did you think you needed this [the rifle] to protect yourself?" This was objected to as not proper redirect examination. The plain purpose of the question was to enable the witness, by giving antecedent facts and circumstances, to

remove the inference left by the cross-examination. This is one of the most important purposes for which a redirect examination is allowed. *Schaser* v. *State*, 36 Wis. 429; *State* v. *Hopkins*, 50 Vt. 316; *People* v. *Smallman*, 55 Cal. 185. The fact that the answer to the question called out a narrative of certain matters touching former conduct of plaintiff in error and his relations with Mrs. Hill, that might prejudice him in the eyes of the jury, cannot change the rule of law. Plaintiff in error moved to strike out a certain portion of the answer to the foregoing question as not responsive, and the court made no ruling. This is assigned as error. This failure of the court to make a ruling was probably equivalent to a denial of the request, but there was no prejudicial error. True, the language was not strictly responsive, but it had no element of prejudice in it. The witness stated that plaintiff in error was at one time in the habit of going to his room late at night, changing his clothes, and going out again. This act is entirely consistent with innocence and good character. We would not depart, particularly in a criminal case, from the rule which requires reversal in every case where evidence is improperly admitted, unless it conclusively appears that such error was innoxious,—that it not only might not, but could not, be prejudicial to the party against whom it was offered; but we feel bound to say in this case that such harmless language could not prejudice the minds of jurymen of average intelligence.

The 4th, 5th, 6th, 7th, and 8th assignments of error present in different forms the same question discussed under the 1st, and require no separate discussion. The 9th and 10th assignments are identical in principle. Certain questions were asked the witness Hill on his redirect examination, and objections thereto overruled. After the witness had answered, motions were made to strike out the answers, or parts thereof, as not responsive, and as immaterial. These motions were sustained, but the court, neither at the time nor in the general charge, cautioned the jury to disregard such testimony. The questions were proper, but a willing witness dragged in incompetent and irresponsive matter

in his answer, and, although promptly stricken out on motion, it is urged that this was not sufficient to remove the poison that it had instilled in the minds of the jurors; that it was a case where it became the duty of the court, without any special request thereto, to caution the jury to disregard it. It has been held that where counsel, in argument to the jury, stated evidentiary matters of which there was no proof, it was the duty of the court, without request, to instruct the jury to disregard such statement. *Yoe* v. *People*, 49 Ill. 412. It has also been held that, where incompetent evidence has been admitted upon the statement of counsel that he would subsequently, by other evidence, so connect the incompetent testimony with the case as to remove the objection, and such subsequent testimony was not produced, it became the duty of the court to expressly withdraw such incompetent testimony from the jury. *Dillin* v. *People*, 8 Mich. 357. And it has even been held, under such circumstances, that the subsequent withdrawal of such testimony did not cure the error. *Marshall* v. *State*, 5 Tex. App. 273. And see *Arthur* v. *Griswold*, 55 N. Y. 400. A full discussjon of the subject may be found in Thomp. Trials, § § 715, 723. While there is lack of uniformity in the decisions, no case is cited which fairly supports the contention of plaintiff in error in this case. The divergence of authority arises from the inherent difficulty in announcing any rule of universal application. When important testimony, bearing directly upon the issue, is introduced at one stage of the trial, and permitted to remain before the jury, while other testimony is given, forming an integral part of the facts, that find a lodgment in the minds of the jurors, and on which they reach their conclusions, and it subsequently appears that such former testimony was, for any cause, clearly improper, it is no doubt the duty of the court in explicit language to direct the jury to disregard such testimony. And the mind can readily suggest cases in which, by reason of the *equipoise* of the other evidence in the case, and the magnitude of the issues at stake, no words of the judge could certainly be relied upon to enable the jurors to entirely emancipate themselves

from the effects of the vicious testimony. "It had poisoned their minds, and its effects could not be erased from their memories." But to hold that where an over-willing witness, in answer to a proper question, volunteered immaterial and irresponsive matter in his answer, such error could not be cured by immediately withdrawing such improper matter from the jury, would open the door for a reversal of a large percentage of criminal cases, and for no material reason, and for no error of the prosecution or the court. But it is claimed this matter was not taken from the jury. We think it was in effect. As soon as the improper testimony left the mouth of the witness, counsel moved that it be striken out, and the court, in the presence and hearing of the jury, so orderd. No intelligent juror misconceived the situation. In a case of this kind, (and we need go no further,) where, at most, the evidence had but an indirect and inferential bearing upon the case, the court had no further duty pertaining to the matter. It was but an incident, and by no means an important incident, in the trial. Before the general charge was reached, it had naturally passed from the mind of the court. If counsel desired a specific instruction on the point, he should have requested it. Doubtless, in the abundance of protection that courts properly throw around persons accused of crime, such a request would have been given. We do not say that a refusal to give it would have been error, but we do say that no error can be predicated upon the failure of the court to give such specific instruction without request.

The testimony of the state developed the fact that Mrs. Hill was present at the rink when the shooting occurred, and might have been an eyewitness of the affray, or at least a portion of it. When the state rested, the plaintiff in error requested the prosecuting attorney to produce Mrs. Hill and have her sworn as a witness for the state. This the prosecutor declined to do, whereupon counsel for plaintiff in error moved the court to order that Mrs. Hill be so produced and sworn. The motion was denied, and this ruling is assigned for error. It is proper to state

that besides the witness Hill not less than six other persons had been sworn for the prosecution, all of whom based their testimony upon the sense of sight or hearing, or both, and the testimony thus produced covered all parts of the transaction. Under this assignment of error it is urged that it was the duty of the prosecutor to produce and swear all persons who were shown by the evidence to have been present at the time of the affray, and whose testimony could throw any light upon the subject that would in any degree aid the jury in ascertaining the facts. The rule thus invoked was early established in England. In *Reg.* v. *Holden*, 8 Car. & P. 606, *Patteson*, J., said: "Every witness who was present at a transaction of this sort ought to be called; and, even if they gave different accounts, it is fit that the jury should hear their evidence, so as to draw their own conclusions as to the truth of the matter." This was a homicide case. And see *Reg.* v. *Chapman*, Id. 559; *Reg.* v. *Bull*, 9 Car. & P. 22; Rosc. Crim. Ev. 128. While this rule was established in that country at a time when the right of persons accused of crime to be represented by counsel was denied, or greatly abridged, and hence the rule found greater support in justice and necessity than at present, yet we are not aware that it has ever been abrogated. The state of Michigan seems to have adopted this rule in its entirety. It is true that the cases in that state which first discussed the question (*Maher* v. *People*, 10 Mich. 212; *Hurd* v. *People*, 25 Mich. 405; *Wellar* v. *People*, 30 Mich. 16; and *Thomas* v. *People*, 39 Mich. 309) announced the modified rule hereinafter stated, but the latest and strongest utterance of that very able court on the subject is found in *People* v. *Dietz*, 86 Mich. 419, 49 N. W. Rep. 296. This was a case of assault with intent to do great bodily harm. There were four persons engaged in the affray,—two on each side. The prosecutor called the two on one side, and the testimony covered the entire transaction. The court refused to require the prosecution to swear the other party to the affray, not on trial, and who was present in court, and also refused to require the prosecution to produce and swear three ladies who witnessed the difficulty

from the porch of a house 35 rods distant, and who were sworn on the preliminary examination. The case was reversed, and the court said: "We think the better rule is that it is incumbent upon the prosecutor not only to have the witnesses present in court, but to have them sworn in behalf of the people, and he may then examine them much or little, as he chooses. It affords the defense an opportunity to cross-examine without prejudicing their case by the bias of the witness, if he should have any." And see *People* v. *Gordon*, 40 Mich. 716; *People* v. *Etter*, 81 Mich. 570, 45 N. W. Rep. 1109. But see, also, comments of Cooley C. J., in *Bonker* v. *People*, 37 Mich. 4. We do not think *State* v. *Magoon*, 50 Vt. 338, cited by counsel, sustains his position; and *Donaldson* v. *Com.* 95 Pa. St. 21, also cited, is not an authority. The case was rape, and was reversed upon another ground, but the court said: "We cannot forbear, however, remarking that, in our opinion, the physician who, the day after the occurrence, examined the person of the girl upon whom the offense was alleged to have been committed, should have been called as a witness, and required to testify by the district attorney. Whether his evidence tended to acquit or convict, it was demanded equally by the cause of humanity on the one side and of justice on the other. We say this more especially because there was no direct evidence of the *factum* of the crime, and no proof of actual penetration, the prosecutrix having testified that she was insensible, and had no knowledge of what took place. We do not reverse for this reason, and do not sustain the fifth assignment of error, which raises the question, but merely express our opinion as to what should have been done in the peculiar circumstances of this case." In the case in 10 Mich., Judge Christiancy said: "Whenever it appears evident to the court that but part of the facts, or a single fact, has been designedly selected by the prosecution from the series constituting the *res gestæ*, or entire transaction, and that the evidence of the others is within the power of the prosecutor, it would, I think, be the duty of the court to require the prosecutor to show the transaction as a whole." And in *Hurd* v. *People*,

supra, the same learned judge, again speaking for the court, said: "But the prosecution can never in a criminal case properly claim a conviction upon evidence which expressly or by implication shows but part of the *res gestæ* or whole transaction, if it appear that evidence of the rest of the transaction is obtainable. This would be to deprive the defendant of the benefit of the presumption of innocence, and throw upon him the burden of proving his innocence." In *Territory* v. *Hanna*, 5 Mont. 248, 5 Pac. Rep. 252, it is said: "The authotities are clear and conclusive upon the proposition that the prosecution cannot select out part of a transaction, and ask a conviction thereon, when testimony showing the whole thereof is within its reach." *Thompson* v. *State*, 30 Tex. App. 325, 17 S. W. Rep. 448, was a homicide case, where the shooting was admitted, and self defense relied upon, by defendant. It was admitted that there were four eye witnesses to the shooting, all of whom had been subpœnæd by the state, and were present in the court room. The state introduced only circumstantial evidence and the testimony of experts, and the court refused to require the prosecutor to introduce any of the eyewitnesses. This was held error, on the broad ground that the evidence introduced was not the best evidence of which the case was susceptible, and revealed the existence of more original sources of information as stated in 1 Greenl. Ev. § 82. The modified rule applied in these cases commends itself so instantaneously to the judicial mind that it would probably be accepted by any court in the land. But the facts and circumstances of this case leave it clearly outside the influence of this rule. Here not less than seven witnesses had testified directly to facts as they saw them and heard them. There had been no particular facts selected out by design or otherwise. The entire transaction had been sifted in all its details. There is not even a suggestion of concealment in the evidence. Nor is it suggested that Mrs. Hill was in better condition to know the facts that any one of several witnesses whom the state called. The most that can be claimed is that Mrs. Hill, testifying upon the same matters, and with the same means of

knowledge, might have contradicted the testimony of the other witnesses. Under such circumstances, no duty rested upon the state to call her. The law is ever more zealous to protect innocence than to punish crime. Persons accused of crime have the full and free use of the process of the court to compel the attendance of witnesses. They are always represented by counsel, chosen either by themselves or by the court. They can be convicted only upon evidence that the jury regards as practically conclusive, and so juries are always instructed. We regard it as clearly unsafe to go further, and require the prosecution, after it has fairly and in good faith given the entire *res gestæ* to the jury, to call every witness to the transaction, howsoever bitterly hostile such witness may be to the prosecution, or howsoever powerful his motives may be to screen the defendant. To place such a witness in the hands of astute counsel for cross-examination would be to confound justice, and establish a rule that innocence never requires for its protection. This assignment of error cannot be sustained on this ground. *State* v. *Middleham*, 62 Iowa, 150, 17 N. W. Rep. 446; *State* v. *Eaton*, 75 Mo. 586; *State* v. *Johnson*, 76 Mo. 121; *State* v. *Martin*, 2 Ired. 101; *State* v. *Smallwood*, 75 N. C. 106; *State* v. *Cain*, 20 W. Va. 679; *Com.* v. *Haskell*, 140 Mass. 128, 2 N. E. Rep. 773.

When counsel for the plaintiff in error asked the court to compel the prosecution to produce and swear Mrs. Hill, the prosecuting attorney, in opposing such request, and in the presence and hearing of the jury, used the following language: "Information comes to me that the witness whose presence is requested as a witness for the state has been known to be conniving and going with the defendant in endeavoring to secure testimony in any way that it can be secured as against the state, in favor of the defense, and for that reason the state declines to produce her or to swear her here as a witness for the state." Counsel for plaintiff in error immediately moved to strike out this statement as an improper statement to be made before the jury. There was no ruling on the

point, and this absence of action by the court is assigned as error. Regarding the failure to rule as equivalent to denying the motion, it follows that, if the statement was improper, the point made must be sustained. The diligence of learned counsel has been awarded with the citation of numerous cases upon this question. The citations are all of comparative recent date, as the question is one of the refinements of the law that has but recently developed into its present proportions. That the rules announced in these cases are in the interests of fairness and justice, and that they should be implicitly enforced in all proper instances, cannot for a moment be doubted; but they should not be indiscriminately extended. Counsel must have some latitude and some discretion. In the heat of *nisi prius* trials, where questions are raised that must be instantly met, counsel cannot be expected to weigh with nicety and precision the effect of their words. This matter must, of necessity, rest largely in the discretion of the court, and abuse of that discretion is not to be rashly presumed. We are in full accord with the language of the learned Supreme Court of the State of Indiana, that "when the statement is a general one, and of a character not likely to prejudice the cause of the accused in the minds of honest men of fair intelligence, the failure of the court to check counsel should not be deemed such an abuse of discretion as to require a reversal." *Combs* v. *State*, 75 Ind. 215. And more emphatically would this be true where, as in this case, the remarks were addressed to the court, and were entirely pertinent and proper for the court to hear; and, while in the presence of the jury, yet in no sense directed to them, or intended to influence them. No case cited by counsel would warrant us in sustaining his point. The cases will be found to fall almost without exception into one of three classes. By far the largest class are cases where counsel have violated some express statutory provision, such as referring in argument to the jury to the fact that a defendant in a criminal case failed to be sworn as a witness, or by referring on a second trial to the fact of a former conviction. In these cases a reversal is, of course, imperative. In other cases

counsel have stated to the jury, as facts in counsel's own knowledge, matters prejudicial to the defendant, but immaterial to the issue on trial, and which could not be properly given in evidence; or have sought to augment the force of the evidence by their own positive but unsworn assertion of a pertinent and material matter. Another class of cases comprise the instances where counsel, in argument, have assumed certain facts to be proven, of which there was no evidence whatever. In all the cases it will be found that the objectionable language was gratuitous. In this instance, under the condition of the authorities heretofore cited, the prosecuting attorney was entirely warranted in believing that, when opposing counsel demanded that he produce and swear as a witness for the state a party who was present at the transaction, it was imperatively necessary for him to render to the court a good and sufficient reason for not so doing. This he did in a manner by no means extravagant, and what he said could only indirectly affect the accused by impairing the credit of a witness whom he subsequently called. But we do not think its effect even went to that extent. The prosecutor was careful to state nothing as a fact. He did not give to the statement the weight of his own assertion of its truthfulness. He simply said that information had come to him of a certain character. This information was such that it would be dangerous for him to call the party, unless he new the information to be false. We do not think the language used, in the manner, under the circumstances, and for the purpose stated, was at all "likely to prejudice the cause of the accused in the minds of honest men of fair intelligence," and hence there was no abuse of judicial discretion in refusing to strike it out, or caution the jury against it.

The defendant below called one Susie Thompson as a witness, and, after showing her age to be 16, sought to prove by her that she had been seduced by the complaining witness Hill, and that he was the father of her bastard child. After a number of questions in this line had been ruled out on objection by the state, counsel for plaintiff in error made a formal offer to prove that

said Hill had seduced this witness, and was the father of her child, and that he had seduced another young girl, and had an abortion produced upon her; that he had admitted these facts to various parties, and, among others, to McGahey; and that McGahey told Hill "that if he didn't desist from such practices he would make a complaint to the officers, and procure his arrest." The offer was rejected by the court. Counsel then insisted, and now insists in this court, that such evidence was proper for the purpose of impeaching Hill, and also for the purpose of showing threats by McGahey against Hill, and thus, as bearing upon the question as to who was the aggressor, furnish a motive on the part of Hill for putting McGahey out of the way. These positions are entirely untenable, and need but brief mention. Hill has been asked on cross-examination as to all of these alleged criminal practices, and had denied them. It was proper to ask him these questions on cross-examination, as affecting his credibility; but his answers were final. The court could not go into an investigation of the truth of these purely collateral matters, and thus virtually place Hill upon trial, instead of McGahey. This is elementary. 1 Greenl. Ev. § 449, and cases cited.

Nor need we enter into a discussion of the law as to threats, communicated or uncommunicated. The question does not properly arise. McGahey did not threaten Hill with prosecution for anything that he had done. The threat was that, "if he did not desist from such practices, he [McGahey] would make complaint," etc. But there was no intimation in the offer of proof that Hill had been guilty of any such practices since McGahey's warning. There was no claim that the condition, upon which alone the threat was based, existed. The offer showed nothing that could raise in Hills' mind the least apprehension of danger from McGahey.

Mrs. Hill was sworn as a witness for plaintiff in error. On cross-examination the state's attorney, over the objection of the opposing counsel, was permitted to interrogate her at length as to her relations to and criminal intercourse with McGahey. This

is urged as error. The able counsel does not contend that it was improper to ask the witness on cross-examination as to her criminal relations with men generally as affecting her credit, but urges that such object could be equally well attained without specifically naming McGahey, and that the necessary effect of so naming him must have been to prejudice the jury against him. Admitting counsel's conclusion, we are still of opinion that the line of cross-examination was proper. The state has the right to show the relations existing between the witness and the party at whose instance, and presumably in whose interest, she was testifying. It had the right to expose to the jury every motive and desire of the witness that might naturally and reasonably be supposed to produce that bias that would effect the character of her testimony. 1 Greenl. Ev. 450, note; *Cameron* v. *Montgomery*, 13 Serg. & R. 128; *Batdorff* v. *Bank*, 61 Pa. St. 179; *State* v. *Bacon*, 13 Or. 143, 9 Pac. Rep. 393.

Some errors pertaining to the charge of the court are argued in the brief of the counsel for plaintiff in error, but an examination of the abstract, amended as stipulated at the oral argument, shows that no exceptions to the action of the court in this matter were saved except in one instance, and that pertains to the refusal of the court to give an instruction requested relative to the law of self-defense. We see no objection to the instruction asked, and it was applicable to the case, but its refusal was not error. It is true that a general charge will not always cure the error in rejecting a specific instruction. Elliott, App. Proc. § 706, and cases cited in note. But in this case the charge of the court covered every point in the instruction refused as specifically and as favorably to plaintiff in error as did the rejected instruction; hence its rejection was not error. Thomp. Trials, § 2352, and cases cited in note. We have noticed all the points argued, and, finding no error in the record, the judgment of the trial court must be affirmed. All concur.

(55 N. W. Rep. 753.)

STATE *ex rel* M. J. EDGERLY *vs.* ARCHIE CURRIE, JR.

Opinion filed May 31st, 1893.

Statutes—Repeal by Implication.

Sections 82, 84 of the constitution of this state are considered in connection with Ch's 122, 123, 125, 126, 128, 187, 188, and Ch's 9 and 10 of the Laws of 1890, and Ch. 9 of the Laws of 1891; and, *held*, that said constitutional provisos, and said statutes of the state, are in conflict with, and repugnant to, § 27 of Ch. 110, Laws 1889, and hence said § 27 was never in force in this state.

Clerk of Railroad Commissioners—Compensation.

The state auditor has no authority, under existing laws, to issue warrants on the state treasurer to pay the salary of the clerk or secretary of the commissioners of railroads upon a basis of $1,500 per annum, as fixed by § 27, Ch. 110, Laws 1889. Accordingly, *held*, that the state auditor lawfully refused to issue such warrants to the relator, who held the position of secretary from January 4th, 1891, until the end of January, 1892. The salary annexed to said position is $1,000 per annum.

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

Mandamus proceeding. Defendant appeals from a final order of the District Court of Burleigh County, (*W. H. Winchester*, J.,) which order directs the defendant to issue warrants for relator's official salary, as secretary of the commissioners of railroads, at the rate of $1,500 per annum.

Reversed.

W. H. Standish, Atty. Gen., for appellant.

M. J. Edgerly, for respondent.

WALLIN, J. The relator was appointed secretary of the commissioners of railroads on February 4th, 1891, and served in that capacity from said date until the end of January, 1892. The relator claims that the salary allowed by law to such secretary is $1,500 per annum, and has, upon that assumption, made out, in due form, his monthly accounts for salary during said period, and has from time to time presented the same to the respondent, as state auditor, and demanded warrants upon the state treasurer

for such amounts. The auditor has refused, and still refuses to issue warrants to the relator upon the basis of a salary of $1,500. The court below directed the defendant to issue the warrants as demanded. The facts are conceded, and the sole question presented for the determination of the court is whether relator's salary is, or is not, $1,500 a year. If it is that amount, the order appealed from must be affirmed; otherwise, it must be reversed. The solution of the question must turn upon the construction to be given to certain constitutional provisions and statutes which bear upon the subject matter.

Chapter 110 of the Laws of 1889 embraces an act of the legislature of the Territory of Dakota, which act amends an act of 1885, entitled "An act to provide for the establishment of a board of railroad commissioners, defining their duties," etc. Both acts authorized the governor of the Territory, by and with the advice and consent of the council, to appoint three persons biennially, to be "and constitute a board of railroad commissioners." Section 6 of the act of 1885 was re-enacted without change, and constituted § 27, Ch. 110, Laws 1889. Said section is as follows: "The said commissioners shall hold their office at such place as they shall determine. They shall each receive a salary of $2,000, to be paid as the salaries of the other territorial officers are paid, and shall be provided, at the expense of the territory, with necessary office furniture and stationery; and they shall have authority to appoint a secretary who shall receive a salary $1,500 per annum." This section is explicit, and under it the territorial board of railroad commissioners "had authority to appoint a secretary," and when appointed the secretary's salary was $1,500 a year. This section was in force when the state constitution went into effect, in the year 1889; and it becomes necessary to inquire whether it was in force during the time when the relator was in office, because it is not claimed that any statute has been passed by the state legislature, in terms, creating the office of secretary of the "commissioners of railroads." The relator's claim is that such office has been recognized by state legislation, and that no state enactment is in

conflict with the provisions of § 27, relating to the appointment and salary of a secretary, and hence that the same are in force. If the position of secretary of the commissioners of railroads is, under § 27, a distinct state office, and one which exists separately and apart from the position of a clerk of the commissioners of railroads, it would be the duty of the state auditor, under the annual appropriation act, approved February 27th, 1891, (Ch. 10, Laws 1891,) to issue the warrants demanded by the relator as the incumbent of such office. That the relator was appointed to the office of secretary by the commissioners of railroads is not questioned.

Turning to the state law we find that § 82 of the constitution provides "there shall be chosen by the qualified electors of the state * * * three commissioners of railroads. * * * They shall severally hold their offices at the seat of government for the term of two years, and until their successors are elected and duly qualified." Section 83 provides: "The powers and duties of the commissioners of railroads shall be as prescribed by law." Section 84 fixes the annual salary of such commissioners at $2,000. The state constitution contains no further provisions relating to commissioners of railroads, and, as has been seen, it confers upon them no powers or duties, but, on the contrary, declares that their powers and duties "shall be as prescribed by law." The legislature of the state, at its first session, enacted a great number and variety of statutes defining the powers and prescribing the duties of the "commissioners of railroads;" but, so far as we can see, no statute of the state has ever created, in terms, the office of secretary of the commissioners of railroads, or authorized such commissioners, or any one else, to appoint an officer of that name. See Ch's 122, 123, 125, 126, 128, 187, 189, Laws 1890. Upon this state of facts the question arises, under the law, whether there is, independent of clerkships, an office of "secretary" of the commissioners of railroads in the State of North Dakota. If the law has not created such an office it will be conceded that the commissioners could not do so by the mere act of appointing the relator

to such an office; much less would such appointment operate to authorize the state auditor to draw warrants on the treasurer, as and for the salary of such secretary, at the rate of $1,500 per annum. No money can be drawn from the state treasury without authority of law. If there is any law which will justify paying the relator a salary of $1,500 per annum, it is conceded that it must be found in § 27, of the act of 1889, which we have quoted above, and which, the relator contends, is still in force.

The attorney general cites Ch's 9 and 10 of the Laws of 1890 to show that § 27, *supra*, has been repealed by necessary implication, if not in terms. Chapter 9 is entitled "An Act to Provide Clerk Hire for the Various State Officers, and Making Appropriation Therefor." Chapter 10 is an amendment of Ch. 9. Section 1 of Ch. 9, as amended, provides: "The following amounts are hereby fixed and allowed for clerk hire of the several state officers hereafter mentioned," etc. Section 1 then goes on to provide clerk hire for the governor's office, and all other state offices, and concludes in the following language: "Commissioners of railroads, one thousand dollars per annum." The proviso of § 1 is as follows: "Provided, that all clerical appointments shall first be referred to the governor for his approval." Section 2 provides for a continuing annual appropriation for such clerk hire. Section 3—the emergency section—declares, as a reason why the act should go into immediate effect, that there was then existing "no provision by law for the payment of any clerk hire for the several state officers." A summary of these statutory provisions will show: *First*, That the state legislature, at its first session, after clothing the commissioners, then newly elected by the people, with extensive powers, some of which were of a nature to require the services of a clerical assistant, authorized the said commissioners, with the approval of the governor, to appoint a clerk to serve the commissioners. *Second*, The legislature provided a continuing annual salary for the clerk so to be appointed. *Third*, The legislature itself declared, in effect, in the emergency clause of the statute, that there was, when the act was passed, no other

existing law which authorized the commissioners to appoint a person to perform their clerical work. Section 4 reads: "All acts and parts of acts in conflict with the provisions of this act are hereby repealed." We are convinced, after careful consideration, that the state constitution, which creates three commissioners of railroads to be chosen by popular vote, when read in connection with the comprehensive body of statutes enacted at the first session of the state legislature, covering all of the ground embraced in the territorial laws upon the same subjects, must be held to have effected a total abrogation of all territorial statutes which created a board of railroad commissioners, and defined their powers and duties, including the power to appoint a secretary of the board. The creation of the constitutional officers to be elected by the voters necessarily implies the abolition of the board appointed by the governor, as the two sets of officers, in the same sphere of duty, could not co-exist, and exercise their powers, without a clash in jurisdiction. All duties which, under territorial laws, were devolved upon the board, are now cast upon the commissioners of railroads, by statutes passed since statehood, except only the duty of appointing an officer who was described in the territorial statute as a secretary, which officer was to be appointed by the board, without reference to the approval of the governor, whereas, under state law, the commissioners are empowered to appoint a clerk, but such appointment does not take effect until approved by the governor of the state. The feature of the approval of the governor, required by the state statutes of both 1890 and 1891, marks a clear departure from the old system, and indicates to our mind a purpose in the state legislature to abolish the old system of allowing the board to appoint a secretary without consulting the governor, and substituting therefor the plan of executive approval of such appointment. The two systems of filling the two clerical offices in question differ so radically that we are satisfied that the state legislature intended to wipe out the old method, and substitute another. We think the legislative intent was to cast the same clerical duties which,

under the territorial regime, were to be performed by an officer called a "secretary," upon a functionary who, under the state statutes, is denominated both "secretary" and "clerk." The terms "clerk" and "secretary," as applied to subordinate ministerial functionaries, are by popular usage, synonymous terms, and are frequently used interchangeably. This use is also strictly accurate, according to the accepted standards of the language. One definition of the term "secretary," as given in Webster's Dictionary, is: "A person employed to write orders, letters, dispatches, public or private papers, records, and the like; an official scribe, amanuensis, or writer." The same authority, under the word "clerk," says: "In some cases, 'clerk' is synonymous with 'secretary;'" also, that a clerk is "one who is employed to keep records and accounts; a scribe; a penman; an accountant; as the clerk of the court." A striking, as well as strictly pertinent, example of the interchangeable use of the terms "clerk" and "secretary," is found in the law we are considering. As we have seen, § 6, Ch. 126, Laws 1885, expressly authorized the board to appoint a secretary. A salary was provided for such secretary. But a careful perusal of the entire chapter will disclose the fact that not a single duty, clerical or otherwise, was devolved by the act upon any official of that name, while, on the contrary, one duty, at least, of a clerical nature, was expressly cast upon a subordinate of the board, who was, in terms, denominated a "clerk;" and no officer called a "clerk" was authorized to be appointed or employed, by the territorial statute. Section 3 of said Ch. 126 authorized the territorial board, under certain circumstances, to serve a written notice upon railroad corporations. The statute required the notice to be served by leaving a copy thereof, "certified by the commissioners' clerk, with any station agent." Unquestionably, such written notice could have been lawfully certified by the secretary of the board, not only because the board had no clerk, and was not authorized to appoint any functionary of that name, but for the further reason, as has been

shown, that the two words, "clerk" and "secretary" as applied to such a functionary, are used interchangeably.

Respondent's counsel cites the following excerpt from § 10, Ch. 122, Laws 1890, to show, quoting from his brief, that "it was evidently the intention of the legislature of the State of North Dakota, of the year 1890, that a clerk or clerks should be employed in the office of the secretary of the commissioners of railroads," viz: "Said commissioners shall inform such railroad company, by a notice thereof, in writing, to be served as a summons in civil actions required to be served by the statutes of this state in actions against corporations, when certified by the clerk or secretary of the railroad commissioners." To our mind this statutory provision furnishes only another instance of the interchangeable use of the terms "clerk" and "secretary," as descriptive of a subordinate functionary, whose duties are ministerial and clerical in character. We think both terms were used in the statute to more fully describe the subordinate functionary, whether called "clerk" or "secretary." Section 1 of Ch. 9, Laws 1891, is also cited by respondent to show that there is such an officer as secretary of the commissioners of railroads. If considered by itself, and wholly divorced from other features of the statute relating to the same matter, the section would possibly tend to support respondent's contention that there is a state officer called a "secretary of the commissioners," and that that officer has been allowed $1,000 per annum to disburse as clerk hire to his subordinates. But this theory becomes untenable when we recall the fact that there never was a statute which, by any construction possible, conferred upon the secretary of the board, or upon any other person or board, the power to appoint a subordinate to render clerical assistance to the secretary or in the secretary's office. We think that we have shown that the obvious purpose of the state laws, when considered together, is to annul the laws of the territory upon the same subject-matter, and to confer upon the commissioners of railroads chosen by the people new and additional powers, including that of appointing, with the approval

of the governor, a clerical assistant, whose salary is fixed at $1,000 a year, and who is referred to in the act of 1890 as a "clerk," and in the act of 1891 as "secretary."

It appears that the point in question has not before arisen in the state. The law in question, as practically construed by the several state auditors, has been held to be adverse to the relator's construction. Prior to the relator's appointment, and since the state was admitted, two persons has been appointed to the position held by the relator, viz: F. W. Fancher and Harvey Harris. Both were paid salaries at the rate of $1,000 a year. While it is true that the relator is not necessarily concluded by the uniform rulings of the several state auditors who have practically construed the law against the relator's theory, nor by the uniform acquiescence of his predecessors in office in such rulings, nevertheless it is true that the ruling of an executive officer upon a point where it is his sworn duty to act, especially where the rulings have been acquiesced in by those whose financial interests were involved, are always given considerable weight in the courts, and when the power is doubtful the uniform rulings in an executive office would be followed, and allowed to turn the scale. Cooley, Const. Lim. (3d Ed.) marg. pp. 69, 70. In the case at bar, however, we think there is a plain and necessary repugnancy between the territorial and state law upon the question involved, and of course the former must give way to the latter. The relator bases his claim wholly upon § 27 of the act of 1889. That section gave absolute authority to the territorial board to appoint a secretary, whose salary was fixed at $1,500 a year. No such authority has been conferred upon the state commissioners. The territorial board no longer exists. The abolition of that board by the repeal of the law which created it must be held to vacate all offices, and to cut off all official salaries, which came into existence by virtue of the law which is repealed. Mechem, Pub. Off. § § 407, 408. We must therefore hold that § 27, Ch. 110, Laws 1889, is repugnant to both the constitution and laws of the State of North Dakota, and especially repugnant to the acts

embraced in Ch's 9 and 10, Laws 1890, and Ch. 9, Laws 1891. Where the salary of an officer is not fixed by the terms of the constitution, it is well settled, where an act of the legislature appropriates a sum as salary which is less in amount than the salary allowed the same officer by the statute which created the office, that the two statutes are repugnant, and the former must give way to the latter, even though the latter enactment contains no repealing words. *Collins* v. *State*, (S. D.) 51 N. W. 776, and cases cited. These authorities are not in point in the case at bar until the conclusion is first reached---and we have reached that conclusion—that all of the enactments in question which touch the matter of a "clerk" or "secretary" of the commissioners are to be construed as referring to one and the same subordinate functionary of the commissioners of railroads, whose duties are ministerial, purely, and of a clerical nature. Chief Justice Waite, in the case of *King* v. *Cornell*, 106 U. S. 395, 1 Sup. Ct. Rep. 312, said: "While repeals by implication are not favored, it is well settled that when two acts are not in all respects repugnant, if the later act covers the whole subject of the earlier, and embraces new provisions, which plainly show that the last is intended as a substitute for the first, it will operate as a repeal."

We deem further comment unnecessary. From what has been said it follows that no law of the state will allow the state auditor to issue warrants on the state treasurer to the relator as and for salary at the rate of $1,500. The relator, whether as the secretary or clerk of the commissioners of railroads, is lawfully entitled to a salary of $1,000 per annum, and no more. The order appealed from must therefore be reversed, and such will be the order of this court. All concur.

(55 N. W. Rep. 858.)

STATE *ex rel* WILLIAM LARABEE *vs.* OSCAR G. BARNES.

Opinion filed May 9th, 1893.

Constitutional Prohibition—Legally Adopted.

Congress by an act approved February 22nd, 1889, known as the "Enabling Act," directed the people in what is now the State of North Dakota to elect delegates to a constitutional convention, which convention should formulate a constitution to be submitted to the qualified electors for their adoption, and provided for the submission at the same time of separate articles or ordinances, and required for their adoption a "majority of the legal votes cast." Article 20 of our constitution, known as the "Prohibition Article," was so submitted for adoption. At the same time, under a provision of the proposed constitution, a full set of state officers was elected. Said article 20 received a majority of all the votes cast upon the question of the adoption of the same, and upon the question of the adoption of the constitution, but did not receive a majority of the votes cast for governor. *Held*, that said article 20 was legally adopted.

Prohibition Statute—Legally Adopted—Title of Act—Unusual Punishments.

Said enabling act provided that the state officers should exercise all the functions of their offices when North Dakota was admitted as a state, and that the legislature might assemble, organize, and elect two United States senators; and § 17 of the schedule to the constitution required the governor, as soon as qualified, to issue his proclamation convening the legislature within a specified time for the purpose of electing such senators. Section 41 of the state constitution provides that the term of office of members of the legislature shall begin on the first Tuesday in January following their election, and § 53 provides that the legislative assembly shall meet on the first Tuesday after the first Monday in January in the year next following the election of the members. The governor, by proclamation, convened the legislature at a time prior to the first Tuesday in January next succeeding the election, for the purpose of electing said United States senators, and "for the performance of such other legislative duties as may be in accordance with the provisions of said constitution." The legislature convened pursuant to such proclamation on November 19th 1889, and at once proceeded to exercise general legislative functions, and passed Ch. 110, known as the "Prohibition Statute," and the same was approved December 19th, 1889. *Held*, that the legislature so convened had full power to enact said statute. Said act is not vulnerable to the constitutional objections that its object is not fully expressed in the title, or that it contains more than one subject, or that it is not uniform in its operation, or that it inflicts cruel and unusual punishment.

Original application in the name of the state at the relation of Wm. Larabee against Oscar G. Barnes, Sheriff of Cass County, for the release of relator on habeas corpus. Writ granted, and

case heard upon objection to the sufficiency of the petition.

Judgment for defendant.

J. W. Tilly, (*H. Steenerson*, of counsel) for relator.

Article 20 of the constitution is void because it was never approved by the qualified voters of the state as required by § 8, of the enabling act. The vote as canvassed and certified was "for prohibition" 18,552, against 17,393. The total vote cast for governor was 38,098 showing at least that number of qualified voters present and voting, and 448 less than a majority voted for article 20. The words "qualified voters of said state" mean the qualified voters voting at the election. *Peo.* v. *Warfield*, 20 Ill. 163; *Peo.* v. *Gamer*, 47 Ill. 246; *Peo.* v. *Wiout*, 48 Ill. 263; *Bridgeport* v. *R. R. Co.*, 15 Conn. 475; *St. Joseph Tp.* v. *Rogers*, 16 Wall. 644; *Taylor* v. *Taylor*, 10 Minn. 107; *Bayard* v. *Klenge*, 16 Minn. 221; *Everet* v. *Smith*, 22 Minn. 53; *Walnut* v. *Wade*, 103 U. S. 683; *State* v. *Becked*, 34 N. W. Rep. 342; *State* v. *Babcock*, 22 N. W. Rep. 372. The prohibition statute, Ch. 110, Laws 1890, was passed in December 1889, before the legislative assembly had any legislative power. The legislature of 1889 was called by proclamation of the governor for election of two United States senators. The term of service of members of the legislative assembly begins on the first Tuesday in January next after their election. Art. 2, § 41, Const. It is a primary requisite to the enactment of laws that there be a legal legislature. In time and place the members entitled so to do must lawfully convene. Tenants Case 3 Neb. 409; *State* v. *Judge*, 29 La. Ann. 223; *Gormly* v. *Taylor*, 44 Ga. 76; *Peo.* v. *Hatch*, 33 Ill. 151. When convened in extra session and limited by the constitution to business for which the session was specially called, all acts passed relating to other subjects will be void. Southerland on Stat. Const. § 25; *Davidson* v. *Moorman*, 2 Heisik. 575; *Jones* v. *Theall*, 3 Nev. 233; *Speed* v. *Crawford*, 3 Met. (Ky.) 207. This statute is void as inflicting excessive punishment. 1 Bish. Cr. Law 947; *State* v. *Driver*, 70 N. C. 423; *State* v. *Petty*, 80 N. C. 367; *ex-parte* Mitchell, 70 Cal. 1; *State* v. *Williams*, 77 Mo. 310; *State* v. *Durston*, 52 Ia. 635.

W. H. Standish, Atty. Gen'l and *C. A. Pollock*, for respondent.

So far as the adoption of article 20 of the constitution is concerned, all that is required is, that it shall be approved by a majority of all the votes cast on that subject at such election. Cooley Const. Lim. 770; *Gillespie* v. *Palmer*, 20 Wis. 572; Prohibition Amendment Cases, 24 Kan. 500; *Sanford* v. *Prentice*, 28 Wis. 358; *Green* v. *Weller*, 32 Miss. 650; *Dayton* v. *St. Paul*, 2 Minn. 400.

BARTHOLOMEW, C. J. The relator was informed against in the Cass County District Court for violation of the provisions of the constitution and statutes of the state prohibiting the sale of intoxicating liquors. He pleaded guilty, and was sentenced to the county jail of Cass County for the term of 90 days, and to pay a fine of $300. To relieve himself from confinement under this sentence he procured a writ of habeas corpus from this court. The petition for the writ, with the exhibits attached, alleges, in substance, that such imprisonment is illegal, because the charge against relator does not state facts sufficient to constitute a public offense, in that the same is based upon article 20 of the constitution of the State of North Dakota, and upon Ch. 110 of the Laws of said state for 1890. That said article 20, and the said act based thereon, are null and void, for the reason that said article was never adopted by the people of the state as required in the enabling act, hereinafter more particularly noticed; and for the further reason that said Ch. 110, was never passed by any legally constituted legislature, and that said chapter, independant of said article 20, is void, for the reason that the title does not embrace any object to prohibit the sale of intoxicating liquors, but only to prescribe penalties for its unlawful sale; and that the act violates § 61 of the state constitution, which provides that no bill shall embrace more than one subject, which shall be expressed in the title; and that said act violates both the federal and state constitutions, in that it inflicts cruel and unusual punishment. The writ was served on the defendant, Barnes who is sheriff of Cass County,

and upon the return day defendant appeared in court with the prisoner, and entered a general demurrer to the petition. Relator bases his right to a release from imprisonment upon the following propositions: *First*, Article 20 of the constitution of the State of North Dakota, commonly known as the "Prohibition Article," was never adopted as a part of the constitution; *second*, Ch. 110, Laws 1890, was not enacted by a legally constituted legislature; *third*, said chapter violates the constitution of this state and of the United States.

To understand the points made under the first proposition it is necessary to state that the enabling act, approved February 22nd, 1889, under the terms of which North Dakota, South Dakota, Montana, and Washington became states, after providing for constitutional conventions to formulate constitutions, and the submission of such constitutions to a vote of the qualified electors of the proposed states, provides in § 8 that "at the elections provided for in this section the qualified voters of said proposed states shall vote directly for or against the proposed constitutions, and for or against any articles or propositions separately submitted. The returns of said elections shall be made to the secretary of each of said territories, who, with the governor and chief justice thereof, or any two of them, shall canvass the same, and, if a majority of the legal votes cast shall be for the constitution, the governor shall certify the result to the president of the United States, together with a statement of the votes cast thereon, and upon separate articles or propositions, and a copy of the said constitution, articles, propositions, and ordinances. And if the constitutions and governments of said proposed states are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the president of the United States to issue his proclamation announcing the result of the election in each, and thereupon the proposed states which have adopted constitutions and formed state governments as herein provided shall be deemed admitted by congress into the Union, under and by virtue of this act, on an

equal footing with the original states, from and after the date of said proclamation." Section 24 of said act provides "that the constitutional conventions may by ordinance provide for the election of officers for full state governments, including members of the legislatures and representatives in the 51st congress; but said state governments shall remain in abeyance until the states shall be admitted into the Union, respectively, as provided in this act." The time and the manner of the election of such officers was left entirely in the hands of the several constitutional conventions. As a matter of fact, the constitutional convention of North Dakota did provide for the election of all state officers at the time of the vote upon the adoption of the constitution. An inspection of the returns of that election as certified by the proper canvassing board, and which are made a part of the petition herein, discloses that there were 35,548 votes cast for or against the adoption of the constitution, and 35,945 votes cast for or against the adoption of said article 20, of which 18,552 were in the affirmative and 17,393 in the negative. It thus appears that a majority of all the votes for or against said article were in the affirmative, and also that the affirmative vote for said article exceeded one-half of all the votes cast for or against the adoption of the constitution. But at said election there were 38,098 votes cast for governor, and the affirmative vote upon the adoption of said article 20 was less than one-half of the total vote cast for governor. Upon these facts it is urged upon us with great earnestness and force that a "majority of the votes cast," within the meaning of said § 8 of the enabling act, were not in favor of the adoption of said article 20, and hence the same was never adopted. This proposition cannot receive our assent and we will briefly state some of the reasons which irresistibly lead our minds to the opposite conclusion. Said § 8 of the enabling act requires (and the requirement is mandatory) that the proposed constitution, and any specific article that the constitutional convention may direct, be submitted to a vote of the people, and that any such specific article shall be voted upon separately, and that, if a

majority of the votes cast be in favor of the constitution, that fact shall be certified to the president of the United States, with a statement of the votes for and against the constitution and each specific proposition so separately submitted, together with a copy of the constitution and of any articles separately submitted; and from the data thus certified the president was required to determine whether or not the constitution was republican in form, and whether or not all the requirements of the enabling act had been complied with, and, if so, he was required to issue his proclamation admitting North Dakota as a state. Where, in this section, congress spoke of the votes cast, it had reference to votes cast upon the particular objects which it directed should be submitted to a vote of the qualified electors. Congress had no knowledge that any candidates for offices would be voted for at that same election, and the matter of electing officers was left under the exclusive control of the constitutional convention; and, further, it was the vote upon the constitution and the articles, if any, separately submitted, that was to be certified to the president; and, if by the use of the words "majority of legal votes cast" congress meant votes cast upon any subject other than those directed to be certified to the president, it would be obviously impossible for that official ever to determine whether or not the constitution had been legally adopted, and yet, under the act, the duty devolved upon him to determine that question at once. These considerations seem to us to conclusively establish that when congress used the words "majority of legal votes cast" it meant votes cast for or against the adoption of the constitution or of the articles separately submitted. Whether or not congress did not also intend that, in case the constitution was adopted, the separate articles should stand or fall upon their separate vote, we need not determine.

Chapter 110, Sess. Laws 1890, was enacted by our first state legislature undoubtedly in response to what the legislature regarded as its duty under the provisions of article 20 of the constitution, and to provide the necessary machinery for the proper

enforcement of that article. It is claimed that at the time of the passage of the act the legislature was not a lawful legislature, and was without power to exercise ordinary legislative functions. The act was approved December 19th, 1889. The constitution was adopted, and full state offices, including members of the legislature, elected, October 1st 1889. North Dakota became a state by virtue of the proclamation of the president on November 2nd, 1889. Section 24 of this enabling act provided, in case that the constitution was adopted, the legislature of the state might assemble, organize, and elect two senators of the United States, and that when the state was admitted the state officers should at once proceed to exercise the functions of their office. On November 4th, 1889, the governor elect of this state qualified. Section 17 of the schedule of the constitution provides: "The governor elect of the state, immediately upon his qualifying and entering upon the duties of his office, shall issue his proclamation convening the legislative assembly of the state at the seat of government, on a day to be named in said proclamation, and which shall not be less than fifteen nor more than forty days after the date of such proclamation. And said legislative assembly, after organizing shall proceed to elect two senators of the United States for the State of North Dakota; and at said election the two persons who shall receive a majority of all the votes cast by the said senators and representatives shall be elected such United States senators." On said 4th day of November, 1889, the governor issued his proclamation convening the legislature on November 19th, 1889, for the election of two United States senators, and "for the performance of such other legislative duties as may be in accordance with the provisions of said constitution." The legislature convened on said November 19th, and at once proceeded to the exercise of general legislative functions, and said Ch. 110 was passed and approved on December 19th, 1889 as stated. Section 41 of the constitution reads: "The term of service of the members of the legislative assembly shall begin on the first Tuesday in January next after their election." Section 53

reads: "The legislative assembly shall meet at the seat of government at 12 o'clock noon on the first Tuesday after the first Monday in January in the year next following the election of the members thereof." The contention is that the term of office of the members of the legislature elected on October 1st, 1889, did not begin until the first Tuesday in January, 1890. Such would be true, if we could not look beyond or away from said § 41. But it must be remembered that when the state was admitted all the legislative offices were vacant unless filled by the newly-elected officers; and unless so filled, however great the emergency, or however imperative the necessity for action, the sovereign state was without power to take legislative action from November 2nd, 1889, to the first Tuesday in January, 1890. We do not think any such condition was contemplated. Section 24 of the enabling act provides that, upon the admission of North Dakota as a state, the officers of the state government shall proceed to exercise all the functions of state officers. In the broad sense here used, members of the legislature are state officers. This section as well as § 17 of the schedule, required that the legislature should meet and organize and elect United States senators. It is a solecism to say that the persons thus called together were legislators for one purpose, but not for all purposes. If they were not legislators they could not elect United States senators. If they were legislators, being legally convened, and there being no restrictions in the constitution or the enabling act, they possessed plenary legislative powers. Cooley, Const. Lim. 187; *Morford* v. *Unger*, 8 Iowa, 82. As other plain provisions had been made respecting the members and the first session of the first legislature, it is clear that §§ 41 and 53 of the constitution were intended to apply only to subsequent legislatures, elected in the regular manner, and at the regular time provided by law, and that said Ch. 110 is not vulnerable to this attack.

All the questions pertaining to defects in the title of this act in this case were raised and fully discussed in *State* v. *Haas*, 2 N. D. 202, 50 N. W. Rep. 254. These same objections are here urged,

on the assumption that we would hold that said article 20 of the constitution had never been adopted. As we do not so hold we need add nothing to what we have said in the Haas case.

The next point made by relator—that the statute is unconstitutional, because it inflicts cruel and unusual punishment—hardly merits mention. It is legal history that all jurisdictions that have sought to prohibit or effectually control the sale of intoxicants have found it necessary from time to time to increase the rigor of the punishment for the violation of prohibitory and regulating laws. The matter is peculiarly of legislative cognizance, and we certainly see nothing in this statute that indicates that the legislature has provided for greater punishment than is requisite to the proper execution of the law. Nor does the fact that by such statute the sale of intoxicants for lawful purposes is confined to druggists render the statute open to the charge of want of uniformity in its operation. It applies to all persons who come within its terms, and no person is prohibited from placing himself within its terms. That is all the constitutional provision requires. *Trust Co.* v. *Whithed*, 2 N. D. 82, 49 N. W. Rep. 318. And it was clearly a wise and proper exercise of police power to so limit the sale. If all persons indiscriminately were permitted to keep and sell intoxicants for the enumerated lawful purposes it would be quite impossible, as all experience teaches, to prevent illegal sales. The statute increases the punishment for second and third offenses. This is urged as an objection to it, but no authority sustaining the objection is cited, nor do we find any. Such statutes are very common, and are universally upheld. Nor can we see that the fact that the increased punishment passes the arbitrary line fixed by the legislature between misdemeanors and felonies can in any manner change the principle. The writ must be discharged, and the relator remanded to the custody of the defendant, to be dealt with according to the terms of his commitment; and it is so ordered. All concur.

(55 N. W. Rep. 883.

NOTE—For other cases upon the liquor law, see, *State* v. *Swan*, 1 N. D. 5; *State* v. *Fraser*, 1 N. D. 425; *State* v. *Haas*, 2 N. D. 202.

PRAIRIE SCHOOL TOWNSHIP *vs.* WM. HASELEU, *et al.*

Opinion filed July 6th, 1893.

School Township Treasurer—Cannot Sell Bonds.

Chapters 44, 45, Sess. Laws Dak. T. 1883, relating to school townships and school house bonds, considered. *Held*, that the school board (consisting of the treasurer, clerk, and director) is the official governing board of such school township, and such board has full power and authority to issue, negotiate, and sell such bonds of the school township as have been duly voted by the electors for the purpose of building a school house. *Held*, further, that the school township treasurer, acting independently, has no authority under the law and by virtue of his office as treasurer, to issue, negotiate, or sell such bonds.

School Board Responsible for Lost Funds.

Where the school board of the plaintiff, consisting of the treasurer, clerk, and director, issued certain school house bonds, which had been regularly voted by the electors, and in doing so delivered such bonds to a bank to be negotiated and sold for the benefit of the school township, and the bonds were sold and put in circulation, but the proceeds were never turned over to the school township, but, on the contrary, were lost to the school township, *held*, that the school board was wholly responsible for such loss. *Held*, further, that such bonds not having been delivered to the treasurer for negotiation and sale, and he never having sold or attempted to sell the same, an action will not lie against the treasurer or his sureties on his official bond for a breach of the condition of such bond which requires the treasurer to account for and pay over all moneys and property which shall come into his hands as treasurer.

Obligation of Surety Not Enlarged by Construction.

The obligations of sureties upon official bonds are measured by the language of the bond, and where the condition of a bond embodies the provisions of the statute, and no more, the obligation cannot be expanded by construction beyond the fair import of the language in which the sureties have consented to be bound.

Parol Evidence to Vary Terms of Receipt.

When the bonds were delivered by the board at the bank for negotiation and sale, all members of the board were at the bank, and acting in concert. At that time the cashier of the bank delivered to the treasurer a writing as follows: "$1,000, Grand Rapids, Dakota, Sept. 28th, 1883. Received of William Haseleu, Treas. Prairie School Township, one thousand dollars in bonds of Prairie Tp., LaMoure Co., D. T., for placing and cr. A. H. Huelster, Cashier Bank of Grand Rapids." *Held*, that such writing embodied both a receipt and a contract, and that, as such, its terms could be varied and explained by parol evidence, but only as to that part which is a mere receipt.

Error Without Prejudice.

Where it appears that upon the uncontroverted facts the plaintiff cannot recover in the action, a verdict and judgment for defendants will not be disturbed by this court even when the record shows errors in procedure. Such errors are without prejudice.

Appeal from District Court, La Moure County; *Rose*, J.

Action on a bond by the Prairie School Township against William Haseleu, August Beckman, and Stephen Kohan. Defendants had judgment, and plaintiff appeals.

Affirmed.

George W. Newton, for appellant.

L. C. Harris and *E. W. Camp*, for respondents.

WALLIN J. This action is brought to recover damages for an alleged breach of the condition of an official bond given by an ex-treasurer of the plaintiff. All of the defendants executed the official bond; the defendant William Haseleu, the ex-treasurer, signing as principal, and defendants Beckman and Kohan signing as sureties. The allegations contained in the first six paragraphs of the complaint, and which are expressly admitted to be true by the defendants' answer, are, in substance, as follows: The plaintiff was at the time in question, and is, a duly organized school township of La Moure County; that defendant Haseleu, after being elected, qualified for the office of treasurer of said school township in July, 1883, by taking the required official oath and giving said official bond; that Haseleu entered upon the duties of his office, and was treasurer of the plaintiff at the time the school bonds hereafter referred to were voted, executed, and delivered; that at a meeting of the school township held in September, 1883, it was decided by a majority of the electors that said school township should, for the purpose of building a school house, issue two bonds of $500 each, bearing 7 per cent. interest; that thereafter, and on the 28th day of September, 1883, the school board of said school township, (which board was wholly composed of the three defendants,) in pursuance of the vote caused to be executed and did execute and did issue two separate school bonds of

said school township, each of said bonds being for the sum of $500, and bearing 7 per cent. interest per annum. Paragraphs 7, 8, 9, 10 and 11 of the complaint are as follows: "(7) That both of such school bonds, each being for the sum of five hundred dollars, and of the value of five hundred dollars each, were placed in the hands and custody of William Haseleu, the treasurer of said school township, for the purpose of negotiation and sale, and that said William Haseleu did negotiate and make sale of said two school township bonds with C. T. Ingersoll for the whole sum of nine hundred and fifty dollars cash. (8) That on the 24th day of June, 1884, the term of said office of said William Haseleu expired as treasurer of said school township, and one Lewis M. Olson immediately succeeded him, the said William Haseleu, as treasurer of such school township, and received from his predecessor, the said William Haseleu, the books and papers belonging to his said office; but that the said William Haseleu neglected and refused to turn over to him, the said Lewis M. Olson, and to deliver up to him, the two school bonds heretofore described, or to turn over and deliver up to him, the said Lewis M. Olson, the moneys for which said described school bonds were sold, and neglected and refused to account for said bonds or their proceeds, or any part thereof, except the sum of fifty dollars. (9) That the said Lewis M. Olson, the school township treasurer who immediately succeeded the said William Haseleu as treasurer, repeatedly demanded of the said William Haseleu the above described school township bonds, or their value, less the fifty dollars accounted for by the said William Haseleu, but that the said William Haseleu has all the time refused to turn over to him, the said Louis M. Olson, the said school township bonds or their value, and has refused in every way to account for their value or for the said bond, except as herein stated, and still refuses and neglects to account for them or for their value, or any part thereof, except the fifty dollars herein mentioned. (10) That the said Lewis M. Olson was treasurer of said school township for the five years next succeeding his first taking possession of such

office on the 27th day of June, 1884, and that he was succeeded in said office by Gustave Papenfuss, who is now the duly elected and qualified treasurer of said school township. (11) That by reason and means of the facts herein stated that said William Haseleu and his co-defendants are indebted to the plaintiff herein, the said Prairie school township, in the sum of nine hundred dollars, and interest thereon from the 27th day of June, 1884, at the rate of seven per cent. per annum, for which amount and costs of this action plaintiff asks judgment against said defendants."

For answer to the complaint defendants say: "(1) That they admit all the allegations contained in paragraphs numbered 1, 2, 3, 4, 5, 6, and 10 of plaintiff's complaint. (2) That they deny that the school bonds described in paragraph 6 of plaintiff's complaint were ever placed in the hands of the defendant William Haseleu, treasurer as alleged; and further deny that the said bonds were sold by the said William Haseleu, treasurer, to one C. T. Ingersoll, for the sum of nine hundred and fifty dollars cash, as alleged; and further deny that said bonds were ever sold or negotiated at any time or place by the said William Haseleu, treasurer, for the sum alleged in paragraph 6, or for any other sum whatever. (3) That they specifically deny all the allegations contained in paragraph 8 of plaintiff's complaint except as to the date on which defendant's (William Haseleu's) term as treasurer expired, and the name of the person succeeding him as such school treasurer. (4) That they specifically deny each and all of the allegations contained in paragraph 9 of plaintiff's complaint. (5) That they deny that they are indebted to the plaintiff in the sum of nine hundred and fifty dollars and interest, as alleged in paragraph 11 of complaint, or that they are indebted to plaintiff in any sum whatever. (6) The defendants for further answer and defense to plaintiff's complaint, say that the cause of action therein stated did not accrue at any time within six years next before the commencement of plaintiff's action thereon. Wherefore defendants demand judgment for costs."

There was a jury trial, and the verdict and judgment were for the defendants. The proceeding had at the trial, embracing the evidence and rulings thereon and the instructions given to the jury, were brought up on the record. A motion for a new trial was denied. Plaintiff assigns error in this court upon certain rulings of the trial court made upon the admission of evidence, and upon certain instructions of the court given to the jury; but, in the view which we have taken of the whole case as presented by the record, we deem it unnecessary to specifically pass upon plaintiff's assignments of error. If the District Court did err in its rulings and instructions which are assigned as error the result would not be different, as we have concluded, upon the conceded facts and undisputed and competent evidence in the record, that the plaintiff cannot recover in this action, and hence that the judgment must be affirmed. Paragraph 6 of the complaint, the averments in which are expressly admitted in the answer, alleges, in substance, that the defendants at the time in question constituted plaintiff's school board; and that the defendants, acting as board, executed and issued two $500 7 per cent. bonds, pursuant to a vote of the electors directing such bonds to issue for the purpose of building a school house. The execution and issuing of the bonds by the school board being admitted, it becomes of importance to inquire when, where, and to whom such bonds were issued and delivered by the school board. Upon this vital feature of the case issue is squarely joined. The complaint (paragraph 7, *supra*) alleges in substance that "both of such school bonds were placed in the hands and custody of William Haseleu, the treasurer of said school township, for the purpose of negotiation and sale; and that said William Haseleu did negotiate and make sale of said two school township bonds with one C. T. Ingersoll for the whole sum of nine hundred and fifty dollars." It is admitted that Haseleu, upon demand therefor, has neglected and refused to turn over the bonds or their proceeds to his successor in office, and has wholly failed to account for either the bonds or their proceeds, except for the sum of fifty dollars which

was paid over to the treasurer when the bonds were issued, and has been properly accounted for; and also for a certain bill of lumber to the amount of $216, which has been received by the plaintiff on account of the two bonds, and which has been accounted for to the plaintiff. The failure to turn over the bonds of their proceeds, except as above stated, constitues the alleged breach of the condition of the official bond upon which the plaintiff bases its rights of action.

At the trial the plaintiff rested its case upon the admissions made in defendants' answer, and upon the testimony, oral and written, set out hereafter. Lewis M. Olson testified substantially as follows: "My name is Lewis M. Olson. Am a farmer. Was treasurer of Prairie school township at one time. Know the defendant William Haseleu. I became treasurer June 27th, 1884. I succeeded Mr. Haseleu, the defendant in this case. Mr. Haseleu did not turn over to me the bonds of Prairie school township of $500. He turned over a receipt. He never turned over any money as realized from such bonds. [Paper shown witness.] That is the receipt and paper. I received that paper from the defendant Mr. Haseleu." The paper was put in evidence, and is as follows: "$1,000. Grand Rapids, Dakota, Sept. 28th, 1883. Received of William Haseleu, Treas. Prairie School Township, one thousand dollars in bonds of Prairie Tp., La Moure Co., D. T., for placing and cr. A. H. Huelster, Cash. Bank of Grand Rapids." Olson further testified: "I was treasurer of the township for some years. As treasurer I have knowledge of the payment of interest on the bonds of $500 each issued September 28th, 1883. I paid coupons every year for two terms while I was treasurer. Am not a member of the school board. These bonds are now outstanding." George R. Fralick testified in substance that he was county auditor of La Moure County. He produced a record showing that the two $500 bonds were registered on September 28th, 1883, and were issued by plaintiff, and made payable to one C. T. Ingersoll. Another witness testified that

the bonds were worth $950 when Haseleu went out of office on September 24th, 1884. Plaintiff here rested its case.

The defendants introduced Haseleu as their only witness. He testified as follows: "Reside in Prairie township, La Moure County, N. D., since 1882. Am one of the defendants in this action. I was treasurer of Prairie school township in 1883. I knew of certain bonds of $500 each having been issued in the month of September, 1883, by Prairie school township. I knew Mr. Beckman procured the blanks for the issuance of these bonds. He was clerk of Prairie school township. The bonds which are in question in this action were filled out at Mr. Whitman's office, at Grand Rapids, in this county. I was in town that day. The way I happened to be there that day was Mr. Beckman came to me, and said he was going to Grand Rapids, and he had some business there; no other party. He told me he was going to prepare these bonds, and asked me to come along with him. Mr. Stephen Kohan went with us that day. He was director of Prairie school township. I did go in there when the bonds were filled out. I did not sign them. These identical bonds were taken in hand by a party I do not know. After these bonds were filled out, Mr. Beckman, Mr. Kohan, and I went with them to the Rapids Bank, and they were handed right over, after we went into the bank, to Mr. Huelster. He was cashier of the bank at that time. There was no conversation at that time,—not as to how much should be received for them. Mr. Ingersoll was not there. I did not, before these bonds were issued, ever make any negotiations with any parties whatever—Mr. Ingersoll or anybody else—for the sale of these bonds. I never saw Mr. Ingersoll. I never made any attempt to sell these bonds to any one. By the Court: Did you have these bonds in your hands? A. I did not. No sir. It was so long ago I couldn't tell. They were carried in by all three of us. Q. Did you never have any conversation previous to the time of your going in, either with Mr. Ingersoll or the cashier of the bank, Mr. Huelster? A. Before these bonds were sold or left there? Q. Yes. A. I did not. I never saw Mr. Ingersoll.

I did not talk with Mr. Huelster. I had nothing to do with these bonds. Q. Did Mr. Beckman tell you before the bonds were sold that he had agreed to sell these bonds to Mr. Ingersoll for 95 cents on the dollar? (Plaintiff's counsel objects to the question on the grounds that it is heresay and incompetent. Objection overruled, to which ruling the plaintiff, by his counsel, duly excepted.) A. He did. Mr. Beckman did the bargaining. Mr. Beckman took full charge and control of procuring all the blanks and negotiating the sale of these bonds. Q. You may state whether or not Mr. Beckman made any statement to you in regard to the fact as to whether Mr. C. T. Ingersoll was to purchase these bonds or simply negotiate for the township. (The plaintiff's counsel objected to the question on the ground that it is incompetent and immaterial and hearsay. The court overruled this objection, to which ruling the plaintiff, by its counsel, duly excepted.) A. He was going to sell them for the district. Q. Did Mr. Beckman ever tell you that? A. He did. Since these bonds were placed there I have been there once a week, to see if the funds for them had been returned; and until I got a little money from him, and an order for the material to build the school house, no money was received from the bank. At the time the bonds were left there by the board, I communicated my inability to collect the proceeds of these bonds to the other members of the board after my trips to Grand Rapids and attempts to collect. Talked with Beckman from time to time about it. We talked about it sometimes twice a week. The order for material that Mr. Ingersoll gave was taken to the lumber yard and figured out. Mr. Beckman took it there. I went along. We both went together. He was the clerk. The amount received by the township on that order was $216. By the Court: Who took this order to the lumber yard? A. I and Mr. Beckman. We both took it. Do not know who it was given to. They delivered the lumber to Mr. Beckman, and the farmers went together and hauled it out. After these bonds were issued, did not give any additional bond to cover the amount to be received from their

proceeds. Only gave one bond as treasurer. Cross-examination by Mr. Glaspell: This order was given at Grand Rapids, in the bank. Mr. Huelster wrote it. I and Mr. Beckman and Mr. Kohan were present. I went along with the board that day. The order was delivered to me, Mr. Haseleu. The order was delivered to Mr. Haseleu for material to build the school house. I made an entry on my books as treasurer for this $216. Don't believe I wrote it in the books. I was in the bank when these bonds were delivered. They were delivered to Mr. Huelster. Mr. Kohan, Mr. Beckman, and Huelster were present. Mr. Huelster gave me that receipt. Exhibit A. The board ordered him to. I didn't ask for any. The board ordered it. I was present at the time, and the members of the school board. The treasurer was a member of the school board at that time. I was present when the receipt was made out in my name. It was not made out in the name of the three members of the school board, because I was put there to collect the money. It was understood and agreed that I was to collect the money, and the board ordered me to collect the money after the bonds were left there. Don't know who carried the bonds over there. I didn't have them in my pocket. I can't tell you if it was possible that I had them. I did see these bonds. I was out and in when they were signed. There were two bonds. They were signed in Mr. Whitman's office. Did not put them in my pocket when we started over to the bank. Mr. Whitman did not go over to the bank with us. I attended the meeting when the proposition was indorsed for the issuance of these bonds for this school township. Do not know when it was. First was in June, 1883. Was at the meeting when the proposition was passed to issue these bonds. Told at the meeting that Mr. Beckman had been talking with Mr. Ingersoll, and the bonds would bring 95 cents, and would rather issue bonds than orders. Mr. Beckman was present, and talked also. Told them the same thing. We all wanted the bonds issued. I did explain the matter of issuing bonds at that meeting. My reason for wanting to issue the bonds was that it was pretty hard

to get money for orders here at that time. Mr. Beckman told me that money could be realized on bonds. All I stated was what Mr. Beckman told me. Don't know as I gave Mr. Beckman as my authority at that meeting." Defendant rests. Gustave Papenfuss recalled on behalf the plaintiff: "I was present at the school meeting in Prairie school township when the proposition of issuing the bonds in question in this suit was brought up. Mr. Haseleu was present. He stated about issuing bonds. He just spoke like this: 'We have spoken to Mr. Ingersoll, and we can get 95 cents, and it is a better way to issue bonds.' Cross-examination: He said, 'We.'"

We think there is no substantial conflict in the evidence upon any feature of the case which is at all material. The facts may be condensed as follows: After the bonds were voted, the school board, consisting wholly of the defendants, caused the bonds to be filled out in favor of C. T. Ingersoll; and after they were properly registered the bonds were conveyed to the bank of Grand Rapids,—all of the defendants going to the bank together,—and the bonds were then and there delivered to the cashier of the bank, who gave to Haseleu the receipt above set out. On the occasion of the delivery of the bonds to the bank no conversation whatever was had between the cashier and the defendants, or either of them, as to what disposition should be made of the bonds; and it distinctly appears by the undisputed evidence that defendant Haseleu had never at any previous time seen Ingersoll, or had at any time sold or attempted to sell or negotiate a sale of the bonds. It appears by evidence offered on both sides that previous to the voting of the bonds some arrangement had been made with Ingersoll whereby the bonds were to be so disposed of that they should yield $950 net to the school township. The details of such arrangement do not appear in evidence, but all the circumstances of the transaction demonstrate the fact that the bonds were delivered to the cashier of the bank pursuant to such previous arrangement. There were two acts done by the

cashier which can only be explained upon the theory of a pre-existing understanding, viz: the payment of $50, which was made at the time to Haseleu, and which money is accounted for, and the execution of the receipt which was delivered to Haseleu. These two acts of the cashier were not the result of any talk had at the time, and they are of a nature to show that an arrangement had previously been made, and one which was understood and assented to by the defendants. The terms of the writing show that the bonds were to be "placed." This expression is one that is well understood by bankers and business men generally, and it means that the bonds were to be sold. The circumstances preclude the idea that the sale of the bonds was to be wholly consummated, and the money paid over then and there, at the bank. The evidence shows that all of the defendants understood that the treasurer should collect the money when it was obtained out of the proceeds of a sale, which sale was not to be fully consummated at the bank at the time when the bonds were delivered. The understanding of all members of the board to the effect that Haseleu was to collect and receive the money derived from the sale of the bonds was natural and in entire consonance with the duties which the law imposes upon a school township treasurer. Hence it was quite proper that the receipt for the bonds should be made out to Haseleu. The law expressly states: "All money received from the sale of the bonds shall be paid to the treasurer of the school township." Section 2, Ch. 45, Laws 1883. The very terms of this statute import that when a school township sells its bonds the proceeds of such sale are to be paid over by those who make the sale to the treasurer. No such provision would be necessary if the treasurer, as such, was, under the law, empowered and required to negotiate a sale. Section 1 of Ch, 45 authorizes a school township to issue and sell its bonds for the purposes stated, and within the limitations of the statute. A school township is a municipal corporation for school purposes, and can only act through its officers. When the bonds have been voted the authority of the electors over the subject matter is

exhausted. The voters direct the issue and sale of certain bonds, but they cannot either issue or sell the bonds. This duty, in the absence of specific provisions to the contrary, devolves upon the governing officials of the corporation, viz: the school board. Section 1, Ch. 45, Laws 1883, provides that "the bond and each coupon shall be signed by the clerk of the school township, and countersigned by the director." Nor is there any provision which authorizes the treasurer to either issue, sign, or countersign the bond; nor is the treasurer, as such, authorized by law to sell or negotiate a sale of a school bond. Plaintiff assumes correctly that the duty of executing and issuing school bonds is devolved by law upon the school board, and plaintiff expressly charges in paragraph 6 of the complaint that the school board "did execute and did issue" the bonds. The truth of this averment is expressly admitted by the answer, and the testimony shows in detail how and in what way the bonds were "executed and issued." They were signed and countersigned by the clerk and director, and, after being registered, were delivered to the cashier of the bank by the board, pursuant to some pre-existing arrangement, the terms of which are not fully disclosed by the evidence, but were obviously known to the board, and concurred in by all the members of the board. This delivery of the bonds to the cashier of the bank is and constitutes the issue of the bonds, which the complaint alleges was an act of the board. No other issue—no other delivery of the bonds—appears to have been made. The plaintiff has signally failed to offer any evidence tending to support the essential averment set out in the seventh paragraph of its complaint as follows: "That both of such school bonds * * * were placed in the hands and custody of William Haseleu, the treasurer of such school township, for the purpose of negotiation and sale; and that said William Haseleu did negotiate and make sale of said two school township bonds with one C. T. Ingersoll for the whole sum of nine hundred and fifty dollars cash." Not only is there an entire failure to support this averment by proof, but the undisputed evidence negatives its truth, and shows beyond

the possibility of a doubt that the bonds were never placed in William Haseleu's hands for sale, or negotiation for sale, or for any purpose. The fact is made perfectly clear by the undisputed testimony that Haseleu never sold the bonds, and never negotiated with Ingersoll for their sale, either as treasurer, or in his private capacity, or at all. On the other hand, the evidence leaves no room for doubt that the board, acting in concert and collectively, "did execute and did issue" the bonds as alleged in the 6th paragraph of the complaint. Not only did the board "execute and issue" the bonds, but it also delivered the bonds to the cashier, and no other delivery appears ever to have been made. Counsel for appellant points to the terms of the writing signed by the cashier and delivered to Haseleu at the time the bonds were handed to the cashier. It reads, "Received of William Haseleu, Treas." etc., and counsel's contention is that the writing shows on its face that the treasurer delivered the bonds to the cashier, and that the writing is the best evidence of the transaction, and excludes any parol evidence which contradicts or varies the terms of the writing. It is true that the terms of the writing, when unexplained, are such as to indicate that the treasurer did deliver the bonds to the cashier; but, as has been seen, the writing was executed in a transaction had between the school board and the cashier of the bank, and the treasurer, as such, was not a party to it. In such a case the rule excluding parol evidence does not apply. 7 Am. & Eng. Enc. Law, p. 95. If the instrument can properly be classed as a receipt, the rule does not apply, and the parol evidence would, in that view, of course, be admissible; but we think the instrument partakes of a dual character, and is in part a receipt and in part a contract. In such instruments the rule is that the part which is a receipt may be explained or varied by parol. *Morris* v. *Railroad Co.*, 21 Minn. 91; *Burke* v. *Ray*, 40 Minn. 34, 41 N. W. Rep. 240. We think the writing is clearly a mere receipt, except as to that part in which it is stated that the bonds were received "for placing and credit." Hence the evidence outside the writing was proper to show the

circumstances and the relation of the parties to the transaction in which the writing was made.

Upon the facts thus appearing the question arises whether the treasurer and his official sureties, in an action for a breach of the condition of the treasurer's official bond, can be made responsible for the loss of the bonds or their proceeds, when such loss was wholly the result of the action of the school board. This question must be answered in the negative. Neither the treasurer nor his official bondsmen should be held responsible for the conduct of other officers over whom the treasurer, as such, has no control. The law and the official bond constitutes the sole measure of the treasurer's liability. Section 35, Ch. 44, Laws 1883, says: "The treasurer of every school township shall, before entering upon duty as such, give bond to such corporation, conditioned that he will faithfully and impartially discharge the duties of his office, (naming it fully,) and render a true account of all moneys, credits, accounts, and property of every kind that shall come into his hands as such treasurer, and pay and deliver the same according to law." The condition of the bond in suit substantially embodies this statute, and the bond and statute furnish the full measure of the treasurer's liability. The statute requires the treasurer to render a true account of money and property which shall come into his hands as treasurer. It requires no more than this. It appears in this case that the treasurer has fully accounted for whatever property and money has been placed in his hands as proceeds of the bonds in question, and also appears that the bonds themselves never came into his hands or custody as treasurer or otherwise. Never having come into his hands, the treasurer, as such, never became liable to account for or turn over the bonds.

While the language of an official bond should, under the established modern doctrine, receive a fair and reasonable interpretation, its obligation is nevertheless *strictissimi juris*. The obligors consent to be bound to a certain extent only and their obligation ought not to be expanded by judicial construction

beyond the fair terms of their consent. The liability of sureties extends to the official acts of the principal, and only to such acts. For acts done outside of official duty an officer may incur personal liability, but for such acts sureties are not responsible. These views have the amplest support in the authorities. *U. S.* v. *Boyd*, 15 Pet. 187; *Bank* v. *Ziegler*, 49 Mich. 157, 13 N. W. Rep. 496; *Taylor* v. *Parker*, 43 Wis. 78; *State* v. *Conover*, 78 Am. Dec. 54; *Gerber* v. *Ackley*, 37 Wis. 43; Murfree, Off. Bonds, § § 461, 462; Mechem, Pub. Off. § § 282, 283.

Appellant's counsel argues that it was the duty of the treasurer to object to the delivery of the bonds to the cashier of the bank, and that his silence constitutes negligence which renders him and his official sureties liable on his bond. This theory is untenable under the issues made by the pleadings. The action arises wholly upon contract and there are no averments in the complaint sounding in tort. The complaint counts on an alleged breach of the condition in the bond for not accounting for certain bonds which it is alleged were delivered to the treasurer. Upon the issues made no queston can arise as to whether the board or its members exercised due care in issuing the school bonds. We find, after a very careful consideration of the whole record, that the verdict and judgment are in accordance with law and the testimony, and therefore should be affirmed. The court will so order.

CORLISS J., concurs. BARTHOLOMEW, C. J., having been of counsel, took no part in the above decision.

(55 N. W. Rep. 938.)

LOUIS A. YORKE *vs.* EMMA M. YORKE.

Opinion filed May 31st, 1893.

Citation to Show Cause—Service on Attorney.

When a decree of court has been obtained, and an application to set the same aside is subsequently made in the same case, service of the citation to show cause why the decree should not be set aside is properly made upon the attorney of record who procured the decree.

Affidavit for Publication of Summons—Diligence.

An affidavit for publication of summons, which entirely fails to show that any diligence was used to find the defendant in this state, and fails to state positively the residence of such defendant, or that any diligence has been used to ascertain such residence, is fatally defective, and a publicatton of summons based upon such affidavit confers no jurisdiction of the person of defendant.

Motion to Vacate Decree—Appearance—Waiver of Service.

When a party who has not been properly served with process appears in a case, and asks to have a decree against him set aside for the reason that the court had no jurisdiction of his person, and for the further reason that such decree was procured by fraud and deceit, and was without evidence to support it, such appearance is general, and is a waiver of all defects in the service of process.

General Appearance Will Not Validate Void Decree.

But such general appearance will not validate a decree otherwise invalid by reason of fraud and deceit practiced in its procurement.

Vacation of Decree—for Fraud or Deceit.

Courts of general jurisdiction have the inherent power, independent of any statutory provisions,—and in divorce cases no less than in other cases,—to set aside and annul any judgment or decree procured by the fraud and deceit of the successful party, practiced upon the complaining party to the action, and the court.

Vacation of Decree—Rehearing.

When a decree is thus annulled for fraud in its procurement, it is not proper for the court to go further, and dismiss the action with costs. The case should be retained, and defendant granted a reasonable time within which to plead to the complaint.

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

Action by Louis A. Yorke against Emma M. Yorke, for a divorce. Plaintiff had a decree, and from an order vacating the same, and dismissing the complaint, plaintiff appeals.

Modified and affirmed.

M. A. Hildreth, for appellant.

Service of papers upon a former attorney, but after the relation of attorney and client has ceased, is not proper service. *Beach* v. *Beach*, 6 Dak. 374. The affidavit for publication of summons was sufficient. *Kennedy* v. *Ins. Co.*, 101 N. Y. 487, 43 Hun. 629, 76 Cal. 646. The defendant having appeared and moved to vacate the judgment upon other grounds than want of jurisdiction, was a general appearance and cured all defects in prior proceedings. *Handy* v. *Ins. Co.* 37 Ohio St. 366; *Swift* v. *Lee*, 65 Ill. 336; *McBain* v. *People*, 50 Ill. 503; *Dunning* v. *Dunning*, 37 Ill. 306.

L. A. Rose, for respondent.

Motion papers to set aside a judgment of divorce granted by default are properly served on the attorney for the plaintiff in the judgment, although made after entry of judgment and after the attorney for the plaintiff has been paid off and discharged. *Miller* v. *Miller*, 37 How. Pr. 1; *Merriam* v. *Gordon*, 22 N. W. Rep. 563; *Beach* v. *Beach*, 43 N. W. Rep. 701; *Drury* v. *Russell*, 27 How. Pr. 130; *Lusk* v. *Hastings*, 1 Hill. 656. The court may vacate its judgment after term where it did not have jurisdiction to render judgment or where for any reason the judgment is void or where its rendition or entry was procured by fraud. *Edson* v. *Edson*, 108 Mass. 590; *Cottrell* v. *Cottrell*, 23 Pac. Rep. 531; *Caswell* v. *Caswell*, 11 N. E. Rep. 342; *Morton* v. *Morton*, 27 Pac. Rep. 718; *Wisdom* v. *Wisdom*, 39 N. W. Rep. 594; *Brown* v. *Grove*, 18 N. E. Rep. 387; *McBlane* v. *McBlane*, 20 Pac. Rep. 61; *Cross* v. *Cross*, 15 N. E. Rep. 333. Lapse of time will not effect the right to vacate a judgment void for want of jurisdiction. *Feikert* v. *Wilson*, 37 N. W. Rep. 585; *Vilas* v. *Pl. N. Y.* 25 N. E. Rep. 941; *Caswell* v. *Caswell*, 11 N. E. Rep. 342. One year limitation within which to vacate default does not apply to void judgments. *Peo.* v. *Greene*, 16 Pac. Rep. 197. Affidavit of merits is not necessary to set aside a decree of divorce obtained by fraud. *Cottrell* v. *Cottrell*, 23 Pac.

Rep. 531; *McBlane* v. *McBlane*, 20 Pac. Rep. 61; *Gay* v. *Grant*, 8 S. E. Rep. 99; *Hanson* v. *Hanson*, 20 Pac. Rep. 736; *Wisdom* v. *Wisdom*, 39 N. W. Rep. 594; *Orth* v. *Orth*, 69 Mich. 158. Appearance and motion of defendant to vacate judgment does not cure prior defects. *Gay* v. *Hawes*, 8 Cal. 563; *Deidesheimer* v. *Brown*, 8 Cal. 340; *Toof* v. *Foley*, 54 N. W. Rep. 59.

BARTHOLOMEW, C. J. This case comes to this court on an appeal from an order entered by the District Court of Cass County on the 23rd day of November, 1892, which vacated and set aside a decree of divorce granted by said court in said action on the 15th day of September, 1891, and dismissed the complaint in said action, with costs. On September 9th, 1892, on the petition of Emma M. Yorke, the defendant and the respondent herein, an order was issued by the judge of said court, citing Louis A. Yorke, the plaintiff and appellant herein, to show cause why such decree should not be vacated. This order was served on M. A. Hildreth, Esq., who had acted as the attorney for plaintiff in procuring such decree. At the final hearing under such citation, the order was entered from which the appeal is taken. The petition upon which the order was granted is exceedingly voluminous. We state such of the ultimate facts, as alleged in the petition, as we deem necessary for a proper understanding of our rulings: Some time in 1889, appellant instituted an action for divorce against respondent in the District Court of Stutsman County, charging her with dissertion. To this action there was an appearance and answer filed, and, the case being thus at issue, the attorney for appellant wrote to the attorney for respondent, who resided in Philadelphia, saying: "Will advise you of further proceedings in the case when the same are taken." That neither respondent nor her counsel ever received any notice of any further proceedings in said case. That on June 20th, 1890, by order of said court, other counsel were substituted as attorneys for appellant in said case, and on the same day such substituted counsel procured an order dismissing said action without prejudice; and immediately thereafter this action was brought, in Cass

County, charging respondent with dissertion and adultery. That subsequently an order for publication of summons was procured in said case, and that the affidavit upon which such order was obtained was false, and known by appellant and his attorney to be false when made, in that it was stated therein that respondent's residence was at Philadelphia, Pa., when it was well known to them that her residence in summer, was at Sea Girt, N. J., and, in winter, at Bryn Mawr, in Montgomery County, Pa., and that she had no residence whatever at said City of Philadelphia; that the summons in this case was published in a weekly newspaper at Fargo, in said Cass County, but that no copies of the summons and complaint were ever mailed to her, at her place of residence, as the statute requires, but the same, if mailed at all, were sent to said City of Philadelphia, and that all this was done for the purpose of preventing respondent from gaining any knowledge of the pendency of this action. The answer filed by the respondent in the case brought in Stutsman County is made a part of the petition in this case. In that answer, respondent specifically charged appellant with desorting her and with long continued adulterous intercourse with one Lena de Zychlinski, and denied that he was a resident of this state. Respondent denies all desertion and all adultery on her part. She had no knowledge of the pendency of this action until after the decree was rendered, and until after October 22nd, 1891. That she then read in a newspaper published in New York City the announcement of the divorce of Louis A. Yorke from Emma M. Yorke, and his subsequent marriage to the Countess de Zychlinski. The evidence is also reviewed in the petition, and the claim made that it was insufficient to support the decree, and that it was false. The relief asked by the petitioner is as follows: "The defendant, Emma M. Yorke, therefore respectfully asks the court, upon the further consideration of the record, proceedings, and evidence in said cause, to open and set aside said judgment and annul said decree therein, and if said court cannot summarily open and set aside and annul said judgment and decree upon the irregularities,

imperfections, and insufficiency of said proceedings, that it will allow said defendant to come and defend the said action." The trial court, in making the order appealed from, also made some preliminary findings of fact, one of which, being a matter of which that court was bound to take notice, becomes important here. The fact that the action had once been brought in Stutsman County, and, after issue joined, had been dismissed by plaintiff without the knowledge of defendant, was in no manner brought to the attention of the trial court until respondent's petition was filed.

The attorney for the appellant, M. A. Hildreth, Esq., appeared specially to oppose the motion to set aside the decree, and claimed that the court had acquired no jurisdiction of appellant in the matter because the motion papers were served upon the attorney, instead of the party. He filed his affidavit, setting forth that service might have been made upon the party in the state, and that the relation of attorney and client no longer existed between himself and Louis A. Yorke. This point is practically ruled against appellant in *Beach* v. *Beach*, 6 Dak. 371, 43 N. W. Rep. 701. We indorse what is there said, and need not repeat it here. We may add, however; that, granting that the relation, powers, and duties of an attorney cease upon entry of final judgment, yet it is upon the ground that the judgment and decree, as entered in this case, were not final, that the application of respondent was made. This application was not by original action in the same or another court, but by motion in the very case in which the decree was entered. While the court could entertain a motion affecting the decree, it cannot, in any proper sense, be said that the decree was final. See, also, *Miller* v. *Miller*, 37 How. Pr. 1; *Merriam* v. *Gordon*, 17 Neb. 325, 22 N. W. Rep. 563. The notice to show cause was properly served upon the attorney of record in the case. It was alleged in the notice that the affidavit upon which the order of publication of summons was based was insufficient in form, as not showing what, if any, diligence had been used to find the defendant in this state. Under the authority of *Beach* v. *Beach*, *supra*, that would be true. Indeed,

we think the affidavit in this case much more vulnerable than in that. It not only entirely fails to show that any diligence whatever had been exercised to find defendant in this state, but fails to give any satisfactory information as to defendant's residence. It was made by the attorney, and states, on information and belief, that defendant's residence is at Philadelphia, Pa.; and the sources of information are stated to be statements made by plaintiff to the attorney, and the fact that certain papers which the attorney had never seen were sworn to by her in that city. This latter circumstance could have no probative force in the mind of a lawyer, and we are at a loss to understand why the plaintiff himself did not make the affidavit, instead of making statements to his attorney. He verified the complaint on the same day, before a notary public, in the same county, and presumably at the same place. True, these affidavits may properly be made by an attorney, but when the truth of the matter stated rests upon the unsworn statement of the client, and the client is present, good faith to the court requires that some reason be given why the client does not make the affidavit. We think the affidavit was insufficient in this case, and that the court was without jurisdiction of the defendant at the time the decree was granted.

But, when the respondent came into court with her motion to set aside the decree, she made no special appearance, nor did she attack the decree on the ground of want of jurisdiction only, but also upon the further grounds of fraud and deceit practiced upon herself and upon the court, and the insufficiency of the evidence to support the decree. The petition asked that the entire proceedings be set aside, or, if that could not be done, that she be allowed to come in and defend. This was a voluntary and unqualified submission to the jurisdiction of the court, generally, and, although made after judgment, was a waiver of all defects in the process. *Elliott* v. *Lawhead*, 43 Ohio St. 171, 1 N. E. Rep. 577; *Leake* v. *Gallogly*, (Neb.) 52 N. W. Rep. 824; *Grantier* v. *Rosecrance*, 27 Wis. 488; *Anderson* v. *Coburn*, Id. 558; *Insurance Co.* v. *Swineford*, 28 Wis. 257; *Carpentier* v. *Minturn*, 65 Barb. 293;

McBane v. *People*, 50 Ill. 503; *Curtis* v. *Jackson*, 23 Minn. 268; *Frear* v. *Heichert*, 34 Minn. 96, 24 N. W. Rep. 319. But what was the effect of this general appearance, made subsequent to the entry of the decree? In *Anderson* v. *Coburn*, *supra*, it was held that, as to the immediate parties to the action, such appearance validated a judgment that was theretofore absolutely void for want of jurisdiction. Such was also the holding in *Grantier* v. *Rosecrance*, *supra*, and in *Alderson* v. *White*, 32 Wis. 308; *Burdette* v. *Corgan*, 26 Kan. 102; *Fee* v. *Iron Co.*, 13 Ohio St. 563; and *Curtis* v. *Jackson*, 23 Minn. 268. But this last case was expressly overruled, as to that point, in *Godfrey* v. *Valentine*, 39 Minn. 336, 40 N. W. Rep. 163. It may not be imperatively necessary for us to pass upon the point, but we cannot forbear saying that we think the case in 39 Minn. 336, 40 N. W. Rep. 163, rests upon much the better foundation in principle. We can well understand that where a defendant against whom judgment has passed, but who was in no manner served with process, comes into court, and asks to have that judgment set aside by reason of such want of service, and also for other alleged irregularities connected therewith, by asking the court to investigate such other irregularities he submits himself to the jurisdiction of the court, and can no longer be heard to say that the court has no jurisdiction of his person. We can understand, also, that if, upon investigation, the court finds that such irregularities do not exist, and refuses to set aside the judgment, the defendant is forever bound by such rulings, unless reversed in a higher court. But we do not understand upon what principle it is held that the mention of such other irregularities in connection with the want of jurisdiction should forever preclude any investigations into the existence of such irregularities. A defendant who has not been served with process may have the judgment against him set aside for that cause. If plaintiff desires to proceed further he must then bring the defendant into court by proper service, and, when so in court, defendant may demur to the complaint, or defend, as he sees proper. But if, when he asks to have the judgment set aside, he goes one step

further, and says to the court: "Notwithstanding the fact that I was never served with process, yet I now aver that plaintiff states no cause of action against me in his complaint, and I ask to have the judgment set aside for that reason also," by what legal necessity or propriety can it be said that he thereby shuts his own mouth, forecloses the question, and forever makes the complaint good, as against himself. We doubt if such a result should follow a voluntary appearance under such circumstances. But, however the law may be as touching mere irregularities, we are confident that no subsequent voluntary appearance can cure or condone fraud, such as appears upon the record before us. A court record, based upon a legal fraud, may demand obedience while it stands, but it is idle to talk of the sancitity of such a record. Whatsoever is tainted with fraud—a court record no less than a contract—must fall before the clear evidence of the fraud by which it was established. This principle can never be departed from without making the law the instrument for the perpetration of injustice, oppression, and crime. This is familiar law. But see Black, Judg. § 321, and cases cited.

It is contended, however that decrees in actions for divorce form a clear exception to the general rule; that in this class of cases, reasons of public polity, the interests of the state, as well the irreparable wrong that may be done to innocent third parties in cases of remarriage, alike demand that divorce decrees should not be subject to attack in this manner. It is freely conceded that courts have sometimes so held. Perhaps the strongest case in the books is *Parish* v. *Parish*, 9 Ohio St. 534. That case did not arise on motion to vacate, but under the old practice of bill in equity filed at a subsequent term. There was a demurrer to the bill, and the court said: "For the honor of human nature, it is to be hoped that the facts alleged in the petition in regard to the procuration of the decree are not true in fact, though, for the purpose of the demurrer, they are to be taken as admitted. Indeed if a case could be supposed in which a decree a vinculo, by a court having jurisdiction over person and subject matter,

could be vacated at a subsequent term by reason of its fraudulent procurement, it would seem that such a case is presented in the bill under consideration." But after a not very thorough review of the authorities the court concludes: "We therefore feel compelled, though reluctantly, to hold that sound public policy, in this class of cases, forbids us from setting aside a decree of divorce a vinculo, though obtained by fraud and false testimony, on an original bill at a subsequent term." See, also, *McJunkin* v. *McJunkin*, 3 Ind. 30; *O'Connell* v. *O'Connell*, 10 Neb. 390, 6 N. W. Rep. 467; *Lewis* v. *Lewis*, 15 Kan. 184; *Greene* v. *Greene*, 2 Gray 361. An examination of these cases will disclose that in almost every instance the decision was more or less influenced by sympathy of the judges for innocent third persons, who, on the strength of the decree, had intermarried with the divorced party, and for the helpless issue of such marriage. They were unwilling "to expunge a sentence of divorce with a stroke of the pen, bastardize after-begotten children, involve an innocent third person in legal guilt, and destroy rights acquired in reliance on a judicial act which was operative at the time." Fortunately for us, as this record stands, our sympathies are not thus wrought upon; and, as a purely legal question, the overwhelming weight of authority is the other way. *Holmes* v. *Holmes*, 63 Me. 420; *Adams* v. *Adams*, 51 N. H. 388; *Edson* v. *Edson*, 108 Mass. 590; *Whitcomb* v. *Whitcomb*, 46 Iowa, 437; *Rush* v. *Rush*, Id. 649; *Olmstead* v. *Olmstead*, 41 Minn. 297, 43 N. W. Rep. 67; *Allen* v. *Maclellan*, 12 Pa. St. 328; *Mansfield* v. *Mansfield*, 26 Mo. 163; *Johnson* v. *Coleman*, 23 Wis. 452. These cases establish beyond dispute the principle that—not less in divorce cases than in any other class of cases—courts of general jurisdiction possess, ex-necessitate, the power to emancipate themselves from the effects of a deceit practiced upon them, and to expunge from their records that which has been spread thereon only through fraud and deception. In no case "shall fraud be skillful enough to impose a sham upon a court of justice, to the injury of innocent parties, without any adequate remedy or reparation therefor."

When we apply these principles to the case before us, there is not the least doubt that the action of the court in setting aside the decree was entirely correct; and in so declaring we do not intend to hold that the fact that the trial court found the appellant to be a resident of this state upon insufficient or false testimony would constitute legal fraud. Nor do we hold that the fact, if such it be, that the original decree was based entirely upon false or prejured evidence could be urged as a ground for annulling that decree. If the truth or falsity of the testimony upon which a judgment is based could be opened to subsequent inquiry, there would be no end of litigation. That matter must be regulated by the conscience of the witness, and the bar of the criminal court. 2 Bish. Mar. & Div. § 1571, and cases cited. But the fraud in this case is of a more palpable character. The plaintiff brought his action in Stutsman County. Process was properly served. Defendant appeared by her attorney, and filed an answer in the case. If the allegations in that answer were true, they formed an insuperable barrier to any decree in plaintiff's favor. With the case thus at issue, plaintiff's attorney stated, in writing, to the attorney for defendant, that he should have notice of any further proceedings in the case. While defendant was thus lulled into security, plaintiff permitted his attorney, in direct defiance of the above understanding, and without any notice whatever to defendant or her attorney, to procure an order substituting another attorney in his stead, and permitted such substituted attorney to procure an order dismissing said action, and on the same day commenced an action in another jurisdiction.—*i. e.* in another Judicial District,—using, it would seem, special precautions to prevent defendant from obtaining any actual notice of its pendency. This conduct, under the circumstances, was a gross fraud upon defendant's rights. In all the subsequent proceedings that led up to the decree, the court was in no manner informed of any of the prior proceedings in the case in Stutsman County. It cannot be doubted that, had the court received any knowledge of such facts, no further step would have been permitted in

the case until the promise made by the former counsel was fully redeemed. Nor can it be doubted that plaintiff well knew that to be a fact. The suppression of those facts was a willful fraud upon the court. *Borden* v. *Fitch*, 8 Am. Dec. 230; *Vicher* v. *Vitcher*, 12 Barb. 640. By means of the frauds thus practiced the respondent, presumably an innocent woman, was branded as an adulteress by the solemn records of a court. That record cannot stand. It is proper as a matter of practice, to say that this application is not made under § 4939, Comp. Laws, giving relief in certain cases of mistake, inadvertence, etc. That section is not applicable to this case. Nor is it made under § 4900. That section gives a defendant served by publication only, and having no actual knowledge of the pendency of the action, the absolute right, on good cause shown, to come in, within the specified time, and defend the action, but divorce cases are expressly excepted from its operation. This application is entertained under that underlying and indestructible right to attack a judgment that is rendered without jurisdiction, or obtained through fraud upon the injured party and the court. But while the action of the court, in setting aside the decree, was proper, we think the court went a step too far, in dismissing the complaint and entering judgment for costs. After all the record that was based upon the fraud was stricken out, there yet remained a complaint to which defendant had entered a voluntary appearance. Justice to all parties requires that the searching light of truth be turned upon this case. The District Court of Cass County is directed to so modify the order appealed from as to set aside the decree of divorce, and allow the defendant 30 days from the entry of such modified order in which to plead to the complaint, if she so elect; respondent to recover costs in this court.

Modified and affirmed. All concur.

CORLISS, J. I refrain from expressing any opinion whether the appearance validates the decree, so far as jurisdiction was concerned, or whether it conferred jurisdiction only from the date of the appearance.

(55 N. W. Rep. 1095.)

ANTONIA HEGAR *et al vs.* JOHN DEGROAT.

Opinion filed July 6th, 1893.

Parties Plaintiff.

Sections 3303, 4870, Comp. Laws, construed. The plaintiff Schmitz conveyed the land in question to the plaintiff Hegar while the defendant was in the actual possession of the land, claiming title adversely to Schmitz. *Held*, in an action brought by Hegar to recover the possession, and damages for wrongfully withholding the land, that Schmitz was properly joined as a formal party plaintiff.

Evidence.

While Schmitz was living on the land, the sheriff, aided by the defendant, and assuming to act under and by virtue of a writ of execution issued out of a Justice's Court, entered upon the land, and ousted Schmitz, and put the defendant in possession. The execution was issued upon a judgment by default in an action for an unlawful detainer, in which the defendant herein was plaintiff, and Schmitz was defendant. The record in said action was excluded from the consideration of the jury upon the ground that the justice of the peace had no jurisdiction. The complaint showed upon its face that both parties to the action claimed title and based their right to possession upon a fee simple title. *Held*, that the ruling was not erroneous.

Void Tax Deed—Instructions.

Plaintiff Schmitz was was the general owner of the land, and in possession. His title was perfect, unless the defendant had a superior title by virtue of a certain tax deed under which defendant claimed title. At the trial it appeared that the tax deed was void on its face, for certain substantial reasons. The District Court ruled out the tax deed, and instructed the jury to disregard the same, as it furnished no justification to the defendant for entering upon the land, and ousting Schmitz therefrom. *Held*, that the instruction was proper.

Attorney's Fees Not Properly Recovered as Damages.

The action is to recover possession of the land, and for damages for its wrongful occupation. At the trial, against objection, plaintiffs were allowed to introduce testimony showing their expenditures for attorney's fees in prosecuting this action. The verdict was for the plaintiffs, and the jury allowed, as a separate item, the sum of $500 as and for plaintiff's attorneys' fees in this action. *Held*, that the court erred in admitting the testimony, and that the judgment must be modified by striking therefrom the amount allowed as attorneys' fees. *Held*, further that § 4601, which allows a recovery, as a part of the damages, of "the costs, if any, of recovering the possession," has reference only to the costs incurred in a previous action, if any had been brought for the sole purpose of recovering possession and that even in such cases expenditures incurred in the previous action could not embrace attorneys' fees as an element to swell the damages in the later action.

Evidence Sustains Verdict.

Testimony as to the value of the use of the land in question is examined and considered. *Held*, that the verdict as to the value of the use is justified by such evidence.

Interest on Damages.

The court instructed the jury that they might, at their option, allow or not allow interest on the annual value of the use of the land while it was wrongfully occupied by the defendant. *Held*, that such instruction was proper.

Irrelevant Testimony—Harmless Error.

Against objection, one of plaintiffs' witnesses was allowed to testify as to certain matters which were foreign to the issues in the case. *Held*, that the testimony was improperly admitted, but that it was not prejudicial to the defendant, and hence a new trial will not be granted on account of such error.

Void Tax Deed Will Not Start Statute of Limitations.

A tax deed, void on its face, cannot operate to set the statute of limitations in motion. Accordingly, *held*, (construing Comp. Laws, § 1640,) that this action is not barred on account of the fact that it was not commenced until more than three years had elapsed after the void tax deed was recorded.

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

Action by Antonia Hegar and Micke Schmitz against John DeGroat in ejectment and for damages for the use and occupation. Plaintiff recovered judgment for possession and $3745 damages and for costs, and defendant appeals.

Modified.

Selby & Ingwaldson, (*M. A. Hildreth* of Counsel) for appellant.

J. E. Robinson, for respondent.

WALLIN J. This action is brought to recover the possession of a certain quarter section of land in Traill County, with damages for withholding the same, and for the costs of recovering possession. It is conceded that in the month of April, 1887, the plaintiff Schmitz, who then resided upon the land with his family, was the fee simple owner thereof, unless De Groat, the defendant, was such owner by virtue of a tax deed executed and delivered by the county treasurer of Traill, and upon which the defendant bases all his rights to the land. It appears that DeGroat, relying upon his tax title to recover possession, instituted an action in a

Justice's Court of Traill County against the plaintiff Schmitz to oust Smitz, and to recover possession of the land, under the unlawful detainer statute. Schmitz did not appear in such action, and De Groat obtained judgment in his favor, whereupon an execution issued, and the sheriff (claiming to act under such execution, and being actively assisted by the defendant) ousted Schmitz from the land, and placed the defendant in the exclusive possession thereof. Schmitz was dispossessed in the month of April, 1887, and the defendant continued in the exclusive possession of the land from that time for six cropping seasons, and was in possession when the trial took place in this action, in December, 1892. In May, 1892, the plaintiff Schmitz and his wife, by a deed of conveyance duly executed and recorded, conveyed all of their right, title, and interest in the land to the plaintiff Antoine Hegar, and also, by the same deed, transferred to Antoine Hegar "all the rights of said grantors to recover possession of said land, with damages for the withholding thereof, and the rents and profits of the same, and for waste committed therein." The grantors further empowered the grantee to institute any and all necessary actions, in their name or otherwise, to recover possession and damages, as before stated. The deed being made while the defendant was in the actual possession of the land, Schmitz name is properly used as a nominal plaintiff in this action, pursuant to the provisions of § 4870, Comp. Laws.

The trial court permitted the tax deed and the tax proceedings upon which the deed was based to be introduced in evidence, but in its charge to the jury they were instructed by the court, in substance, to wholly disregard the tax deed. We are satisfied that the tax was void, and that the deed was void on its face; but, as the soundness of this ruling of the District Court is practically conceded by appellant's counsel, we do not deem it necessary, in this case, to set forth in detail the grounds or reasons upon which we rest our conclusions upon this feature of the case.

The complaint charged that the plaintiff was lawfully seized and possessed of the land as owner in fee simple, and "that

while so possessed thereof, on April 2nd, 1887, the defendant entered upon said premises, and ousted said Schmitz, and that he still unlawfully withheld from the plaintiff possession thereof, * * * and that the value of the use and occupation of said premises since the 2nd day of April, 1887, * * * is $500 a year." Plaintiffs further claimed in their complaint general damages in the sum of $1,000, but do not set up in their complaint any demand for attorney's fees as a part of plaintiffs' costs in recovering the possession. The verdict was for the plaintiffs, and embraced the following: "For the use and occupation of the land, $3,245; for the cost of recovering the said land, $500,—amounting in all to the sum of $3,745." Plaintiffs' counsel was called as witness to show the amount of attorney's fee which plaintiffs would be obliged to pay out in this action as one part of the cost of recovering possession of the land. The witness testified, in substance, that at the lowest figure the attorney fee would be from $500 to $550. The testimony was objected to upon the ground that it was not the proper measure of damages, was incompetent, irrelevant, and immaterial, and no foundation laid for the proof. These objections were overruled by the court, and defendant excepted. These rulings are assigned as error in this court. We think these exceptions must be sustained. The prevailing general rule is that expenditures for attorneys' fees made by the successful party cannot be shown at the trial as an element of damages. This is true, especially where the statute, in terms, allows specific sums as taxable costs, and as indemnity to the suitor for his expenses, over and above disbursements. The statute of this state expressly allows such costs, as distinguished from the disbursements made by the prevailing party. Comp. Laws, § 5186. As to the general rule that money paid as attorneys' fees cannot be shown in evidence as an element of damages, see the following: *Day* v. *Woodworth*, 13 How. 372; *Fairbanks* v. *Witter*, 18 Wis. 287; *Barnard* v. *Poor*, 21 Mass. 278; *Seeman* v. *Feeney*, 19 Minn. 79, (Gil. 54;) *Jandt* v. *South*, 2 Dak. 46, 47 N. W. Rep. 779; *Otoe Co.* v. *Brown*, (Neb.) 20 N. W. Rep. 274.

Nor do we think that the section of the Code which prescribes the measure of damages for the "unlawful occupation" of real property (Comp. Laws § 4601) should be so construed as to change the general rule. Besides the value of the use of the land, the section authorizes the recovery of "the costs, if any, of recovering the possession." We think the term "costs," as used in the statute, was intended to have a limited and technical meaning. In general use, the term "costs," when employed with reference to litigation, embraces both disbursements and specific sums allowed by statute as indemnity to the prevailing party for his expenses. In a narrower sense, the term "costs" excludes disbursements. Giving the term its most liberal signification, it could embrace only the taxable costs and disbursements in an action. The statute regulating costs and disbursements in this state is later in date than that which regulates the measure of damages in cases like this, and if the two enactments were in conflict the former would have to give way, but in our opinion they are not in conflict. The statute allows certain sums as costs to the prevailing party in the cases enumerated in the statute. Section 5191 declares: "Costs shall be allowed of course to the plaintiff upon a recovery in the following cases: 1. In an action for the recovery of real property." The sums allowed by the statute are not discretionary with the court in this class of cases, and the plaintiff can therefore add such sums in taxing the costs to his items of disbursements. Reference to § 5186 shows that the allowances for costs were intended by the legislature to be by way of idemnity for expenditures, including expenditures for attorneys' fees made by the successful party. Section 4601 constituted one of the sections of the Civil Code which was reported for adoption by the commissioners of the State of New York, See Civil Code of New York reported by the "commissioners of the Code," p. 576. The section seems not to have been adopted in New York, but it was adopted by the Territory of Dakota, and since then it has been incorporated with the Civil Code of the State of California. So far as we know, this feature

relating to costs has never received judicial construction. Doubtless, the clause of the section which allows, as an element of the damages, the prevailing party to recover the "costs, if any, of recovering the possession," voices the better rule of law, as the law stood in the State of New York when the commissioners of the Code made their report to the legislature of that state. At that time it was allowable, and it may be done in this state; to first sue for the possession, and, if successful, the prevailing party could institute another action for damages for withholding, or for rents and profits, or waste. Comp. Laws, § 4932; Sedg. & W. Tr. Title Land, § 650 *et seq.* In a case where the party had been successful in a former action brought for the sole purpose of recovering the possession of the land, and the costs of such former action, for any reason, had not been recovered, the rule was that such costs, *i. e.* the taxable costs incurred in the action to recover possession, could be shown as a distinct element of damages in in the action for wrongful occupation. It is the rule which is voiced in the clause of § 4601, *supra*, which allows the recovery of "the costs, if any, of recovering the possession." In this case the evidence showing that plaintiffs had paid out a large sum as attorneys' fees for prosecuting this action was inadmissable. It did not come within the statutory rule, because there had never been any costs incurred in a former action to recover the possession. The attorney's fee paid in this action was paid for prosecuting a suit for damages, as well as for the recovery of the possession; and in this suit, as has been seen, the statute has, besides disbursements, made allowances by way of costs to reimburse plaintiff for his expenditures. To recover double costs would be oppressive. We go further, and say that, if there had been a former action for the recovery of the possession alone, attorneys' fees paid in the former action could not be included as an element of damages in this action. There is some conflict of authority, but the general rule, and we think the better rule, is that sums paid out or incurred for attorneys' fees should not, in this class of cases, be allowed to swell the damages. In *White* v. *Clack*, 2 Swan, 230,

the Supreme Court of Tennessee held that the costs of ejectment could be recovered, and that this meant "the legal and proper costs taxed in the action of ejectment, not including counsel fees or other expenses incurred by the plaintiff in the prosecution of the suit." The development of the doctrine we have been considering may be traced in the cases cited below. *Baron* v. *Abell*, 3 Johns. 481; *Aslin* v. *Parkin*, 2 Burrows, 665; *Delatouche* v. *Chubb*, 1 N. J. Law, 466; *Hunt* v. *O'Neill*, 44 N. J. Law, 566. Also, Sedg. & W. Tr. Title Land, § 679, and cases there cited. The result is that the special verdict for $500, as and for plaintiffs' attorneys' fees in this action cannot stand, and the evidence upon which it is predicated was improperly admitted, to defendant's prejudice.

The complaint charges that the value of the use of the land during the period of defendant's occupancy thereof was $500 a year. To support this averment, plaintiff's introduced several witnesses, and a majority of them testified that the use of the land was worth at least $500 a year, and two of plaintiffs' witnesses testified that the use was much more than $500 per annum. Two of plaintiffs' witnesses estimated the value of the use on the basis of a cash rental, and their estimate was from $2 to $2.25 an acre for each year. The testimony of defendant's witnesses was, in substance, that the value of the use was from $2 to $2.25 an acre each year. The question of the value of the use was a question of pure fact, and one falling strictly within the province of the jury to determine. We cannot say that the verdict is not supported by a preponderance of the evidence, and, even if the preponderance was in favor of a lower figure, that alone would not justify a court of review in setting aside the verdict. To do so would be, in effect, to substitute our judgment for that of the jury, which of course, cannot lawfully be done. It follows that the general verdict cannot be vacated on the ground of the insufficiency of the evidence. *Halley* v. *Folsom*, 1 N. D. 325, 48 N. W. Rep. 219.

The court instructed the jury, in effect, that they might or might not, at their discretion, allow interest at 7 per cent. as a part of the plaintiffs' damages. The instruction was excepted to

by the defendant, but we think the exception untenable. The action was for unliquidated damages, and in such cases the jury have discretion as to the allowance of interest. *Johnson* v. *Railroad Co.* 1 N. D. 355, 48 N. W. Rep. 227. In cases like this, the rule has long been established that interest may be allowed upon the annual value of the use. Sedg. & W. Tr. Title Land, § 670.

Issue was joined, by a special denial, upon the averment of the complaint that the defendant unlawfully entered upon the land, and unlawfully evicted the plaintiff therefrom. In support of such averment, the plaintiff Schmitz testified, in substance, that he was living on the land at the time the defendant came with the sheriff, and that the "defendant made him get off." That the sheriff said, "'Get off, and stop there, or I will put the handcuffs on you, and put you in the Caledonia jail.' The reason I got off the land was because he threatened to put the shackles on me, and put me in jail." Defendant when testifying, denied, substantially, that any threats were used at the time referred to, and stated that Schmitz, on such demand being made by the sheriff, voluntarily agreed to go, and did surrender possession voluntarily, and in obedience to the writ of execution issued by the justice of the peace in the unlawful detainer action. We think all of the testimony on this point was competent. But the court below took this feature of the case from the jury, and instructed them, in effect, that defendant's entry upon and occupation of the premises were wholly unlawful. This instruction is assigned as error in this court. We think the instruction was not erroneous. The complaint in the unlawful detainer action, which, with the entire record in that action, was put in evidence, showed on its face that the justice could have no jurisdiction to try the action. The facts alleged in the complaint showed, in substance, that the defendant herein was the owner of the land by virtue of said tax title, and that, prior to the execution of the tax deed, Schmitz was the owner, and that since the defendant became the owner under the tax deed he had formally notified Schmitz to quit and vacate the land, but that Schmitz refused, and would not vacate.

These allegations showed conclusively that the controversy between the parties arose over a question of title to land, and consequently that the justice could have no jurisdiction to try the case. Hence the District Court instructed the jury, quite properly, that the proceedings in the justice's court gave the defendant no right to evict Schmitz, nor could such proceedings furnish any legal excuse for compelling Schmitz to vacate. It is entirely proper to allow Schmitz, as a witness in his own behalf, to state all the facts and circumstances surrounding his removal from the land; and he was obliged, under the allegations of eviction set out in the complaint, to prove the fact that he was forced to leave the land. Defendant objected to plaintiff's evidence on this feature of the case, and moved to strike it out. The court refused to strike it out, and we think quite properly. While testifying as to his removal from the land, Schmitz was asked this question: "State what kind of a place you had to go to live in after you were put off this land." He answered: "Well, I went over to Lewis Wright's, and slept in the barn, in the hayloft, two miles east, or two and a half, from where I lived. Q. How much of a family have you? A. We had one. I had a wife and child coming two years old. Q. You are of German decent? A. Yes sir." "No, I cannot read English, so I cannot write." These questions were all objected to as incompetent, irrelevant, and immaterial. The objections were overruled, and the court refused to strike out the testimony, and defendant took exception to the several rulings. We think the evidence was foreign to the issue, and was erroneously allowed to remain in the record; but, after a very careful consideration of the entire record, we are convinced that the error was a harmless one. The testimony referred to certainly could not have operated to influence the jury to find a verdict for defendant. That was out of the question. The trial court, in plain terms, instructed the jury that defendant's pretended title to the land was worthless, and that their verdict must be for the plaintiffs. The court said: "I charge you as a matter of law, that the plaintiff's are entitled to recover in this case, and

therefore I direct a verdict in favor of the plaintiffs; but what the amount of the verdict will be is left to you, as you may find they are damaged. So the only question that you have for your consideration is, what have the plaintiffs been damaged by the defendant withholding this land from them?" The single issue for the jury to pass upon related to the plaintiff's damages, and it is certain that the obnoxious testimony could not, in view of the judge's very careful charge on that feature of the case, have influenced the jury at all. The court laid down the measure of damages by reading the whole of section 4601; and the court also reiterated to the jury that the only element of damage was the value of the use of the land, with plaintiffs' attorneys' fees added, and expressly said to the jury: "You can allow nothing by way of punitive damages,—nothing by way of exemplary damages,—because, in this action, all the plaintiffs are entitled to is compensatory damages; nothing more or less than compensatory damages; what will compensate them for the injury sustained by the withholding of this land." The jury was properly and fully instructed as to the measure of damages, except as to attorneys' fees, and was especially cautioned against allowing anything by way of exemplary damages; and hence we are satisfied that the testimony, though improperly admitted, could not have been prejudicial to the defendant. The verdict, as it stands, has ample support in evidence which was entirely competent; nor is there, in our judgment, any good reason to suppose that another trial, if granted, would result in a verdict which would more nearly approximate to right and justice, or to a correct legal standard, than that already rendered, after excluding the attorney fee.

One other point remains to be considered. Defendant claims that the special statute of limitations requiring that actions brought to recover possession of lands sold for taxes shall be brought within three years after the recording of the tax deed applies to this action, citing Comp. Laws, § 1640. The action was not commenced until more than three years after the tax

deed was recorded. But we are clear that the statute cannot be invoked as a bar to an action to recover possession in a case where the defendant's only claim of title is a tax deed void on its face. The deed being void on its face, there was nothing for the statute to operate upon,—nothing to set it in motion. This view has the support of the weight of authority, and is, in our judgment, the safer doctrine. *Moore* v. *Brown*, 11 How. 414; *Waterson* v. *Devoe*, 18 Kan. 223; *Hall* v. *Dodge*, Id. 277. In Iowa, when the assessment is void, the statute will not run. *Nichols* v. *McGlathery*, 43 Iowa, 189; *Burke* v. *Cutler*, (Iowa,) 43 N. W. Rep. 204; *Towle* v. *Holt*, (Neb.) 15 N. W. Rep. 203; *Sheehy* v. *Hinds*, 27 Minn. 259, 6 N. W. Rep. 781; *Hurd* v. *Brisner*, (Wash.) 28 Pac. Rep. 371; *Bird* v. *Benlisa*, 142 U. S. 664. 12 Sup. Ct. Rep. 323.

It follows from what has been said that the judgment of the District Court is erroneous as the sum of $500 improperly inserted therein as plaintiffs' attorney fee. That sum must be stricken from the judgment, and this court will direct that the judgment be modified accordingly; defendant to recover costs in this court. All concur.

(56 N. W. Rep. 150.)

WM. BRAITHWAITE *vs.* HENRY C. AKIN, *et al.*

Opinion filed July 24th, 1893.

Intervention—Counterclaim Not Connected With the Subject of the Action.

Plaintiff and interveners having recovered judgment against the defendants, the interveners claimed the money under a written contract with plaintiff. (See the contract referred to in the opinion.) Such contract provided that the interveners and the plaintiff (defendant in intervention) should contribute certain sums to a common fund with which to purchase the steamboat Eclipse, that the title should be taken in the names of plaintiff and another; that they should operate the boat, and pay over her earnings to the interveners, until their advances and certain claims of theirs against the boat were paid. After that the interveners' interest in the contract was to cease, and the boat to belong absolutely to plaintiff and the other purchaser. The boat was purchased by plaintiff and the other person under the agreement, and it is for the earnings while plaintiff was operating her under the agreement that the plaintiff recovered judgment. The interveners claimed the money due under this judgment as money to which they were entitled under the agreement. *Held*, that the plaintiff (defendant in intervention) cannot set up as a counterclaim a a cause of action for the conversion of his interest in the steamboat referred to in such contract; that the cause of action for the tort did not arise out of the contract or transaction set forth in the intervention complaint as the foundation of the interveners' claim, and is not connected with the subject of the action.

Equitable Set Off—Tort.

Nor could the cause of action for tort be sustained as an equitable set off, independent of statute, there being no averment that the interveners are insolvent. The mere fact that they are not residents of the state does not warrant the application of the doctrine of equitable set off.

Cause of Action in Tort Not Set Off Against Cause of Action Upon Contract.

Even if the interveners were insolvent, equity would not allow the set off of a cause of action for an independent tort against a claim arising on contract.

Waiver of Tort—Recovery on Contract.

One whose property has been converted may waive the tort and sue for the benefits received by the wrongdoer, although he has not disposed of the property converted; but the intent to waive the tort must appear on the face of the pleading.

Judgment Against Intervener.

One who intervenes in an action subjects himself as fully to the jurisdiction of the court as if he had brought an original action against the person against whom his complaint in intervention is filed, and the defendant in intervention may

recover an affirmative judgment against the intervener either because of matters growing out of the intervener's claim or by establishing a counterclaim the same as a defendant in an ordinary action.

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

Action by William Braithwaite against Akin and others. William Rea and George F. Robinson, partners as Robinson, Rea & Co., and others intervened. To the complaint in intervention, plaintiff, Braithwaite, answered, setting up counterclaims. To this answer interveners demurred. From an order overruling their demurrer, interveners appeal.

Reversed.

Louis Hanitch, *F. H. Register* and *Edgar W. Camp*, for appellants.

A single count of a complaint cannot be permitted to combine several kinds of action as one in tort, one for money demand on contract, and one in equity. *Supervisors* v. *Decker*, 30 Wis. 624; *Schuenert* v. *Koehler*, 23 Wis. 523; *Rothe* v. *Rothe*, 31 Wis. 570; *Anderson* v. *Case*, 28 Wis. 505; *Johanneson* v. *Borschenius*, 35 Wis. 136; *DeGraw* v. *Elmore*, 50 N. Y. 1; *Ross* v. *Mather*, 51 N. Y. 108; *Walter* v. *Bennett*, 16 N. Y. 250. In the present case the wrong done is the conversion of plaintiff's property, not the mere breach of an agreement to deliver property to him. *Smith* v. *Hall*, 57 N. Y. 48. The counterclaim sets out facts showing plaintiffs ownership—the conversion and the value of the boat. It is true plaintiff might have waived the tort and sued upon an implied contract. *Star Cash Car Co.* v. *Reithart*, 20 N. Y. S. 872; *Norden* v. *Jones*, 33 Wis. 600. But the allegations do not admit of such construction. The counterclaim does not set forth a violation of any contract right, but the violation of a non-contract right. *Schuenert* v. *Koehler*, 23 Wis. 523; *Smith* v. *Hall*, 67 N. Y. 48; *Edgerton* v. *Page*, 20 N. Y. 281; *Thorpe* v. *Philbin*, 3 N. Y. S. 939; *Boreal* v. *Lawton*, 90 N. Y. 293; *Woodruff* v. *Garner*, 27 Ind. 4; *Peo.* v. *Dennison*, 84 N. Y. 272. The counterclaim does not state a cause of action connected with the subject of the action. *Thorpe* v. *Philbin*, 3 N. Y. S. 939; *Burgman* v. *Burr*, 46 N.

W. Rep. 644; *Rothchild* v. *Whitman*, 30 N. E. Rep. 858; *Edgerton* v. *Page*, 20 N. Y. 281; *Woodruff* v. *Garner*, 27 Ind. 4. The subject of an action is either property (as illustrated by a real action) or a violated right. The *Glenn & Co.* v. *Hall*, 61 N. Y. 226; *Woodruff* v. *Garner*, 27 Ind. 4, 7 Abb. Pr. 372.

Geo. W. Newton, for respondent.

The counterclaim in question shows a breach of the contract alleged in the complaint as the basis of the claim in this action. At common law when the contract in suit laid mutual duties and obligations, the defendant was allowed to meet plaintiffs demand by a claim for breach of duty on his part. This was called recoupment and only reduced or extinguished the plaintiffs claim. Bliss Code Pl. 370; *Keyes* v. *Slate Co.*, 34 Vt. 83. "Recoupment, a *quasi* off set of counterclaims not liquidated." *Londonderry* v. *Andover*, 28 Vt. 416. It is a rule of strict justice and the deduction is allowed to prevent a circuity of actions. *Florida R. R. Co.* v. *Smith*, 21 Wall 255; *Wender* v. *Caldwell*, 14 How. 434; *Dermott* v. *Jones*, 23 How. 220; *Ingle* v. *Jones*, 2 Wall. 1. In tort by conversion of personal property, the plaintiff can waive the tort and recover for the value of the property converted as upon an implied contract to pay its value. Bliss Code Pl. 381; *Norden* v. *Jones* 33 Wis. 600; *Brady* v. *Brennan*, 25 Minn. 210; *Bank* v. *Bank*, 32 Hun. 105.

CORLISS, J. This case is no stranger in this court. In various forms it has already been before us several times. 1 N. D. 455, 475, 48 N. W. Rep. 354, 361; 2 N. D. 57, 49 N. W. Rep. 419. On this appeal we have to deal with the rights of the interveners and the plaintiff. The defendants are no longer interested in the contests of the cause. Their liability to the plaintiff and the interveners has been finally established, and now the only strife is between the interveners and the plaintiff over the judgment they have recovered. By their complaint in intervention, the interveners have ingrafted upon the original suit another controversy. In that controversy they have become plaintiffs, and the plaintiff

has become defendant. To their complaint in intervention, the plaintiff Braithwaite interposed an answer, which embodied two counterclaims. Other matters appear in the answer, but upon this appeal we have to decide only the question whether these counterclaims set forth in the answer are such counterclaims as the defendant Braithwaite had a right to interpose to the claim of the interveners. There is no contention that the first counterclaim does not contain facts sufficient to constitute a cause of action; but it is urged that this claim which the defendant Braithwaite seeks to set off against the interveners' claim to the judgment is not a legal counterclaim under the statute. The question was raised in the court below by demurrer to the answer to the complaint in intervention. From the order overruling the demurrer the interveners have appealed. The judgment in favor of the plaintiff and the interveners over which this contest is pending, was recovered in an action for freight earned by the plaintiff Braithwaite in the transportation of army stores for the defendants from Bismarck to Ft. Buford, by the steamer Eclipse. The interveners' alleged interest in the judgment grows out of a written contract, which is fully set out in the opinion of this court in the case of *Braithwaite* v. *Akin*, 1 N. D. 475, 48 N. W. Rep. 361. The substance of the agreement was that the interveners and the defendant Braithwaite were to contribute in cash certain sums of money with which to purchase the steamer Elipse, which was about to be disposed of at judicial sale, the interveners being interested in making this purchase because of claims held by them against the steamer, which would be cut off and rendered valueless by the sale. So far as they were concerned, their sole purpose in entering in the arrangement was to save, if possible, the money which they had theretofore ventured on the security of the boat. With the fund so created, the defendant Braithwaite was to attend at the marshal's sale, and buy the boat, taking the title in the name of himself and the intervener Joseph McC. Biggert as trustee. Under this purchase the boat was to be run by Braithwaite as captain and Biggert as financial agent; and out

of her earnings the claims of the interveners were to be paid in full, and also the sums contributed by them to the purchase fund; and thereafter the Eclipse was to be the absolute property of Braithwaite and Biggert. The interveners claim that they have not been paid in full, and that the judgment for freight earned by the steamer under this contract, or some part of the judgment, belongs to them, and they ask for an accounting. It is obvious that the interveners' cause of action against Braithwaite, set forth in the complaint in intervention, is upon contract. The counterclaim interposed is for the conversion of the steamboat Eclipse by the interveners. The defendant Braithwaite seeks to recover against these wrongdoes the value of his half interest on account of such conversion.

The right to set up a counterclaim rests upon statute, except in those cases which are peculiar in their nature. In those cases, equity, to prevent injustice, will allow counterclaims which the law ignores. Our first inquiry is whether the defendant Braithwaite has a right to set up this tort as a counterclaim under the statute? This brings us to the statute itself. It provides: "The counterclaim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: *First*, A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action. *Second*, In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action." Section 4915, Comp. Laws. Under the second subdivision, any other cause of action arising on contract would constitute a good counterclaim. It is contended that the defendant Braithwaite had a right to waive the tort involved in the conversion of his interest in the steamboat, and sue in the assumpsit. The averments of the counterclaim would not bring him within the rule that a tort may be waived, as it is

laid down in many of the cases. The doctrine that the injured party may waive the tort and sue in assumpsit is limited by these decisions to cases where the wrongdoer has sold the property, and received therefor money or money's worth. *Jones* v. *Hoar*, 5 Pick. 290; *Mhoon* v. *Greenfield*, 52 Miss. 434; *Willet* v. *Willet*, 3 Watts, 277; *Stearns* v. *Dillingham*, 22 Vt. 624; *Watson* v. *Stever*, 25 Mich. 387; *Balch* v *Pattee*, 45 Me. 41; *Kidney* v. *Persons*, 41 Vt. 386; 1 Am. & Eng. Enc. Law, 888; cases in note to *Webster* v. *Drinkwater*, 17 Am. Dec. 242; *Tuttle* v. *Campbell*, 74 Mich. 652, 42 N. W. Rep. 384; *Moses* v. *Arnold*, 43 Iowa, 187. There is no allegation in the answer that the interveners ever sold the steamboat, or in any manner received money or money's worth for her. But we are of opinion that this limitation of the doctrine that the tort may be waived is without foundation in reason or principle. The whole doctrine is built upon a fiction. It asserts that what was done in defiance of the owner's rights was in law done with the most perfect regard for his rights; that the wrongdoer has received the money for the owner, or that he has bought the property from the owner at its fair value. This fiction is indulged only in the interests of the owner, and it rests upon the receipt by the wrongdoer of benefits accruing to him from his wrongful acts. Where no benefits are received, the liability is only for the wrong. As this right in the injured party to turn the tort liability into a contract liability stands upon the receipt of benefits by the wrongdoer, is it not beneath the dignity of any tribunal to draw a distinction between the receipt of benefits in the shape of cash and the receipts of benefits in the form of property? In our judgment, the fact that a sale has not been made is unimportant. Not only upon sound principle, but also upon the foundation of strong authority, do we establish the rule in this state that the owner of property converted may waive the tort and sue in assumpsit for the benefits received whenever the tort feasor receives benefits of any kind from the wrong committed, whether by sale or by retention of the converted property, or in any other manner. *Norden* v. *Jones*, 33 Wis. 600-604; *Hill* v. *Davis*, 3 N. H. 384; *Stockett* v.

Watkins, 2 Gill & J. 326-342; *Barker* v. *Cory*, 15 Ohio, 9; *Berley* v. *Taylor*, 5 Hill, (N. Y.) 583; *Terry* v. *Munger*, 121 N. Y. 161, 24 N. E. Rep. 272; *Fratt* v. *Clark*, 12 Cal. 89. See note to *Webster* v. *Drinkwater*, 17 Am. Dec. 244. That the claim of defendant Braithwaite to recover in assumpsit the value of his interest in the boat would have been a good counterclaim had he waived the tort and sued in assumpsit cannot be doubted. When the tort is waived, the claim rests in contract, as well for the purpose of making it a cause of action arising on contract within the statute regulating counterclaims as for other purposes. In fact, the sole object in waiving the tort is often for the purpose of enabling the injured party to set up his claim as an offset, when, without such waiver, he could not, because of its tort nature, use it as a counterclaim. *Norden* v. *Jones*, 33 Wis. 600; *Coit* v. *Stewart*, 50 N. Y. 17; *Brady* v. *Brennan*, 25 Minn. 210; *Car Co.* v. *Reinhardt*, (Com. Pl. N. Y.) 20 N. Y. Supp. 872; *Wood* v. *Mayor*, 73 N. Y. 556; *Barnes* v. *McMullins*, 78 Mo. 260; *Becker* v. *Northway*, 44 Minn. 61, 46 N. W. Rep. 210; *Evans* v. *Miller*, 58 Miss, 120; Pom. Rem. & Rem. Rights, § 801.

It remains to be considered whether the defendant Braithwaite has elected to waive the tort and sue in assumpsit. The portion of the answer material to this inquiry contains the following averment: "That, notwithstanding the interveners forcibly and wrongfully seized and took possession of said boat, her tackle, apparel, furniture, machinery, papers, books, stores, and merchandise, and forcibly and wrongfully dispossessed the plaintiff of the same, and there and then wrongfully converted the same to their own use at Bismarck, aforesaid." There are other allegations in the counterclaim, but none of them throw any light upon the subject of the election of the defendant Braithwaite to waive the tort; nor are there any allegations of a sale of the property by the defendant Braithwaite, or that other interveners undertook or promised to pay for Braithwaite's interest in the boat the value thereof or any sum whatever. The other averments of the counterclaim, so far as these matters are concerned, might as well have

been omitted from the answer. They are mere surplusage. The substance of them is that, while Braithwaite was performing his part of the contract, the interveners seized the boat wrongfully. It was just as much a conversion for them to seize under these circumstances as it would have been had there been no agreement between the parties. The act was as much a tort as though a stranger to the contract had seized the boat. There being no averment of an election to waive the tort, and there being nothing in the pleading to warrant a recovery in assumpsit,—the allegations being those which are peculiarly adopted to the averment of a cause of action for conversion,—we cannot treat the counterclaim as setting up a cause of action arising on contract. That the pleading should clearly show that the party elected to stand upon contract, and not upon the tort, is apparent when we consider the consequences which flow from a judgment for a wrong. Execution may issue against the person. Sections 4945, 5115, Comp. Laws. If allowed, through error of the court, to use the tort as a counterclaim, on the ground that no waiver was necessary, could he not, after a judgment in his favor, proceed against the person of the debtor under the judgment? Nor would it do to answer that, by using the tort as a counterclaim, he had manifested his election to stand upon contract, for there are many cases in which a tort may be used as a counterclaim under the statute. In such cases the interposition of a cause of action for a wrong as a counterclaim would not indicate a purpose to waive the tort. The right to a body execution would therefore involve an inquiry whether the cause of action for the wrong could have been set up as a wrong against the plaintiff's cause of action. This right would never depend upon the construction of the pleading alone when judgment had been recovered by a defendant upon a counterclaim, while it would depend entirely upon such construction whenever judgment should be recovered by a plaintiff in an action founded on a similar cause of action. In the latter case the court would look only to the complaint to see whether the tort had been waived.

To allow the defendant to insist upon a constructive waiver would violate the fundamental law of pleading. The answer must set up the facts constituting the counterclaim. But facts which show a cause of action for a wrong do not make out a case in assumpsit, and, unless the case is in assumpsit, there is no legal counterclaim. To establish a cause of action in assumpsit, the waiver must be averred either expressly or by the manner of stating the cause of action, for without the waiver no cause of action in assumpsit arises. It is not the wrong which gives the injured party the right to sue on contract; it is the wrong, coupled with the waiver of the tort. The waiver is an indispensable element in the cause of action. That the counterclaim was for conversion does not admit of doubt. See *Smith* v. *Frost*, 70 N. Y. 71; *Smith* v. *Hall*, 67 N. Y. 48; *Anderson* v. *Case*, 28 Wis. 505. The case of *Austin* v. *Rawdon*, 44 N. Y. 63, has been cited to sustain the defendant's contention that he has set up a cause of action arising on contract. Other cases might be added to this to support the doctrine which it enunciates. We cite a few: *Conaughty* v. *Nichols*, 42 N. Y. 83; *Tugman* v. *Steamship Co.*, 76 N. Y. 211; *Neftel* v. *Lightstone*, 77 N. Y. 99; *Goodwin* v. *Griffis*, 88 N. Y. 629; *Becker* v. *Northway*, 44 Minn. 61, 46 N. W. Rep. 210. But these cases decide nothing contrary to the conclusion we have reached. They merely hold that, where the pleading contains a good cause of action for breach of contract, the addition of works or of allegations which are appropriate to a cause of action for a wrong does not change the action from tort to contract. They were cases where the pleader had a cause of action for breach of contract without any waiver of tort; but the same act which gave him such cause of action constituted also an actionable wrong. It was therefore necessary for him to elect which remedy he should adopt, but it was not necessary for him to waive a tort before he could sue on contract. He was held in these cases to have made his election not to proceed for the tort, and the mere presence in the pleading of words germane to an action for a wrong was properly held not to overthrow the main purpose of the pleader to sue on contract. In case of doubt

the courts incline against construing the pleading as embodying a cause of action for a tort. *Goodwin* v. *Griffis*, 88 N. Y. 629, 639, 640. And, under such circumstances, authority and reason support the rule that where the answer is susceptible of either construction, the defendant, by using his cause of action as a counterclaim in a case where it would be a valid counterclaim only on the basis of an election to counterclaim for breach of contract, evinces his election to hold the plaintiff responsible for the violation of his contract, and not for the tort. *Becker* v. *Northway*, 44 Minn. 61, 46 N. W. Rep. 210. Whether defendant can now waive the tort by amending his answer is not before us for decision, but there seems to be strong authority against his retracing his steps in pleading under such circumstances. The cases appear to hold that the election is irrevocably made when the pleading is served, provided the pleader has full knowledge of the facts. We do not, however, wish to foreclose this point before it arises, and therefore refrain from expressing any opinion on it. We merely cite the decisions which hold that the election, when once made, is final. *Terry* v. *Munger*, 121 N. Y. 161, 24 N. E. Rep. 272, and cases in note to *Fowler* v. *Bank*, [21 N. E. Rep. 172,] 10 Am. St. Rep., at pages 487 to 494.

Having reached the conclusion that the counterclaim was not proper under subd. 2 of § 4915, we will now inquire whether it comes within the provisions of the first subdivision. Does the counterclaim arise out of the contract or transaction set forth in the interveners' complaint as the foundation of their claim to this freight money? The contract which is the foundation of this claim is the written agreement already referred to. The wrongful seizure of the boat does not arise out of that contract. The seizure was independent of that agreement. It had no more connection with the contract than a seizure by a third person would have had. Is it in any manner connected with the subject of the action? The words "subject of the action" are of rather indefinite significance. In our judgment the subject of the interveners' intervention is their right to the earnings of the boat under this

agreement until they are fully paid. The only possible theory on which it can be said that the cause of action for the conversion of the boat is connected with the interveners' right to the boat's earnings is that there was an implied engagement on the part of the interveners not to interfere with defendant's right of possession while he was managing the boat under the contract. But we do not think that any such implied agreement can be said to have existed, imposing any different obligation upon the interveners than rested upon every other person, *i. e.* the obligation under the law not to disturb the defendant in the control of his own property. Even one who sells property to another cannot be said to have agreed, as part of the contract of sale, that he will not disturb the vendee in his possession. When the vendor has performed his part of the agreement, the contract is executed so far as he is concerned, and cannot thereafter be broken by him. If he subsequently seizes the property, and converts it to his own use, he is not liable for breach of his contract of sale or any of the terms thereof, but merely as a wrongdoer, independently of any agreement,—liable in the same manner as a stranger to the agreement would have been, and in no other way. We hold that the cause of action for the conversion of the boat had no connection, however slight, with the interveners' right to the boat's earnings; and no mere partial or remote connection will suffice to bring the case within the statute. The connection must be immediate and direct. Pom. Rem. & Rem. Rights, § 776. Without attempting to lay down a general rule by which future cases are to be governed, we refer to the following decisions as sustaining our views on this point: *Bazemore* v. *Bridges*, (N. C.) 10 S. E. Rep. 888; *Humbert* v. *Brisbane*, 25 S. C. 506; *Manufacturing Co.* v. *Hall*, 61 N. Y. 226; *Woodruff* v. *Garner*, 27 Ind. 4; *Thorpe* v. *Philbin*, (Com. Pl. N. Y.) 3 N. Y. Supp. 939; *Edgerton* v. *Page*, 20 N. Y. 281; *Rothschild* v. *Whitman*, (N. Y. App.) 30 N. E. Rep. 858; *Brugmann* v. *Burr*, (Neb.) 46 N. W. Rep. 644; *Ward* v. *Blackwood*, (Ark.) 3 S. W. Rep. 624; *MacDougall* v. *Maguire*, 35 Cal. 274.

Can the counterclaim be sustained as a set off in equity? We

think it cannot, for two reasons. In the first place there is no fact averred in the answer calling for the application of the liberal doctrine of equity jurisprudence on this subject. There is no allegation that the interveners are insolvent. It is true that they are nonresidents, but the mere inconvenience of being compelled to resort to a foreign jurisdiction is not sufficient to call into operation those equitable rules which grafted upon the common law the civil law doctrine of compensation in a modified form. *Smith* v. *Gaslight Co.*, 31 Md. 12; *Murray* v. *Toland*, 3 Johns. Ch. 569; *Tone* v. *Brace*, 8 Paige, 600. See, also, *Stonemetz Printers' Machinery Co.* v. *Brown Folding Mach. Co.*, 46 Fed. Rep. 854. Equity follows the law as to set offs unless insolvency or or some other fact calls for the application of a more liberal rule to prevent injustice. This rule is elementary. *Duncan* v. *Lyon*, 3 Johns. Ch. 351; 2 Story, Eq. Jur. § 1434; *Abbott* v. *Foote*, 146 Mass. 333, 15 N. E. Rep. 773. Mere nonresidence of the parties is not such a fact. But, even if we should hold that a special equity in favor of the defendant was created by the fact that the interveners resided in another state, our conclusion would not be different. The doctrine of set off, as applied in equity, relates only to claims arising on contract. Equity has never set off a cause of action for tort against a debt. The doctrine was borrowed from the civil law doctrine of compensation. *Duncan* v. *Lyon*, 3 Johns. Ch. 359; 2 Story, Eq. Jur. § 1440. No mention of setting off a claim for damages because of a wrong against a defendant can be found in the civil law. "Under Justinian the debts were held to operate as mutually extinguishing each other *ipso jure*. When the parties came before the judix, he ascertained their respective claims on each other, and, if there was on the whole a balance in favor of the plaintiff, awarded the amount to him. All the old distinctions were done away, and it no longer made any difference whether the two debts arose from the same transaction, or whether things of the same kind were payable. [The words '*ex eadem causa*' in text are therefore, under Justinian's legislation, inaccurate.] But Justinian made it requisite that the

defendant's claim should be clearly well founded, and that the amount should be at once ascertainable, and not need further inquiry to determine it, and he would not allow any set off to an *actio deposite*." Sandar's Just, p. 541. Here is no mention of tort. The doctrine related exclusively to debts, and the amount of these debts must have been fixed or capable of ascertainment by computation. It has never been pretended that the English chancellors went beyond the civil law in relation to set off. Judge Story deprecates their refusal to go as far. He says: "The general equity and reasonableness of the principles upon which the Roman superstructure is founded make it a matter of regret that they have not been transferred to their full extent into our system of equity jurisprudence." 2 Story, Eq. Jur. § 1444. The absence of any decision sustaining the power of equity to set off a tort claim against a debt is very persuasive that no such power existed, but the question is rescued from all doubts by the cases. "Set off in equity is allowed upon the same general principles as at law. There must be mutuality in the demands, and the amounts should be liquidated and certain; and, while the practice in equity may be more liberal than at law in respect to mutual credits, set off can no more be allowed in equity than at law in cases of demands for uncertain damages as on breaches of covenant or for torts." See, also, *Duncan* v. *Lyon*, 3 Johns. Ch. 359; *Dugan* v. *Cureton*, 1 Ark. 31; *Chambers* v. *Wright*, 52 Ala. 444; *Price* v. *Lewis*, 17 Pa. St. 51. Neither can it be said that, irrespective of the rules regulating set offs and counterclaims, the court, in adjusting the rights of the parties to this fund, can take into consideration this independent tort. If it was a tort connected with the matter as to which the accounting is to be had, there would be force in the the contention. In an action to redeem from a mortgage, the mortgagee in possession may be compelled to account for injury done to the freehold; and in such a proceeding all matters will be inquired into which go to determine the rights of the parties with respect to the mortgage debt and the land. But in such an action an independent tort would not be considered. The conversion

of this boat was in no manner connected with the agreement between the parties, or their rights and duties thereunder, or the claim of the interveners for the earnings of the boat. So far as such connection is concerned, the case would have been the same if they had seized other property belonging to the defendant. By the seizure of the Eclipse they violated no provision of their agreement. They invaded the defendant's rights as owner. But those rights were not secured to him by the contract. He obtained them by virtue of his purchase of the boat at the marshal's sale. The agreement gave him no title to the boat. By it the interveners did not agree to defend him in that title; nor did they promise not to molest him in his ownership. They merely agreed to furnish him certain money to enable him to buy the vessel, and thereafter he was to run the boat in their interests until their advances and their old claims against the boat were fully paid. Whatever rights he enjoyed as owner the parties left to the protection of the same law which protects all persons in the ownership of property. The act of the interveners in converting the boat had a twofold effect,—it affected the defendant Braithwaite's rights as owner, and it affected his interests under the contract. So far as it invaded his rights as owner, the act had no connection with the rights of the parties under the contract.

What rights of the defendant under the agreement did it interfere with? This brings us to the second counterclaim. It is for the loss of a year's wages which it is claimed defendant would have earned had he run the boat as captain under the agreement. But the interveners nowhere in the writing agree to pay the defendant any stipulated wages. He is merely to receive $150 out of the earnings of the boat. It cannot be said that the parties intended, if defendant ran the boat at a loss, that they should nevertheless pay this salary out of their own means. Nor is there any time specified during which defendant is to receive this salary. If he can recover a year's pay, why not two years' pay as well? This claim is founded in a mistaken construction of the agreement. The interveners did not hire defendant to run his

own boat for any specified period. They were providing for the payment of their claims, and, as defendant must have some income on which to live, they allowed him to pay $150 per month less out of the boat's earnings on their claims than he would have paid had no such provision been inserted in the agreement. But in the end they were to receive only so much money, and the defendant was, by turning over these earnings, only paying for his interest in the boat. The interveners might at any moment have waived the performance by defendant of the obligation to pay them the boat's earnings, and no one would dream that they would have been bound to keep on paying his monthly salary; or they might have prevented such performance without being liable for his salary in the future. The mere fact that their act preventing performance rendered them liable for the conversion of the boat did not increase their liability under the contract. There is no other possible interest of the defendant under the contract which could be effected by the seizure of the boat. The interveners had fully performed their part of the agreement. As to them the contract was executed. They could not violate an engagement they had already performed. Whatever remained to be done under the agreement was to be done by the defendant. Exonerating him from the performance of those executory conditions would be a benefit, and not a detriment. We are therefore of opinion that the demurrer to the two counterclaims should have been sustained, and the order overruling the demurrer is therefore reversed.

There is another question which was not discusssed, but which may arise on the trial of the issues between the interveners and the defendant. We wish to settle it now to the end that no further appeal need to be taken to settle it in the future. Including this appeal, there have been four appeals in the case. This would seem to be sufficient for one litigation. The question to which we refer is whether there can be an affirmative judgment in favor of defendant Braithwaite in case the evidence should disclose the fact that not only were the interveners not entitled to

any of the proceeds of the judgment, but that they were indebted to the defendant because of any matters growing out of the transaction. The theory of an intervention is that the interveners become plaintiffs to the extent of their intervention against the parties to the original action against whom their claim is made. It is an action within an action. We are clear that, when these interveners sought to recover this freight money as against Braithwaite, they opened for final determination all matters which could have been litigated between the parties had they brought an action to compel him to account for and pay over the money after he had collected it. The code seems to settle this point. In case of intervention the parties to the action against whom the interveners make their claim are allowed to answer or demur to the complaint as if it were an original complaint. Comp. Laws, § 4886. He may therefore not only go into the case fully in his answer, but he may do what any other defendant may do, *i. e.* set up a counterclaim, and recover an affirmative judgment. The hardship, if not the injustice, of any other rule, is apparent. Were defendant not allowed to have judgment against the interveners, then he might be compelled to litigate the same question against them twice to secure relief. It is only by an examination into all matters between these parties that it can be determined whether the interveners are entitled to the proceeds of the judgment or of any portion thereof. Such an investigation might disclose the fact that they had been overpaid through mistake or fraud. Must the defendant, after showing that they were indebted to him in a certain sum, see the interveners dismissed by the court from the jurisdiction without his obtaining any redress from the court, and be forced to sue them, and travel over the same weary, tedious, and expensive route to secure relief? It would be a reproach to the administration of justice to so sacrifice substance to form, without a single reason to justify or excuse the sacrifice. When persons intervene in an action, they assume the position of plaintiffs against those who are called up to answer their complaint in intervention, and they are subject to all the rules which regulate

pleading and practice between plaintiffs and defendants in similar cases. So the statute, in effect, declares. The rule is practicable and just; and it is supported by authority. *Bank* v. *Weems*, 69 Tex. 489, 6 S. W. Rep. 802. This was an action brought by stockholders of the City Bank of Houston to have it dissolved, and for the appointment of a receiver, and the distribution of its assets among its creditors and stockholders. The Continental National Bank of New York intervened in the action as creditor of the City Bank of Houston, claiming priority of payment. The receiver set up a claim of the City Bank against the Continental National Bank for paper sent by the former bank to the latter bank for discount, which the latter bank had refused to discount, but which it was collecting, appropriating the money to its own use. Judgment was rendered against the intervener bank, in favor of the receiver, upon this counterclaim, and on appeal this affirmative judgment was sustained, the court saying: "We are of opinion that, although this proceeding was an intervention in another suit, and was a mere outgrowth of the original action, yet, appellant (the intervener) having sought the jurisdiction of the court to establish equities against the estate in the hands of the receiver, it was proper to allow the latter to reconvene and set up all the rights of the insolvent corporation growing out of a continued course of dealing under one general agreement. It was not error for the court to adjust the equities between the two banks, and to state the amount, and give judgment for a balance found in favor of the insolvent bank."

The order overruling the demurrer is reversed. All concur.

(56 N. W. Rep. 133.)

NOTE: See for other features of this ligation. *Rae* v. *Eclipse*, 30 N. W. Rep. 159. The Steamer Eclipse, 135 U. S. 590, S. C. 10 S. C. Rep. 873.

THOMAS HODGINS *vs.* THE MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILROAD COMPANY.

Opinion filed July 7th, 1893.

Stock Killing Cases—Prima Facie Case—Negligence—Evidence.

Where an action is brought against a railroad company for the negligent killing of a domestic animal, the plaintiff can, if he sees fit to do so, make out a *prima facie* case without showing actual negligence, by proving the value of the animal and the fact that it was killed by defendant's train of cars; but in such case, if the defendant, to overcome the statutory presumption of negligence arising from the killing, shows conclusively by undisputed evidence that the train in question was at the time of the accident in good repair and condition, and was equipped with the best modern appliances and improvements in use, and was operated skillfully and with due care, then, and in such case, the statutory presumption of negligence arising from the killing is rebutted and entirely overcome; and where in such case, at the close of the testimony, defendant requested the trial court to direct a verdict for the defendant, and the court refused to do so, *held*, that such refusal was reversible error.

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

Action by Thomas Hodgins against the Minneapolis, St. Paul & Sault Ste. Marie Railroad Company for the killing of plaintiff's horse. Judgment for plaintiff. Defendant appeals.

Reversed.

A. D. Flemington and *A. H. Bright*, for appellant.

W. H. Rowe and *Jas. M. Austin*, for respondent.

WALLIN, J. This action is brought to recover damages for the killing of plaintiff's horse. The horse was killed in the evening, at about 8:45 o'clock, on May 24th, 1890, by being run over by defendant's locomotive. The accident occurred on a bridge at a crossing of the Maple river, a short distance east of Boynton station, in Dickey County. When struck by the locomotive, the hind legs of the horse had slipped through the ties of the bridge, so that the animal could not extricate them, and the horse was partly on the railroad track and partly off the track and on the bridge. The animals head was facing the west, and the locomotive and train were going east. The train, besides the locomotive

and tender, consisted of two coaches, viz: a passenger car and a sleeper. Plaintiff, without proving actual negligence, made out a *prima facie* case, under the statute, by showing the killing of the horse by being run over by the defendant's locomotive, and the value of the animal. To rebut the presumption of negligence raised by the statute from the mere fact of killing, the defendant introduced as witnesses the men who had charge of the train in question, viz: the engineer, firemen, and conductor. The engineer testified, in substance, that he had been an engineer nine years, and in defendant's employ six years, and that there were no demerit marks against him as an engineer; that the train in question was a special train drawn by a locomotive then newly repaired, and in good condition, and was equipped with all the appliances in use at the time and all the modern improvements, and that there were air brakes on the engine, tender, and coaches. After leaving the station, at 8:35 P. M., the train ran for some miles at the rate of about twenty miles an hour until it came upon a rough piece of road, and, while running over that, the rate was about fifteen miles an hour, to a point on the road distant about one-half mile from the bridge in question, and from there the speed was quickened to about twenty miles an hour, until the horse was seen by the engineer and fireman. "Q. How about the lookout? A. I had my lookout all the time. Just before I got to the rough place, I got to the window, and was looking out of the window. Q. Go on now, and state further. A. When we got down very near the bridge, I saw an object, right side, as I supposed was the number board. As I got very near to it, it moved. By the Court: Q. You supposed it was what? A. I supposed it was the number plate of the bridge. It was a white plate, with figures on it. White board, about that wide. * * * A. As I got very near the bridge, I saw the object move, and I discovered it was a horse; raised his head up, and threw one leg over the rail. Q. Where was he lying? A. He was lying between the guard rail of the bridge and the rail on which the engine runs, outside of the track. Just as he made a lunge, he threw one leg over the

rail, which cut off one hoof. He threw his head out, and the engine trucks, and pilot pushed him along. Q. When you saw this motion, what did you do? A. Did all possible to stop. Q. What was that? A. Put the air on, and made a———to stop. I reversed my engine on sand, putting her on the back motion; made what is called an 'immergency stop.' Q. What effect would that have on the brakes and wheels? A. It would have a great———. Q. Would it stop the wheels? A. It would stop the wheels. It would help to stop the train speed. The motion of the wheels going ahead, the reverse of the engine would have the effect to drive the wheels opposite to the head motion. Q. And it would have a tendency to shove the train back? A. Yes sir. Q. After you saw this horse, was there anything else you could have done to have stopped this train? A. No sir. Q. You made what you call an 'emergency stop?' A. Yes sir. Q. I will ask you, until you saw the horse raise his head, and throw its leg over the rail, was the track clear? A. The track was clear. Q. Clear across the bridge? A. Yes sir. Q. Now, if I understand you, you mean that no part of the horse's body,—that no part of the horse was lying between the rails? A. No. sir. Q. How far is the outer rail from the guard rail, as you call it? A. The guard rail is put on the outside of the bridge tie, so as to hold them from slipping endways. It is a wooden guard rail. Q. How far from the rail? A. I think it is calculated to be three feet. Q. When you saw this horse, what did you see in the way of danger to yourself that it amounted to? A. I knew right off that there was great danger there. If the horse had been between the rails, I should have been almost tempted to jump off. Q. And you say that the train and the people on it were in danger of their lives? A. Yes sir. Q. What was the color of the horse? A. White. Q. What was the color of the number board? A. White. Q. What was the firemen doing? A. Keeping a lookout. Q. Do you know when he recognized this object? A. At the same time that I did. He had just about half the words out of his mouth, saying 'Ho,' when I saw it. Q. How many feet were you

from the horse when you applied the brakes? A. I should judge between six and seven hundred feet. I would say between six and seven rods. Q. Or how many feet. A. About 114-15 feet. Q. State whether or not this is a long or short distance to stop a train in of that kind. A. A short distance to stop a train of that kind. Q. About what rate were you running at the time you saw the horse? A. Twenty miles an hour. Q. About what rate when you struck? A. About five. Q. You stopped, did you? A. Yes sir.. Q. Was there any one there when you stopped? A. No one there when I stopped." The witness further testified that the train reached the bridge about 8:45 P.M., and that it was dusk, but not dark, at the time; that the lights on the train were lighted at the last station, Boynton, some three miles distant; and that the headlight is not much of a light until darkness comes. "Q At that time of day, how far could you see along the track? A. Not over one hundred and fifty feet. Q. Could you stop a train of three coaches with the latest improved air brakes in going the length of the train? A. Yes sir."

The testimony of the conductor, so far as it bears on the points made in the assignments of error, corroborates that of the engineer, but the appellant claims that there is a material conflict in the testimony of the fireman and engineer as to where the train was with reference to the position of the horse when the horse was discovered by the engineer and fireman. It will be necessary to consider this feature of the fireman's testimony, which is as follows: "Q. Where were you, and what were you doing, on the evening of May 24th or 25th, 1890, the time of this accident? A. I was firing with Mr. Furtny [the engineer] on a special." Speaking of a point about a half a mile from the bridge, the witness was asked: "Q. From this time on until the engine struck the horse, what were you doing? A. Sitting on the seat. Q. Where was that? A. Left hand side of the engine. Q. What were you doing? A. Looking out of the window. Q. Were you constantly looking along the track? A. Yes sir. Q. How far was this from the bridge? A. About a half a mile. Q. During that time, did

you have to put any fire in the fire box? A. No, sir. Q. When did you first discover the horse? A. When he raised his head. Q. Up to that time, was the track itself clear? A. Yes sir. Q. Well, what was done by the engineer? A. He blew the brake alarm, and reversed his engine, and gave her sand." The witness fully corroborated the engineer as to the appliances on the train and the good condition of the engine. He then testified as follows: "Q. About how far do you think you were from the horse when these brakes were put on? A. I should judge about five or six hundred feet,—somewhere along there. Q. Now, in stating the distance the train was from the horse, when I asked this question, I have reference to the distance that your locomotive was west of the horse when the brakes were applied. How far was that? A. I couldn't just tell. Q. How far do you think? A. Somewhere along between five and four hundred feet. That is what I thought it was. Q. How many times the length of the train do you think it was? A. It was not over the length of the train. Q. Is that train nearly four hundred and fifty feet long? A. I do not think I understand the question. Q. I want to know how far it was from where the engine was, when the brakes were put on the engine, to the horse at the time. I asked you how many lengths of the train? A. It was not the length of the train. About the length of two coaches is what it was. By the Court: Q. How long is a coach? How many feet is a coach? Is it 200 feet long? A. I do not believe they are. Q. How many feet do you think the engine was from the horse when the brakes were applied? A. I couldn't say. Q. Of course you didn't measure it. Give an estimate. A. Well I did. Q. About four hundred feet? A. About four hundred feet. Q. Daylight or dusk? A. Dusk,—quite dusk. Q. Which one saw the horse first? A. That I couldn't say. Both saw it about the same time. I hadn't the words out of my mouth when he put the brakes on." The testimony showed that the grade approaching the bridge was 30 or 35 feet to the mile; also that a passenger coach is 60 feet in length. As to the stop, the conductor testified: "It was a very

quick stop; almost threw me off my feet. When they applied the brakes first, I fell forward, and it almost threw me off my balance.

A motion was made at the close of the case to direct a verdict for the defendant, which was denied, and in this court the ruling is assigned as error. We think the ruling was error. There was but a single point arising on the evidence. The court charged the jury as follows: "Now, gentlemen, there is just one question to determine in this case: Did those in charge of that train use ordinary care to prevent the injury after they had discovered the horse? They had no right to anticipate, or, rather, there was no obligation upon them to anticipate, that a horse or a person or anything else was upon the track. But, when they observed that a person or an animal is upon the track, it is their duty to exercise reasonable care to prevent injury to the horse or person, as the case may be." The charge was entirely correct, and laid down the well established rule and the rule applied by this court in *Bostwick* v. *Railroad Co.*, 2 N. D. 440, 51 N. W. Rep. 781. But we think the case, as presented by the testimony, is one in which there was a complete failure of proof upon the vital point of negligence, and consequently a case where the responsibility of making a decisive ruling belonged to the court, and should not have been devolved upon the jury. In making out a *prima facie* case, no testimony tending to show negligence was introduced by the plaintiff. The fact of the killing, however, made out a case of legal or constructive negligence under the statute, which declares: "The killing or damaging of any horse, cattle or other stock by the cars or locomotive along said railroad or branches, shall be *prima facie* evidence of carelessness and negligence of said corporation." Comp. Laws, § 5501. But this court held in the case of *Smith* v. *Railroad Co.*, 53 N. W. Rep. 173, that negligence which is constructive and legal, as contradistinguished from actual negligence, may be overcome by proof of the exercise of due care on the part of the railway company, and that whether or not such constructive negligence has been overcome by testimony is always a question of law for

the court, and not a question to submit to a jury. The defendant offered testimony to rebut and overcome the technical case of presumptive or legal negligence which the statute creates for plaintiff's benefit. In our opinion, the testimony was ample for this purpose, and went further, and demonstrated that the defendant was guilty of no negligence whatever in the premises. The testimony of the engineer, conductor, and fireman is not contradicted as to any material fact having reference to the degree of care used by the engineer and fireman in keeping a lookout, or in their strenuous efforts to avoid a collision after the peril to the horse and the train were discovered. Counsel for the respondent points to the discrepancy in the testimony of the fireman as to the distance of the horse from the engine at the time the air brakes were applied to stop the train. True, the fireman's ideas of distance between the engine and horse at that time, when expressed in feet, were confusing; and apparently conflicting with the engineer's testimony upon the point. But it is clear that the conflict was apparent, and not real. The fireman said and reiterated, in substance, that the horse was not the length of the train away from the engine when the brakes were applied, and that the distance was about the length of two coaches. In this he agreed substantially with the engineer, and, as we have said, there is no evidence in the case tending to show that the distance was either greater or less than that testified to by both the trainmen. Negligence is a fact, and where, as in this case, it constitutes the gist of the action, it must be made out affirmatively by the plaintiff. In the case at bar we find no proof whatever of actual negligence, and hence we are of the opinion that the court erred in refusing to direct a verdict for the defendant. A new trial will be directed. All concur.

(56 N. W. Rep. 139.)

STATE *ex rel* WM. H. STANDISH *vs.* NELSON F. BOUCHER.

Opinion filed May 9th, 1893.

Trustees of State Institutions—Tenure of Office.

Section 1, Ch. 93, Laws 1889, which provides for the appointment of trustees of the state institutions, including the penitentiary, examined and construed. The section contemplates that such trustees shall (except in cases of vacancy) be appointed by the concurrent action of the governor and senate, and, when so appointed, that such trustees shall continue in office, not only until the expiration of the prescribed term for which they are appointed, but beyond that period, and until their successors are chosen by the action of both the governor and senate. It is accordingly *held*, that trustees who were appointed by the governor, and confirmed by the senate at its session in 1891, for a term of two years, are lawfully entitled to hold over after the expiration of the term of two years for which they were appointed, notwithstanding the fact that the governor in due time nominated their successors, and the senate which assembled in 1893 adjourned without confirming them, or confirming any successors of the trustees appointed in 1891.

Expiration of Prescribed Term—When Vacancy.

The expiration of the prescribed term, when coupled with the fact that the senate adjourned without confirming successors of trustees in office under a former appointment, will not operate to create a vacancy in the office, which, under the statute, can be temporarily filled by the governor. The vacancies contemplated by the statute are actual vacancies, and such as arise from death, resignation and like causes.

Power of Governor to Fill Vacancies.

Under § 78 of the state constitution, the appointing power of the governor is confined to filling vacancies in office in cases where no other mode is provided by the constitution or laws for filling the same.

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

Action by the State of North Dakota, on the relation of William H. Standish, as attorney general, and Daniel Williams, against Nelson F. Boucher, to try title to the office of warden of the state penitentiary. Judgment for defendant. Plaintiff appeals. Affirmed.

W. H. Standish, Atty. General, for appellant.

The executive possesses the power of removal from appointive offices and by appointing Ward and Taylor for the places

that had been held by Donnelly and Van Horn as trustees of the penitentiary, this operated as a removal and created a vacancy, even had not that vacancy taken place by a previous lapse of their two years term. *Territory* v. *Cox*, 6 Dak. 501; *Blake* v. *United States*, 103 U. S. 227; *Keenan* v. *Perry* 24 Texas 253; *ex parte* Hennen 13 Peters 259; *Smythe* v. *Latham*, 9 Kan. 672.

Alexander Hughes and *John F. Philbrick*, for respondent.

Successors to the incumbents must be appointed by the governor by and with the advice of the senate and in no other way. And appointments to fill vacancies must be made in the same way, except only when the legislature is not in session, the governor alone may make temporary appointments. *Peo.* v. *Howe*, 25 Ohio St. 588. *State* v. *Lusk*, 18 Mo. 341; *Peo.* v. *Osborne*, 4 Pac. Rep. 1079; *State* v. *Bearshide*, 32 La. Ann. 934; *Watkins* v. *Watkins*, 2 Md. 354; *Taylor* v. *Hibden*, 24 Md. 202; *Tapper* v. *Gray*, 9 Paige Ch. 516; *Com.* v. *Hawley*, 9 Pa. St. 513; *Territory* v. *Hauxhurst*, 14 N. W. Rep. 432; *State* v. *Wilson*, 72 N. C. 155; *Peo.* v. *Tyrrell*, 25 Pac. Rep. 684; *Peo.* v. *Bissell*, 49 Cal. 407; *State* v. *McMullen*, 46 Ind. 407; *McBlair* v. *Bond*, 41 Md. 155; *Peo.* v. *Hammond*, 66 Cal. 657; *Hubbard* v. *Crawford*, 19 Kan. 570; *State* v. *Brewer*, 44 Ohio St. 593. *Gossman* v. *State*, 106 Ind. 205; *State* v. *Harrison*, 113 Ind 437. A vacancy in office is never created by the appointment of a successor to the incumbent except in those cases where there is no tenure of office and the incumbent holds at the pleasure of the appointing power. *State* v. *Lusk*, 18 Mo. 341; *Peo.* v. *Carrigue*, 2 Hill 103; *State* v. *Jones*, 3 Oregon 536; *McBlair* v. *Bond*, 41 Md. 152; *Field* v. *Peo.*, 2 Scam. (Ill.) 79; *State* v. *Harrison*, 113 Ind. 434; *State* v. *Leary*, 64 Mo. 89.

WALLIN, J. This is a civil action, brought by the attorney general of the state, under Ch. 26 of the Code of Civil Procedure, to try the title to the office of warden of the state penitentiary at Bismarck, as between said plaintiff Daniel Williams and Nelson F. Boucher, the defendant. After a trial the District Court

adjudged that the plaintiff Williams had no right or title to said office, and that the defendant, Boucher was the duly elected and qualified warden, and entitled to hold said office and exercise its powers. From such judgment, plaintiffs appeal to this court. The facts which are embodied in the complaint and answer, are not controverted. Both claimants of the office in dispute base their respective claims to the office upon an alleged appointment thereto made by certain distinct groups of individuals, each group claiming to be and to constitute the board of trustees of the penitentiary at Bismarck, and therefore it will be necessary in disposing of this case to inquire into and determine which of the two groups of individuals that have assumed to act as the board of trustees of the penitentiary is entitled in law to exercise the power of such board, and to appoint the warden. The law creating the office of trustees of state institutions, including the Bismarck penitentiary, and regulating their appointment and terms of office, is found in § 1, Ch. 93 Laws 1889. At a session of the state legislature which convened in the year 1891, the governor of the state, acting under said statute, duly nominated, and, with the advice and consent of the senate, appointed, five trustees for the penitentiary,—three for a term of four years, and two for a term of two years. The title of the three who were appointed for the term of four years is not questioned; but the title of the two trustees who were appointed for the term of two years, viz: one Frank Donnelly and one Arthur Van Horn, is now denied and disputed by the plaintiffs. All of said trustees, appointed in 1891 as aforesaid, soon after their appointment, qualified and entered upon the discharge of their duties, and have ever since being acting in the discharge of their duties as such trustees. At the regular session of the legislative assembly, which convened at Bismarck in 1893, the governor of the state, at the proper time, nominated and sent to the senate for confirmation the names of W. O. Ward and Joseph B. Taylor as trustees of the penitentiary at Bismarck, and as the successors in office of said Donnelly and Van Horn, who had been appointed in 1891 for a

term of two years, as before stated. The nomination of said Ward and Taylor was not confirmed by the senate, but, on the contrary, their nomination was rejected, and the senate of 1893 adjourned without confirming any successors of the trustees appointed in 1891. Soon after the adjournment of the legislative assembly for the year 1893, the governor of the state, acting upon the assumption that a vacancy had occurred and was existing in the offices for which said Donnelly and Van Horn had been appointed in 1891 for a term of two years, appointed and commissioned said Ward and Taylor as trustees of the Bismarck penitentiary, and as the successors in office of said Donnelly and Van Horn. After such appointment by the governor, said Ward and Taylor undertook to qualify for their said offices, and took the oath of office, and executed an official bond, which official bond was approved, filed, and recorded with the secretary of state. Thereafter said Ward and Taylor, acting together with one Charles E. Stowers, (who was one of the duly appointed trustees of the penitentiary, and whose title to such office is not challenged,) met together, and assumed to be and constitute the penitentiary board, convened at the City of Bismarck, at the time and place appointed by law for the appointment of a warden for the penitentiary, and then and there did name and undertook to appoint the plaintiff Daniel Williams to be the warden of said penitentiary for a term of two years. All of the other trustees of said penitentiary refused to act and did not act or meet with said Stowers, Ward and Taylor at the time of their said meeting, or at any time. Said plaintiff Williams accepted such appointment, and his official bond was approved by Stowers, Ward, and Taylor, the other trustees refusing to act with them in the premises. After such appointment, the plaintiff Williams, in March, 1893, went to the penitentiary building, and made demand to be admitted thereto, and to have turned over to him the charge of said penitentiary as warden; but the defendant, Boucher, claiming to be the lawful warden of the penitentiary, refused to comply with such demand, and did not permit said Williams to enter the

building, and refused to turn over the penitentiary to Williams, and has never done so. The defendant Boucher, is in charge of the penitentiary as warden, and prior to such demand upon him by the said Williams, and after the attempted appointment of Williams, said Boucher had qualified as such warden, and claimed to be lawfully entitled to the office under and by virtue of an appointment thereto made by all of the trustees who had been appointed in 1891, as aforesaid, except said Stowers, who did not act, but refused to act, with the others who appointed the said Boucher as warden, as above stated. It appears from what has been said that the legality or illegality of the appointment of the said plaintiff Daniel Williams to the office of warden must turn upon the validity of the appointment of Ward and Taylor, who acted with Stowers in making his appointment. If Ward and Taylor were not trustees, and did not become such by virtue of the governor's appointment, then the appointment of Williams to the office of warden is and must be held to be a mere nullity.

The facts in the record call for a construction of the statute above cited. A portion of § 1 of the act is all that need be recited for the purposes of this decision. It reads: "And the governor shall nominate, and by and with the advice and consent of the council, shall appoint, at this session of the legislative assembly, five trustees for each of said institutions, two of whom shall hold their office for the period of two years, and three for the period of four years, and until their successors are appointed and qualified, except to fill vacancies, which appointments shall be made by the governor and shall extend only to the end of the next session of the legislative assembly." This statute contemplates and in terms provides that the trustees of state institutions, including the penitentiary, shall be chosen by the concurrent action of the governor and state senate, the governor to nominate, and, with the advice and consent of the senate, appoint, the trustees; and the statute further provides that upon the occurrence of a vacancy in the office of a trustee, and only in that event, the governor of the state shall, without the concurrence of the senate,

appoint a trustee to fill such vacancy, such appointee to hold office until the end of the next ensuing session of the legislative assembly, and no longer. But, before we proceed to discuss the question of the existence of a vacancy in the offices of Donnelly and Van Horn, we will briefly consider a broad and sweeping proposition advanced by the learned attorney general, who argues —and it is his principal contention—that neither the senate nor the legislative assembly, under the state constitution, has or can acquire the power to confirm any appointments to office made by the governor unless the office is strictly legislative or judicial in its nature. The claim is made that the right to appoint to office and to fill vacancies; except to legislative and judicial offices, is an implied executive function, and that the governor, as the sole repositary of executive power under the state constitution, possesses the inherent right to name the officers, and to fill all vacancies therein, and that such right exists by implication of law, and independently of express constitutional or statutory authority. The further claim is made that, inasmuch as the state constitution has not expressly declared that the power to appoint to office shall be shared by the governor with the senate or legislature, the whole power inheres in the executive alone. From these premises the attorney general draws the conclusion that, inasmuch as the limited term of two years had run before Ward and Taylor were appointed, the power existed in the governor, and that it was his duty, to appoint successors, and to do so without consulting the senate or allowing the senate to act upon his appointments. These views of course, imply necessarily that all parts of the statute creating the office of trustees of our state institutions which purport to confer upon the senate the right to confirm appointments made by the governor to such offices are unconstitutional and void. We have stated the proposition of the attorney general thus fully because it has been strenuously contended for and urged upon our attention with great force and earnestness; but, after careful consideration, we are unanimously of the opinion that the exigency of this case does not demand a

decision by this court of the abstract question which is involved in the proposition for which the attorney general contends. We will therefore simply say that the impressions of this court are decidedly against the views of the attorney general. We do not think that all power to appoint to office resides with the governor of a state as an implied executive function in cases where the constitution is silent upon the question. This view is in harmony with the spirit of our institutions, and has the support of a decided preponderance of authority. We cite only a few of the cases which are accessible: *Biggs* v. *McBride*, (Or.) 21 Pac. Rep. 878; *People* v. *Freeman*, (Cal.) 22 Pac. Rep. 173; *People* v. *Hurlbut*, 24 Mich. 44; *State* v. *Irwin*, 5 Nev. 111; *State* v. *Rosenstock*, 11 Nev. 128; *Mayor, etc., of Baltimore* v. *State*, 15 Md. 376; *State* v. *Lusk*, 18 Mo. 333-340; Cooley, Const. Lim. (5th Ed.) 136. Under the common law of England, the sovereign power belonged to the king, and the power to appoint to office was unquestionably a sovereign perogative. In this country, and under our form of government, the sovereignty has been transferred, and is in the hands of the people. It is conceded in this case, as it must be in all cases arising under our political institutions, that the sovereign authority,—the people,—in creating a state government, can lodge the authority to appoint its officers in any branch of that government, or bestow it at pleasure upon any official upon whom they may elect to bestow the same. In granting such power it may be conferred in full measure, and without limitation, or it may be conferred only to a limited extent. *Field* v. *People*, 2 Scam. 111. The people of this state have exercised this authority, and, in terms easily understood, have indicated in their constitution when and to what extent the governor shall exercise the power to appoint to office. Section 78 of the state constitution reads: "When any office shall for any cause become vacant, and no mode is provided by the constitution or law for filling such vacancy, the governor shall have power to fill such vacancy by appointment." This language is clear and explicit. It confers no right to fill any office which has not previously become vacant. The power to

fill a vacancy is granted, but that power is conferred subject to a double limitation upon its exercise. The governor can only fill a vacancy in cases where neither the constitution nor the law has made provision to fill the same. As the governor can fill a vacancy, and can do no more than that, it will not, as we have already said, become necessary in this case to determine whether § 78 is to be construed as a limitation upon an inherent power in the executive, or whether it must be regarded as a grant of authority not before existing. The power to fill an existing vacancy is conferred by the constitution upon the governor, and in the case at bar the statute, also in express terms, authorizes the governor to fill all vacancies which occur in the offices of trustees of public institutions.

Just at this point it may naturally be asked, since the power of the governor to appoint to office extends only to cases of vacancies not otherwise provided for, and since there is no express grant of appointing power in the constitution to any other functionary or department of government, where does the power of appointment of officers and their successors in office rest? The power to appoint to office is an attribute of sovereignty. All attributes of sovereignty essential to the administration of government must be vested in the several departments of government by the people; otherwise, the government founded by the people would not constitute a full grant of governmental power. Such government would, to that extent, be defective, for the reason that the people themselves, in their collective capacity, exercise no governmental functions. Now, we have seen that the power to appoint to the offices in question is not vested by the constitution in the governor. Neither is any appointing power vested in judicial department, except to appoint certain court officials. Unless, therefore, this power resides in the legislature, it is lodged in no part of the government. As to this it will suffice to say that all governmental sovereign power is vested in the legislature, except such as is granted to the other departments of the government, or expressly withheld from the legislature by constitutional restrictions.

Was there a vacancy in the offices occupied by Donnelly and Van Horn when the governor appointed Ward and Taylor to fill a supposed vacancy in such offices? This is the decisive question in the case. In appointing said Ward and Taylor, the governor of the state undoubtedly assumed that there was a vacancy in the offices occupied by Donnelly and Van Horn, and that such vacancy resulted from the fact that their term of office of two years had expired, and the senate had adjourned without confirming their successors. Did such supposed vacancy exist? If there was no vacancy, it will be conceded that the governor was without authority to appoint Ward and Taylor. We are quite clear that the supposed vacancy did not exist. When the appointments were made; Donnelly and Van Horn were incumbents holding over after the expiration of their definite term of two years, and until their successors should be lawfully appointed. It therefore appears that the offices which Ward and Taylor were appointed to fill were not empty when the appointment was made, but, on the contrary, such offices were occupied by incumbents whose title and right to hold such offices were based upon the express language of the statute, which declares that all trustees of state institutions shall continue in office until successors are elected and qualified. The statute in question not only fixes definite terms of office for the terms of two and four years, but also, with equal clearness, annexes to the definite terms another period or term of indefinite duration, which period has been aptly described as a "defeasible term" of office. The statute explicitly declares that trustees shall, after their limited term has expired, continue in office for a further period, and "until their successors are appointed and qualified." The definite terms of Donnelly and Van Horn had expired, and the legislature of 1893 had adjourned without confirming their successors, before the governor made his appointments; but, as has been seen, the terms of all trustees of state institutions in this state are extended by the statute beyond their limited duration, and until successors are appointed and qualified. Donnelly and Van Horn were appointed by the governor,

by and with the advice and consent of the senate, and hence, under the statute, will continue to hold their office until their successors are appointed and qualified in manner and form as the statute directs. There is no doubt in our minds that the statute in question must be so construed as to mean that successors of trustees shall be appointed by the same power and authority which appointed their predecessors, *i. e.* by the governor of the state, by and with the advice and consent of the senate. The legislature having adjourned without day, and the senate failing to confirm successors to Donnelly and Van Horn, it follows as of course that their successors cannot be legally appointed until the legislature shall reassemble, unless a vacancy has occurred or shall occur in their offices. It is the policy of the statute, as well as its clearly expressed purpose, to require the action of both the governor and senate in filling the important offices of trustees of state institutions, and not to allow them to be selected by the independent action of the executive, except in those cases of vacancies, not frequently occurring, where an executive appointment can be made temporarily to fill an actual vacancy. It has been said that the law abhors a vacancy in an office, but, in our judgment, a vacancy in the office of a trustee of one of the public institutions of this state does not come about from the mere expiration of the limited term, even when that event is coupled with the fact that the senate had adjourned without confirming successors of those whose terms had expired by limitation of time. It seems quite clear to us that the vacancy referred to in the statute, and which alone gives the executive the right to make a temporary appointment, relates only to such actual vacancies as may arise from death, resignation, and the like. The expiration of a definite term, and failure of the senate to confirm successors to those whose terms have expired, are certainly not among the causes enumerated in the Code which will create a vacancy in office. Pol. Code, § 2 Ch. 22; Comp. Laws, § 1385. A "vacancy in office," within the meaning of the law, can never exist when an incumbent of the office is lawfully there, and is in

the actual discharge of official duty. Similar statutes of other states, which are indentical in their meaning, and generally in their language, with that we are considering, have quite frequently been construed by the courts of last resort in other states, and the construction we have placed upon our statute is sustained by the unanimous current of authority. *State* v. *Howe*, 25 Ohio St. 588; *People* v. *Tilton*, 37 Cal. 614; *People* v. *Whitman*, 10 Cal. 39; *People* v. *Bissell*, 49 Cal. 407; *People* v. *Edwards*, (Cal.) 28 Pac. Rep. 831; *People* v, *Oulton*, 28 Cal. 44; *State* v. *McMullen*, 46 Ind. 307; *State* v. *Hadley*, 64 N. H. 473, 13 Atl. Rep. 643; *Gosman* v. *State*, 106 Ind. 203, 6 N. E. Rep. 349; *State* v. *Harrison*, 113 Ind. 434, 16 N. E. Rep. 384. See, also, authorities cited in 19 Am. & Eng. Enc. Law, pp. 432, 433; *People* v. *Tyrrell*, (Cal.) 25 Pac. Rep. 684; Mechem Pub. Off. § 128; *Com.* v. *Hanley*, 9 P. St. 513; *State* v. *Rareshide*, 32 La. Ann. 934. "A vacancy exists only where no one has any legal title to the office." *State* v. *Ralls County Court*, 45 Mo. 58. "So long as the defeasible right to hold over continues, and the incumbent exercises it, the same conditions which would create a vacancy during the prescribed term will be required to create one during the term which he is lawfully holding over." *Gosman* v. *State*, 106 Ind. 203, 6 N. E. Rep. 349. Our conclusion is that the plaintiff Daniel Williams was not appointed to the office of warden by the board of trustees of the state penitentiary, or by any lawful authority, and that said plaintiff has no right or title to said office. The judgment of the court below will be affirmed. All concur.

ON REHEARING.

(August 14th, 1893.)

BARTHOLOMEW, C. J. Elaborate and exhaustive petitions for rehearing have been filed in this case by the attorney general and C. U. Greely, Esq., of special counsel. In these petitions the view of the law taken by the executive in submitting to the senate the names of Ward and Taylor as members of the board of directors of the state penitentiary, and in the subsequent appointment of such persons after their rejection by the senate, and after

the adjournment of the legislative assembly, upon the theory that a vacancy existed by reason of the expiration of the terms of office of Donnelly and Van Horn, is abandoned, and it is admitted that, if there existed in the senate any power of confirmation, then no vacancies existed, and the attempted appointment of Ward and Taylor was a nullity. But it is urged that a ruling upon this question of appointing power to which we adverted, but upon which we expressly declined to rule in the original opinion, is necessary to the proper disposition of this case, and that the power of appointment to office is so necessarily and inherently an executive function that it passed to the governor by plenary grant of executive power, to be divested only by express words, and that § 78 of the constitution, quoted in the orginal opinion, is not necessarily a limitation upon that power, but is a grant of power to fill a vacancy occurring in an elected office, which the governor would not have in the absence of such section. An attempt to answer this position places this court at once in that delicate and embarrassing situation from which all courts may well be excused from shrinking. Individuals and individual interests become as ciphers when passing upon the conflicting claims to power put forth by two co-ordinate and independent departments of a sovereign state. The great difference due from us to the executive department, not more than the high esteem we entertain for the gentlemen who has honestly sought to exercise this power, makes it eminently proper that, in denying the petition for a rehearing, we should succinctly state our objections to those views that have been so learnedly pressed upon us.

Appellant takes the position that when the people of this state adopted their present constitution, § 71 of which declared that "the executive power shall be vested in a governor," thereupon there passed to and vested in the governor the exclusive, unrestricted, and uncontrollable power to fill all appointive offices, and that such power must remain in full force unless limited by express words in the constitution, the presence of which is broadly denied; and that, while it is a legislative function to direct

the manner of induction into office created by the legislature, yet that such function extends only to the right to declare such office elective or appointive; and that, when so declared appointive, the volition of the governor in filling such office can no more be influenced, limited, or thwarted by the legislative assembly that could the volition of an elector in filling an elective office; and, further, that, as the legislative assembly has no appointing power in itself, neither can it confer such power in whole or in part upon any person, persons, or body, except the governor. This last claim, while not made in words, is the logical and necessary result of the claim of exclusive appointing power in the executive. The fundamental necessity, under the genius of our government, for the separation of the three great governmental functions and their distribution to the executive, legislative, and judicial departments, has been so often demonstrated, and so much more forcibly than the writer could do it, that it becomes us to accept the necessity without recapitulating the reasons for its existence. We accept without question the proposition that when our constitution vested executive power in the governor, and legislative power in the legislative assembly, and judicial power in the judiciary, these grants were in their nature exclusive, and that neither department, as such, could rightfully exercise any of the functions necessarily belonging to another department. With this statement of the exclusive nature of the powers of the different departments, if appellants' contention that the power to appoint to office passed to the governor by the grant of executive power, and that there is nothing in the constitution in any manner limiting or controlling such grant, be correct, then the conclusion is obvious that so much of Ch. 93, Laws Dak. T. 1889, cited in the original opinion, as required the appointment of the members of the board of directors of the penitentiary to be made "by and with the advice and consent of the council," was repugnant to the constitution, and was by § 2 of the schedule to that instrument nullified by the adoption of the constitution. If, however, the exclusive

power to appoint to office was not vested in the governor by the grant of executive power, then this result would not follow.

Is the power to appoint to office necessarily an executive function? A solution of this one vital point must rule this case. It is first argued that it is not competent for the senate to share the appointing power with the governor, by reason of the absence of certain provisions in our constitution. It is provided in § 2, Art. 2 of the Federal Constitution, that the president of the United States shall have power, by and with the advice and consent of the senate, to appoint certain officers. Section 1857, Rev. St. U. S., which, as § 61 of the organic law of Dakota Territory, was in force when Ch. 93, Laws 1889, was enacted, gave the governor power to appoint certain officers by and with the advice and consent of the council. Our constitution contains no similar provision. It is urged that these provisions were adopted for the express purpose of conferring upon the senate a share in the appointing power which it does not possess in the absence of such provisions. No authority is cited to support the position, and we deem it radically wrong. The provision in the Federal Constitution was adopted for the purpose of conferring upon the president a power which he did not have. We think this is clear, for several reasons. The provision appears in the article granting and defining the powers of the executive, and not in the article defining legislative powers. It purports on its face to be a grant of power to the executive. The phrase "by and with the advice and consent of the senate" was not contained in the original draft of the section, but came in by way of amendment. See Journal of Convention, p. 225. The sole object of the original draft was to confer power upon the president. The object of the amendment was to put a limitation upon that power. See opinion of *Mitchell*, J. in *Hovey* v. *State*, 119 Ind. 401, 21 N. E. Rep. 21; also Mechem, Pub. Off. § 110. The section in the organic law to which we have referred is too long for insertion here, but the plain purpose of the language is a grant of qualified power to the executive. Any other construction is strained, and renders a large portion of the

section worse than meaningless. Constitutional provisions empowering the governor to appoint officers by and with the advice and consent of the senate are found in many of the states, and always in the article defining the powers of the executive; yet such provision is wanting in the constitution of many of the western states, among which we may mention, in addition to our own state, Wisconsin, Michigan, Missouri, Kansas, and Iowa. While in each of these states the executive power is vested in the governor, yet their statute books are full of instances where offices have been created and made appointive by the governor "by and with the advice and consent of the senate." The constitutionality of these provisions has never been doubted in those states, so far as we know. We think it clear that the absence of that provision from our constitution has no effect whatever upon the power of the legislature to direct that appointments be confirmed by the senate.

Is the senate precluded from participating in the appointing power by reason of the exclusive executive nature of that function? Counsel for appellants, in discussing this point, lose sight of one very important distinction. The legislative department, as such, has not sought to exercise or to participate in exercising the appointing power. It has simply designated certain existing officers, to-wit, the senators, who should thus participate. Much of the labor of counsel is lost in this case by their failure to make this distinction, as will appear when the cases are examined. Mr. Mechem, in his work on Public Officers, says, at § 104: "So it is said that appointments to office, whether made by judicial, legislative, or executive bodies, are in their nature intrinsically executive acts." He cites the following cases, all of which are relied upon by counsel in this case: *Taylor* v. *Com.*, 3 J. J. Marsh. 401; *State* v. *Barbour*, 53 Conn. 76; Achley's case, 4 Abb. Pr. 35; *Marbury* v. *Madison*, 1 Cranch, 137; *Heinlen* v. *Sullivan*, 64 Cal. 378, 1 Pac. Rep. 158. It would be an unwarranted use of space to review these cases at length. We are convinced none of them intended to assert the doctrine for which appellants contend.

The case from Kentucky, which seems to be a leading case, and which asserts that the power to appoint to office is inherently executive, still upheld an appointment made by a court exercising judicial powers. The cases from Connecticut and Abbott's Practice were instances where appointments were made by city councils which were upheld, and which in no manner involved the power of the governor. The case from Cranch involved an appointment made by the president, "by and with the advice and consent of the senate." The commission had been signed by the president, and sealed by the secretary of state, and the action was brought to compel delivery. It is only by inference that the opinion states the appointment to office to be an executive function. The case from California is entirely foreign to the point. Much reliance is placed upon the case of *State* v. *Kennon*, 7 Ohio St. 547. The case is not applicable. It deals entirely with the lack of power in the legislature, and not with the exercise of power in the executive. The constitutional provison in that state declared: "But no appointing power shall be exercised by the general assembly except," etc. As said by *Swan*, J., in that case: "Appointing power by the general assembly is thus cut up by the roots, except only in the special cases in which it is expressly given by the constitution itself." Then the constitution contained "negative words to limit the legislative authority." Nevertheless, the general assembly enacted a law creating a board to do certain work and appoint certain officers, and named the members of the board in the act. This was held to be an exercise of the appointing power, and void. But the court declined to say, even under the prohibitive language of their constitution, that the legislative assembly might not create a board of appointers to office and direct the manner of their induction into office, but held that "directing by law the manner in which an appointment shall be made, and making an appointment, are the exercise of two different and distinct powers,—the one, prescribing how an act shall be done, being legislative; and the other, doing the act, being administrative." Judge Swan in his concurring

opinion clearly intimates that the legislative assembly might enlarge the scope of an existing office, and require the incumbent tc exercise additional functions, such as the appointing power. *State* v. *Hyde*, 121 Ind. 20, 22 N. E. Rep. 644, was another instance where the legislature created a state office, and named the incumbent, and empowered him to appoint certain other officers, and to fill vacancies. A provision of the Indiana constitution, after dividing governmental powers among the three departments, provided that "no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided." Another provision empowered the governor to fill vacancies in state offices. The court held—three judges against two—that the act of the legislature violated both of these constitutional provisons. A study of the majority opinion shows it to be grounded upon the fact that there was no express authority conferred upon the legislature by the constitution to fill such office. The court say: "Whatever may be said of the constitution of other states, it cannot be successfully maintained that, under the constitution of this state, the legislature possesses latent or undefined power." If there be any reasoning in that case that does not meet our approval, it is based upon a constitutional provision which we do not have. The case of *State* v. *Peelle*, 121 Ind. 495, 22 N. E. Rep. 654, is in its main features identical with *State* v. *Hyde*.

Our own researches fully confirm the statement of Chief Justice Elliott in his dissenting opinion in the case last named, where he says: "I have searched with all possible care, but I can find no decision which sustains the contention of the relator that the appointing power resides in the governor. I find no conflict, but entire unanimity; for, in every case that I have seen, it is affirmed that, unless expressly prohibited by constitutional provisions, there is a class of offices which the legislature may create and fill by appointment." Mechem on Public Officers (§ 108) says: "But the power to appoint officers, excepting perhaps, those who are to assist him in the discharge of his personal executive duties, is

not inherent in the chief executive, but must exist, if it exist at all, by virtue of the authority conferred upon him by the sovereign power." By this we understand the author to mean that the fact that executive power is lodged with the governor—the fact that he is constituted chief executive—does not give him appointing power. In *Mayor, etc., of Baltimore* v. *State*, 15 Md. 376, cited in original opinion in this case, the court said: "We are not prepared to admit that the power of appointment to office is a function intrinsically executive, in the sense in which we understand the position to have been taken; namely, that it is inherent in, and necessarily belongs to, the executive department. Under some forms of government it may be so regarded, but the reason does not apply to our system of checks and balance in the distribution of powers, where the people are the source and fountain of government, exerting their will after the manner and by instrumentalities specially provided in the constitution. The case cited [3 J. J. Marsh. 401] affirms that it is intrinsically executive; but the judge explains that the nature of the power is executive, whether exercised by the governor or a court, as distinguished from those acts of the court that are merely judicial. But it is nowhere intimated that another department than the executive cannot exercise the power." The erudite Judge Cooley, in speaking of this same Kentucky case, so much relied upon, after stating that the case declared the appointing power to be inherently executive, says: "In a certain sense this is doubless so, but it would not follow that the legislature could exercise no appointing power, or could confer none on others than the chief executive of the state. Where the constitution contains no negative words to limit the legislative authority in this regard, the legislature, in enacting a law, must decide for itself what are the suitable, convenient, or necessary agencies for its execution, and the authority of the executive must be limited to taking care that the law is executed by such agencies." Cooley, Const. Lim. 136, note 2. In *Biggs* v. *McBride*, 17 Or. 640, 21 Pac. Rep. 878, cited in original opinion the court say: "It was not claimed at the argument that

there is any express provision of the constitution which authorized the governor in direct terms to make the appointment in question, but that it is included in the grant in § 1. Art. 5, of the constitution. That section declares: "The chief executive power of the state shall be vested in the governor." Now, if it could be shown that the power to appoint all officers which are not expressly made elective by the people is a part of 'the chief executive power of the state,' the appellant's contention would be sustained. But no authority whatever has been cited to sustain this view, nor is it believed that any exists. On the contrary, the provisions of the fifth article of the constitution, which relates to the executive department, all seem at variance with this view. The framers of this instrument evidently designed that no prerogative powers should be left lurking in any of its provisions. No doubt, they remembered something of the history of the conflicts with perogatives in that country from which we inherited the common law. They therefore defined the powers of the chief executive of the state so clearly and distinctly that there ought to be no controversy concerning the method of filling the same, or in some cases of changing the method of filling an existing office." It is proper here to state that the constitution of Oregon contains the express prohibitive language quoted from Indiana, and the section granting the governor the express power of appointment is much broader that our § 78. In this case, also, the appointment was made by the legislature. In *People* v. *Freeman*, 80 Cal. 233, 22 Pac. Rep. 173, it is said: "The contention on the part of the relator is that appointing to office is intrinsically, essentially, and exclusively an executive function, and therefore cannot be exercised by the legislature." The court then quotes the constitutional provision dividing governmental functions, which is practically the same as in Indiana, and adds: "If the making of appointments to office is a function which, in the sense of the constitution, appertains to the executive department of the state government, there would seem to be no escape from the conclusion that the appointment of the respondent by the members of

the legislative department was invalid, unless by some specific provision of the constitution such appointment is expressly directed or permitted. On the part of the respondent, it is contended that such specific provision is found in § 4 of Art. 20, which reads as follows: 'Section 4. All officers or commissioners whose election or appointment is not provided for by this constitution, and all officers or commissioners whose offices or duties may hereafter be created by law, shall be elected by the people, or appointed as the legislature may direct.' But we cannot construe this section as an express direction or permission to the legislature to exercise the power of appointment to office, if that is essentially an executive function. It would upon such an assumption amount only to this: that, with respect to newly created offices, or offices not provided for in the constitution, the legislature may direct whether they shall be filled by popular election or by executive appointment; in other words, that the legislature may prescribe the rule of selection, but may not itself make the selection. *State* v. *Kennon*, 7 Ohio St. 561. Our decision, therefore, must depend upon the solution of the question whether appointment to office is essentially an executive function." And, on a review of the authorities, the court holds that it is not an executive function. The language in the Nevada cases cited is even stronger, but we will not take space to quote it. Mechem on Public Officers (§ 110) reads as follows: "The power of appointment may be absolute or conditional. Where it is absolute, the choice of the appointing power, if it falls upon an eligible person, is conclusive. But frequently the power of appointment is conditional, and may be exercised, as in the case or the president of the United States, 'by and with the consent of the senate' or some other body only, and this requirement of assent or confirmation is found in all grades of municipal offices." But the grant of executive power to the governor is never conditional. The condition is always found in a subsequent provision granting express appointing power. But, if the grant of executive power carries with it appointing power, then these well nigh

universal subsequent provisions expressly granting appointing power are meaningless and confusing surplusage. But we are not allowed to thus construe the organic law. "In written constitutions there are no meaningless words. In the declared will of the sovereign people, every word has an office and a purpose. Hence these subsequent provisions must be necessary, and, if necessary it is because power to appoint to office does not necessarily adhere in executive power." One further quotation will be excused by reason of the incomparable ability and fairness of the mind from which it issued. "The inferences which I think follow from these views are two: *First*, that the denomination of a department does not fix the limits of the powers conferred upon it, nor even their exact nature; and, second, (which, indeed, follows from the first,) that in our American governments the chief executive magistrate does not necessarily, and by force of his general character of supreme executive, possess the appointing power. He may have it or he may not, according to the particular provisions applicable to each case in the respective constitutions." Webster's Speech on the Presidential Protest.

A careful study of all authorities to which we have been cited and all that we are able to find has made it entirely clear to each member of this court that the power of appointment to office does not necessarily and in all cases inhere in the executive department, and that when, as in this state, the express provisions of the constitution vest in the governor a limited power of appointment, such grant is exclusive, and no other or greater appointing power can be exercised. It is different with the legislative department. It is conceded in the brief of counsel that, by the great weight of authority, constitutional provisions are in the nature of grants of power to the executive and judiciary, but are limitations upon the power of the legislature. This is no doubt true. All governmental power not by the constitution lodged elsewhere resides in the legislature. "Whenever a power is not distinctly either legislative, executive, or judicial, and is not by the constitution distinctly confided to a department of the government

designated, the mode of its exercise and the agency must necessarily be determined by law; in other words, must necessarily be under the control of the legislature." Cooley, Const. Law, 44. "The general rule is that the legislature may exercise any power not denied to it by the constitution of the state, or the exercise of which is not prohibited by the federal constitution." *Cattle Co.* v. *State*, 68 Tex. 545, 4 S. W. Rep. 865. Many of the authorities already cited bear upon this subject, and from them the conclusion is clear that, where the legislature has the power to establish by law state institutions,—as, for instance, a state penitentiary, —it also has the power, as incident to the power of establishment, to say by what means and agencies the law shall be carried into effect; and, even when all appointing power is expressly denied to the legislature, it still has power to annex additional duties to an existing office. *Walker* v. *City of Cincinnati*, 21 Ohio St. 14; *State* v. *Harmon*, 31 Ohio St. 250-258; *Bridges* v. *Shallcross*, 6 W. Va. 562. If this be not true, and if the exclusive power of appointment rests in the executive, then the relator must assuredly fail in this case, because the law which established the penitentiary (Ch. 30, Sp. Laws Dak. T. 1883) declared the warden thereof to be a public officer, and directed that his appointment should be made by the board of directors. Relator is in this court claiming title to an office by virtue of an appointment by a board created and vested with appointing power by the legislative assembly, but urges in support of his claim that the appointing power is vested exclusively in the executive, and the legislative assembly can in no manner control the same.

If in any case a court should be controlled by contemporaneous construction, we are certainly bound in this case. That the constitutional convention that framed that state constitution fully understood that the senate might be empowered to act with the executive in making appointments to office is perfectly clear from § 39 of the constitution, which provides "that no member of the legislative assembly shall receive any civil appointment from the governor or governor and senate during the term for which

he was elected." Every governor of the state, since our admission into the Union, has also acted upon the same theory by submitting to the senate the names of nominees for appointing offices, and every senate has acted upon such nominees by confirming or rejecting the same. During the three sessions of the legislature that have been held since statehood, and since the adoption of the construction, not less than 23 separate laws have been passed creating appointive offices where the governor has been required to share the appointment with some other person or persons or body, usually the senate. All of these acts, seven of which were passed by the last legislature, and signed by the present executive, are unconstitutional and void, on the theory that the exclusive appointing power rests in the executive.

Thus much we have deemed it proper to say in explanation of the position taken in the original opinion. It is apparant from what we have said that our original views are in no manner changed. We are required in this case to choose between officers appointed by the governor and senate and officers appointed by the governor alone. In declaring the former to be the legal officers, we have no fear of in any manner violating the declared will of the sovereign people of this state, as expressed in their constitution. The petition for rehearing is denied. All concur.

(56 N. W. Rep. 142.)

OWEN MARTIN *vs.* WM. R. HAWTHORN, *et al.*

Opinion filed Nov. 6th, 1893.

Lien for Threshing Grain—Notice—Action for Conversion—Evidence.

When a party claiming to have a thresher's lien under Ch. 88, Laws 1889, takes possession of the grain, and sells the same, and an action is brought against him by the owner of the grain for converting the same, it is incumbent upon the lien claimant to show at the trial not only that he filed a verified account in writing embodying, among other things, a description of the land upon which the grain was grown, but he must further prove that, as a matter of fact, the grain upon which the lien is claimed was grown upon the land described in the writing on file. Accordingly, *held*, where in such action the defendant (lien claimant) rested his defense without offering any testimony tending to show where the grain in question was grown, and the plaintiff testified that no grain was grown in the year in question upon the land described in the statement filed with the register of deeds, it was error in the trial court to deny plaintiff's motion to strike out all evidence in the case relating to the lien.

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

Action for conversion by Owen Martin against William R. Hawthorn and others. Defendants had judgment for costs, and plaintiff appeals.

Reversed.

S. L. Glaspell, for appellant.

The defendants failed to make a good defense, in that they failed to show by evidence where the grain was grown. *Lavin* v. *Bradley*, 1 N. D. 291, (47 N. W. Rep. 384;) *Parker* v. *First Nat'l Bank*, 3 N. D. 87, (54 N. W. Rep. 313.)

Fredrus Baldwin, for respondents.

Argued that the lien statement described the land and when in evidence supplied the necessary proof to sustain the verdict.

WALLIN, J. This action is brought to recover the value of a quantity of wheat owned by the plaintiff, which the defendants seized and sold in attempting to foreclose an alleged thresher's lien in favor of the defendant Hawthorn. The only question presented upon the record is whether or not the alleged lien was

valid under Ch. 88, Laws 1889. We think the lien proceedings were fatally defective, and that the judgment must therefore be reversed. The statute under which defendants attempted to justify their seizure of the grain, while incomplete and incongruous in many of its provisions, yet imperatively requires, as we construe it, that the party seeking to perfect a lien upon grain threshed by him to file with the register of deeds a written and verified statement embracing certain features enumerated in the statute, among which is a description of the land upon which the grain was grown. In *Parker* v. *Bank*, 54 N. W. 313, this court had occasion to consider this feature of the statute, and in its opinion the following language was used: "Yet the statute is peremptory in requiring the statement to contain a description of the land on which the grain was grown, in order to entitle a party to the lien given by the statute." We still think that the benefits of the lien cannot be realized in any case without a substantial compliance with that feature of the law which positively requires the filing of a statement. In the case under consideration the thresher (Hawthorn) filed a statement which was regular on its face, and which embraced a description of certain land, viz: W. ½ section 28, township 144, range 65; and the statement further declared that the grain in question was grown upon such land. But the filing of a statement regular upon its face does not alone suffice to secure the benefits of the lien in a contested case. It was necessary to show at the trial that the grain threshed was in fact grown upon the land described in the statement on file. The only evidence offered by defendants to establish this vital fact came from the defendant Hawthorn, who testified as follows: The defendant William R. Hawthorne testifies that he went upon the west-half of (W. ½) of section 28, township 144 north, of range 65 west of 5th P. M., in Stutsman County, N. D., to thresh, and threshed the grain of plaintiff thereon." This evidence, not being contradicted, certainly showed that defendants threshed grain for the plaintiff upon the land described in the account on file. This evidence was, however, wholly irrelevant to any issue

in the case. As a matter of fact there was no statement contained in the account on file touching the locality or place where the defendant did the threshing; nor does the law require any statement in writing to be made, or any proof made as to the place where the work of the threshing is performed. This requirement of the statute has reference only to the tract upon which the grain in question is grown. The defendants having rested their case upon the testimony above set out, "the plaintiff testified that he raised no grain on the land described during the year 1890, and had no grain threshed on such land during the year 1890." It will be noted that the plaintiff's testimony, as above recited, is in conflict to that given by the defendant Hawthorn as to where the threshing was done; but as has been seen, the place of doing the work is not all relevant to any issue in the case. The testimony of the plaintiff stands alone, and is not sought to be rebutted upon the material matter of where the grain was grown. The plaintiff swore positively that he "raised no grain on the land described." Plaintiff's testimony, standing alone, as it does, conclusively shows that the statement made in the account filed as to the tract of land upon which the grain in question was grown was erroneous and untrue in fact; in other words, the defendant signally failed to prove a fact which is essential to be proven in all cases arising under the statute. Both sides having rested the case upon this testimony, plaintiff moved in the court below to strike out all evidence relating to the lien as immaterial and incompetent, "because no grain was raised on the land described in the lien." This motion was overruled, and plaintiff preserved an exception to the ruling. We are clear that the ruling was erroneous. The evidence should have been striken out, and the refusal to do so was error to plaintiff's prejudice. It will be unnecessary to consider other assignments of error found in the record. A new trial will be ordered. All concur.

(57 N. W. Rep. 87.)

REEVES & CO. *vs.* WILLIAM CORRIGAN, *et al.*

Opinion filed December 7th, 1893.

Written Order for Machinery—Contruction Contract for Sale—Alteration by Agent.

Plaintiff, a corporation, was engaged in the manufacture of farm machinery at Columbus, Ind., and W. & R. were plaintiff's agents for the sale of machinery at Lisbon, D. T. The defendants negotiated with plaintiff, through said agents, for the purchase of a certain straw stacker, and signed and delivered to such agents a written order directing that such straw stacker be forwarded from plaintiff's place of business, and delivered to the defendants, at a time stated in the order, at Lisbon, D. T. The terms of the proposed purchase, including the price and terms of payment, were embraced in the order, with other stipulations, including a warranty of the machine, coupled with a right to rescind, and return the machine, etc. Pursuant to such order, and in due time, plaintiff forwarded the straw stacker, and delivered it to the defendants at Lisbon. In an action for the purchase price, defendants denied the purchase, and set up an alleged oral agreement with plaintiff, through said agents, whereby the defendants took possession of the straw stacker on trial only, but did not purchase the same. The trial court instructed the jury as follows: "When the machine came, and before Messrs. Maddox & Corrigan took the machine, they had the power or the option at the time to say to these plaintiffs: 'We will not take the machine on the terms of the written order. We have concluded not to take the machine on those terms.' They had a right to rectify the terms of that purchase. They had a right to refuse to take the machine at all." *Held*, that such instruction was error. Whether the order was or was not a contract of sale, or whether or not the title would pass after the delivery of the order and its acceptance, but before the defendants had received the machine, is not material in such a case. In any view of the transaction, the order was not a nullity. After the plaintiff, strictly pursuant to the requirements of the order, had accepted the order, forwarded the machine, and tendered it to the defendants at Lisbon, it was incumbent upon the defendants to receive and settle for the machine in accordance with the stipulations contained in the order. Defendants could not, after a tender, arbitrarily, and without cause, refuse to receive the machine under the terms of the order, without violating their agreement, and being liable in damages therefor.

Signing Order—Knowledge of its Contents Presumed.

The order in question embodied the following stipulation: "The stacker is hereby purchased and sold subject to the following warranty and agreement, and no one has authority to add to or abridge or change it in any manner." *Held*, that defendants, having signed the order embracing such stipulation, are presumed to be aware of this feature of the order, and are bound to know it and observe its requirements. The stipulation was lawful, and one which the parties had a right to make, and, being made, the defendants, while it was in

force, could not lawfully enter into an oral arrangement with plaintiff's agents, the terms of which are wholly inconsistant with those stipulated in the writing.

Verdict not Justified by the Evidence.

After an examination of the evidence, *held*, further, that the verdict returned was not justified by the evidence.

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

Action by Reeves & Co., a corporation, against William Corrigan and Eugene Maddox. Defendants had judgment, and, from an order denying a new trial, plaintiff appeals.

Reversed.

L. W. Gammons and *Steele & Rees*, for appellant.

Rourke & Allen, for respondents.

WALLIN, J. This action is brought to recover $200 and interest as the alleged purchase price of an implement called a "Reeves Patent Straw Stacker," which the complaint charges was sold by the plaintiff, a corporation, to defendants, at Lisbon, D. T., on September 21, 1888, for the agreed price of $200, to be paid in installments of $100 each, in November, 1888, and in November, 1889. Defendant Maddox, the partner of Corrigan, was not served with the summons, and never appeared in the action. Defendant Corrigan answered the complaint separately, and denied that the defendants, either jointly or severally, or in any manner, ever bought the straw stacker of the plaintiff, and further answered, in substance, as follows: That at the time stated in the complaint the defendants, who were partners in a threshing outfit, were induced by the plaintiff, through its agents at Lisbon, D. T., to take the straw stacker in question on trial, and defendants did take the same for trial only; that the agreement was that these defendants should try the stacker, and if it should do good work, and give them full and entire satisfaction, that the defendants might then at their own option, purchase the stacker, or not, but, if they chose to purchase it, that it could then be purchased at the price stated in the complaint; that defendants tried the stacker, and found it defective, and that it did not do good

work, nor satisfactory work; and that defendants never did purchase the same. A jury trial was had, resulting in a verdict for defendants. A statement of the case, embracing the exceptions and all of the evidence, was settled, and a motion for a new trial was made, on the ground of alleged errors of law occurring at the trial and for alleged insufficiency of the evidence to justify the verdict. The motion was denied.

There is no substantial conflict in the evidence. The following facts are conceded: That, in the year 1888, plaintiff was engaged in the sale of agricultural implements at Columbus, Ind., and was then selling the Reeves patent straw stacker. That, at the same time, plaintiff was represented at Lisbon, D. T., by the firm of Worden & Rickford, which firm was then in the machine business at Lisbon, and were plaintiff's local agents there for the sale of the straw stacker. That at the solicitation of plaintiff's said agents the defendants signed in their firm name, and delivered to plaintiff's said agents, an order for a Reeves straw stacker, which order was in the following words and figures: "Dated at Lisbon, D. T., July 17th, 1888. W. E. Worden: You will please deliver to me at Lisbon, D. T., on or about the 1st day of August, 1888, new Reeves patent straw stacker, all complete; said stacker to be of the ordinary width and length, and is intended to be attached to a Buffalo Pitts separator, built in 1885. Where in consideration thereof, I, or we, agree to receive the same, pay the freight and charges from Columbus, Ind., and at the same time settle for said stacker in cash and notes, in the sum of two hundred dollars, as follows: Cash in hand, ——; note due November 1st, 1888, for $100.00; note due November 1st, 1889, for $100.00; note due —— 1st, 188—, for $——. Notes to be made payable to the order of ———, and their blanks shall be used, and bear the highest rate of legal interest from date until paid. Said notes to be accompanied by a mortgage on additional property, if required, or other approved security. This stacker is hereby purchased and sold subject to the following warranty and agreement,

and no one has any authority to add to, abridge, or change it in any other manner: That it is well made, of good materials, and with proper management it is capable of doing first-class work; that the purchaser shall have one day to give it a fair trial, and, if it should not work well, written or personal notice, stating wherein it fails, is to be given to the agent from whom it is received, and reasonable time allowed to get to it, and remedy defects, if any, (the purchaser rendering necessary and friendly assistance,) when, if it cannot be made to do good work, a reasonable time shall be allowed to get a man from the house; and, if the stacker cannot be made to do good work then, it shall be returned to the place where received, and a new stacker given in its place, which shall fill the warranty, or the notes and money will be refunded; which, when done, shall be the settlement of the whole transaction. Continued use of the stacker for more than one day shall be evidence that the warranty is fulfilled. Order taken by Worden & Rickford, P. O., Lisbon, D. T. Corrigan & Maddox." Pursuant to said order, the plaintiff, in due time forwarded a Reeves straw stacker to their said agents at Lisbon, and the latter delivered the same to the defendants at Lisbon, and defendants removed the same, and operated it at least one season, *i. e.* in 1888, and a part of the next season. The straw stacker has never been returned, and at the time of the trial, which occurred in December, 1891, it was in defendants' possession. At the time of the delivery of the stacker, two promissory notes were executed and delivered to Worden & Rickford, payable to the plaintiff's order, for the sums stated in the order, and by their terms the notes fell due at the times mentioned in the order. A chattel mortgage was also given to secure the notes. The notes and mortgage were signed by the defendant Corrigan only, and for some reason, not explained in the record, were not signed by defendant Maddox. The action is not upon the notes, but they and the mortgage were put in evidence, without objection, as tending to support the plaintiff's allegation of a sale and delivery of the stacker to the defendants as alleged in the complaint.

In support of its complaint, the plaintiff put in evidence the deposition of W. E. Worden, who after stating that he resided at Lisbon, at the time in question, testified as follows: "Q. State whether you had, during the summer of 1888, any business transactions with the defendants, Corrigan & Maddox. A. I did. Q. State whether you had such a transaction with reference to what is called the 'New Reeves Patent Straw Stacker.' A. I did. Q. What relation at that time, and in that transaction, did you bear to Reeves & Co., the plaintiff in this action? A. I was agent for them. Q. For the sale of their manufactures at that place? A. Yes, sir. Q. What transaction did you have with defendants, Corrigan & Maddox? A. I sold them a machine. Q. What machine? A. I sold them a Reeves stacker. Q. Known as the 'Reeves Patent Straw Stacker?' A. Known as 'Reeves Stacker.' Q. State whether or not you had a written order from the defendants for the purchase of such a stacker. A. I did. [Here the order above set out was put in evidence without objection.] Q. State whether or not, upon this written order, Exhibit A, you delivered to the defendants the machine in question. A. I did. Q. State whether or not you sold this machine to the defendants, or whether the machine was to be tried by them, and purchased by them, at their option, after trial. A. I sold them the machine, guaranteed material and workmanship, to be returned in case it did not fill the guaranty. Q. Did they ever return it? A. They never tendered it back, to my knowledge. They never returned it. Q. Was it upon any other condition than that stated in the written order, Exhibit A, that you delivered the machine in question to the defendants? A. I do not remember any other condition. Q. State whether or not it was in fulfillment of this written order that you so delivered the machine to them. A. Certainly."

In support of the defense, the defendant Corrigan testified as follows: "Q. I will ask you to state just what that transaction was. A. Mr. Worden insisted on me, quite a while, to buy a Reeves stacker to attach to my threshing outfit. I gave him an order, after quite a while, and a short time after I took a straw

stacker out. Mr. Worden came out. The day he came out, we did not thresh any of any account. Our engine did not work right. So we did not give the machine a trial, and he promised to come back. He came back once, and did some little fixing about it,—showed me some points. Q. What led up to your taking the straw stacker? What was the understanding? Say whether you bought it outright, or what you were to do with it,—take it out and try it? By the court: Just state the transaction had between you and Mr. Worden at the time you took the straw stacker out, or the substance of it. A. Well, at the time he came out to try the stacker, and put her in running order. At the time the machine did not work right, and he promised to come back, and get her rigged out and in running order. My recollection of the conversation is that I was to take it out and try it, and if she proved to do good work,—to carry the straw off our separator,—and to be made of good material, I was to keep her. If not, I was to return her. This was somewhere near the 1st of September. I took the straw stacker out. It did not work very good the first day. Mr. Worden was there when it started. Q. Did he make it work good before he went away? A. No. We run her for awhile." On cross-examination, Corrigan's testimony as to taking possession of the machine is as follows: "It was about the 1st of September that I got the stacker. I signed the written order for it some little time before that. I don't know exactly how many days I used the stacker that fall. Threshed some jobs with it. I used it some the next fall. Threshed some jobs with it. One job we did not finish, I know. Started on that, and she collapsed,—had a break up. I never took the machine back, but offered to take it back somewhere about the 10th or 15th of September, I think. I don't think that I took the machine out. Had some talk with Mr. Worden in regard to the machine being delivered. He did not ask me to pay for it in advance. Q. Did he ask you to give some notes in settlement? A. Yes, I signed some notes. I did it on condition that he was to make everything work right." Corrigan further testified as follows: "Q. What

agreement had you with Mr. Worden to keep it over the next season? A. The agreement was to keep it over, and he was to put it into good running order the next year. In the condition the machine was at the time I got it, it was not worth anything to me, and now lays about six miles out here. I offered to return the machine, but did not return it because Mr. Worden induced me to keep it. Q. For what reason? How did he induce you to keep it? A. He always claimed that he could make it work, and that it would work." In 1889, Corrigan sold his interest in the threshing outfit to his partner, Maddox; and, with respect to the stacker, Corrigan testified: "Q. Then any interest that you had or might have in the straw stacker was transferred to Maddox at the time the machine was transferred, as I understand it? A. Yes. Q. And, if Mr. Maddox was satisfied with the straw stacker, he was to pay for it? A. Pay for it if it worked,—do good work." Thomas Gilbertson testified as to the circumstances attending the delivery of the stacker as follows: "Q. I will ask you if you heard the conversation between Mr. Corrigan and Worden at the time? A. Part of it, yes. Q. State what that conversation was? A. Well Mr. Corrigan was in favor at that time to take the stacker, as I heard, and, if the stacker didn't work, needn't keep it, and Maddox was in with him; and finally Mr. Worden talked him into taking the stacker, providing, if it—if the straw stacker —didn't satisfactorily work, that the stacker could be returned. That is as near as I can remember. Mr. Worden was coaxing these boys to take the stacker out, and he says. 'If it is not satisfactory you need not keep the stacker, but we will see that the stacker works satisfactory.'" Corrigan was recalled, and testified that the understanding was that if they took the machine they were to pay $200 for it, according to the agreement.

The court instructed the jury at length upon the issues in the case, and, among other things, charged the jury as follows: "Messrs. Corrigan & Maddox signed an order, and delivered it to Mr. Worden, the agent for the plaintiffs, for this machine,—for the purchase of this machine, when it came. That is not the

contract of sale. That is a customary contract, called, in lieu of a better name, a 'contract for a sale in the future.' The title does not pass. The machine is not delivered at the time the order is signed, and it is simply a contract for the sale of property in the future. When the machine came, and before Mr. Maddox and Mr. Corrigan took the machine, they had the power or the option, at the time, to say to these plaintiffs: 'We will not take the machine on the terms of the written order. We have concluded not to take the machine on those terms.' They had a right to rectify the terms of that purchase. They had the right to refuse to take the machine at all. If you shall find that there was such a revocation of the terms of that order before the property was delivered, then, so far as the written order was changed, it will be superseded by the oral contract between the parties at the time this property was delivered to Corrigan & Maddox." It is unnecessary to quote the whole charge. We need only state that the court submitted the question to the jury, upon the evidence, whether, as a matter of fact, the stacker was delivered to the defendants under the terms of the written order signed by them, or whether that order was set aside or materially modified by the defendants by a new oral arrangement made at the time of the delivery between the defendants and plaintiff's agents at Lisbon. This question is submitted as the pivotal question in the case. The court further instructed the jury: "As to whether the machine worked or did not work is not material, in the view the court takes of this case. The simple question here is, did Messrs. Corrigan & Maddox buy the machine at the time they took it out? Did they buy it with a warranty, or did they take it on trial? If these defendants bought the machine with a warranty, they had a right to rescind the contract and return the machine, but it is not contended here that the defendants ever rescinded the contract. That is not claimed by the defendants in this suit."

There are several assignments of error, but those chiefly relied upon in this court are as follows: "*First*, That the court erred in refusing to direct a verdict for the plaintiff. *Second*, The evidence

is insufficient to justify the verdict. *Third*, To the following instructions given to the jury, to which an exception was saved: 'When the machine came, and before Mr. Maddox and Mr. Corrigan took the machine, they had the power or the option at the time to say to these plaintiffs: "We will not take the machine on the terms of the written order. We have concluded not to take the machine on those terms." They had the right to recify the terms of that purchase. They had a right to refuse to take the machine at all.'"

We are clear that all of the assignments of error are valid, and must be sustained. As we view the case upon the record, the entire charge of the court to the jury, in so far as it related to the material facts and issues, proceeded upon a misconception of the law, as applicable to the conceded facts. We think it will be unnecessary in this court, and was unnecessary in the court below, to consider whether the order for the machine, at the time it was signed and delivered by the defendants to the plaintiff's agents, operated as an absolute sale, or whether or not the title then passed to the defendants. The real case before the trial court was this: The order had been executed and delivered. It embraced every element essential to a proposal to purchase the machine, including a description of the machine, the time and place when and where it was to be delivered to the defendants, the sum to be paid for the machine, including the terms of credit; also, an agreement to pay freight charges from Columbus, Ind., to Lisbon, and an express agreement to receive and settle for the machine in cash and notes, as specified in the order. The plaintiff, relying upon the legal validity of the order, had complied with the requirements thereof to be performed by the plaintiff, and had forwarded the machine to Lisbon, and by its agents there had requested the defendants to take it away, and settle for the same. Upon this state of facts, it was quite immaterial whether, in strictness, the title to the machine passed, or did not pass, at any time before defendants took possession. The material inquiry at this point was and is whether, when the

machine was forwaded and offered to be delivered by plaintiff's agents to the defendants, they were under a legal obligation to comply with the terms of the order, and receive the machine under the order, and settle for the same. The trial court instructed the jury, in effect, that the defendants were under no such obligation. The court said: "When the machine came, and before Mr. Maddox and Mr. Corrigan took the machine, they had the power, at their option, at the time, to say to these plaintiffs: 'We will not take the machine on the terms of the written order. We have concluded not to take the machine on those terms?' They had the right to rectify the terms of their purchase. They had the right to refuse to take the machine at all." No reason was offered by the learned trial court in support of its views, as above expressed, upon this feature of the case; and, from our point of view, no legal reason and no authority can be found in support of the instruction last quoted. It is, in our opinion, fundamentally unsound to assert that a valid agreement, which is not assailed as being made fraudulently, or under a mistake of fact, or under duress, is not binding upon the parties to is simply and solely because one of the parties may elect, without cause, to repudiate it after it has been relied upon and performed by the other party. The claim is not made that, before or at the time the defendants took away the machine, they found any fault with its construction, or pretended that the plaintiff had not fully performed its part of the agreement in manner and form as stipulated in the order. Let it be conceded, for argument's sake, that the title did not pass in advance of an actual delivery of the machine to the defendants; and the fact will remain that the defendants, by their deliberate agreement, were bound to receive and settle for the machine, when it was offered to them. This agreement could not lawfully, and with impunity, be violated by the defendants; and, if they had actually refused to accept the machine under the contract,—which, so far as appears, they did not do,—they would, beyond a peradventure, have been liable in damages for their breach of contract.

There is another objection to the above instructions, as given to the jury, which, as we view it, is equally fatal to the verdict: In its charge, the trial court overlooked—at least, did not comment on—the following clause of the writing signed by the defendants: "This stacker is purchased and sold subject to the following warranty and agreement, and no one has any authority to add to or abridge or change it in any manner." If the alleged oral agreement was made at all, it was made by and between the defendants and the agents of the plaintiff, who were forbidden by the terms of the writing from making the change; and such prohibition was brought home to the defendants' knowledge in the very writing which they had signed, and upon which plaintiff had acted. The court, by its instruction to the jury, must have assumed that the inhibitory clause in the agreement was a mere nullity. Here also, the court below advanced no reason for this view of the matter, and we are confident that no good reason can be given. We think the restriction upon the power of plaintiff's agents to alter, change or abridge a written contract, when once deliberately made with the plaintiff, is not only a reasonable restriction, but is also a perfectly legal one, and will bind all persons dealing with plaintiff's agents, and having knowledge of the restriction. *Fahey* v. *Machine Co.*, (N. D.) 55 N. W. 580, 3 N. D. 220. No claim is made that plaintiff ever waived the restriction.

The views already expressed will necessitate a reversal of the order appealed from, but we may add to what has been said still another—and, we think, equally fatal—objection to the verdict. We think the evidence, all of which is certified up, does not justify the verdict. The jury, by their verdict, have said, in effect, that the written terms of the agreement, as stated in the order, were set aside; and a new and different agreement as to the terms of the delivery of the machine was made by parol, at the time when defendants took the machine away from Lisbon. A careful and repeated perusal of the evidence found in the record has served to convince us that the testimony in the case signally fails and comes short of establishing any such new and oral arrange-

ment. In other words, the defense pleaded in the answer is, in our judgment, without support in the evidence. Plaintiff's agent, as has been seen, testified, pointedly and squarely, that he delivered the machine to the defendants under the written order, and in fulfillment of its terms. This was never contradicted by testimony. Defendants produced two witnesses, and only two, who testified as to the talk had on the occasion of the delivery of the machine to the defendants. We have already quoted from the record what was said by the two witnesses. To our minds, it is significant that their testimony discloses nothing like an effort on defendants' part to be relieved from their contract obligations as embodied in the writing. It does not appear from the testimony that either of them refused to accept the machine upon the terms stated in the writing, nor does it appear that a request or suggestion was made at the time, looking to a desire on defendants' part of being released from the terms of the written agreement. Gilbertson testified: "Mr. Worden was coaxing these boys to take the stacker, and he says, 'If it is not satisfactory you need not keep the stacker, but we will see that the stacker works satisfactorily.'" Corrigan testified in substance to the same thing, and stated further: "Yes, I signed the notes. I did it on condition that he was to make everything work right." It would be unprofitable to reproduce the testimony at greater length in this connection. It is quoted above. We have read it carefully, and are satisfied that it harmonizes with the terms of the written agreement, with respect to receiving the machine, settling for it, trying it, and returning it if not satisfactory, all of which details were fully anticipated and provided for in the well guarded agreement which was reduced to writing. The statement made when the stacker was delivered, that it could be returned if it failed to do good work, was in entire harmony with the written contract, which expressly provided that in such event a new stacker would be given, which would fill the warranty, or the notes would be returned Upon the testimony adduced at the trial, we can find no support for the verdict. In the disposition

of the case, we have had occasion to apply only the elementary principles of the law of contracts, and hence we have not considered it necessary to fortify our views by the citation of numerous cases. It appearing conclusively from the record that the defendant Corrigan has no valid or legal defense to the plaintiff's cause of action, therefore the order appealed from must be reversed, and the District Court will be directed to enter judgment for the plaintiff, as demanded in the complaint. All concur.

(57 N. W. Rep. 80.)

STATE *ex rel* WM. H. STANDISH *vs.* KNUD J. NOMLAND.

Opinion filed December 7th, 1893.

Constitutional Provision—Subject of Act Not Expressed in its Title—Act Void.

Chapter 48, Laws 1893, entitled "An act creating the office of the board of state auditors and prescribing the duties thereof," and which provides that said board shall check up the books of the state treasurer at intervals, and ascertain the funds on hand, and shall, with the governor, designate certain depositories for such funds, and shall, with the governor, approve the bonds of such depositories, and which requires the treasurer to deposit the state funds in such designated depositories, and requires such depositories to pay interest thereon, and relieves the said treasurer and his bondsmen from liability for money so deposited, *held*, void, as a violation of § 61 of the state constitution, because the subject of the act is not expressed in the title.

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

Action by the State of North Dakota, at the relation of William H. Standish, attorney general, against Knud J. Nomland, state treasurer, for mandamus. There was judgment for plaintiff, and defendant appeals.

Reversed.

Frank V. Barnes, for appellant.

This enactment is in violation of § 6, Art. 11 of the constitution of the state in that it embraces more than one subject. The

leading features of the act are neither expressed nor referred to in the title. The purpose of the provisions of § 61 Const. was, *first*, to prevent "hodge podge" or "log rolling" legislation; *second*, to prevent surprise or fraud upon the legislature; and *third*, to fairly apprise the people through such publication of legislative proceedings as are usually made of the subjects of legislation that are being considered in order that they may have an opportunity of being heard thereon. *Henderson* v. *London & Lane Ins. Co.*, 20 L. R. A. 827; *People* v. *Mahaney*, 13 Mich. 481; *Lim. Mut. Ins. Co.* v. *New York*, 8 N. Y. 241; *State* v. *Davis, Co. Judge*, 2 Ia. 280; *Grubbs* v. *State*, 24 Ind. 295; *Harris* v. *People*, 59 N. Y. 599; Cooleys Const. Lim. 173. The title to the act must express the subject so clearly as to give notice of the legislative purpose to those interested therein. *Re* Pottstown 117 Pa. 538; *State* v. *Tucker*, 48 Ind. 355; *State* v. *Demonchet*, 3 So. Rep. 565; *Brown* v. *State*, 4 S. E. Rep. 861; *Brooks* v. *People*, 24 Pac. Rep. 553; *Sanilac Co.* v. *Aplin*, 36 N. W. Rep. 794, *Gilbert* v. *McCarthy*, 34 Minn. 318; *State* v. *Cantiency*, 34 Minn. 1; *Mississippi and Rum River Boom Co.* v. *Prince*, 34 Minn. 79.

Wm. H. Standish, Atty Gen'l and *J. B. Wineman*, for respondent.

Any provision of the statute incidentally connected with or leading to the subject or object expressed in the title will be included by it. *State* v. *Haas*, 2 N. D. 202, (50 N. W. Rep. 254;) *State* v. *Woodmansee*, 1. N. D. 246, (46 N. W. Rep. 970;) *State* v. *Barnes*, 3 N. D. 131; *Blake* v. *People*, 109 Ill. 504.

BARTHOLOMEW, C. J. Chapter 48 of the Session Laws of 1893 is entitled "An act creating the office of the state board of auditors and prescribing the duties thereof." The first section constitutes the secretary of state, the state auditor, and the attorney general such state board of auditors, and directs that as such board they shall examine the books and vouchers of the state treasurer, and ascertain the kind and amount of funds in the treasury, at least twice in each year, and make report of their doings in the premises to the governor; and they shall also witness

and attest the transfer of books, property, and funds by an outgoing to an incoming treasurer, and report to the governor. The second section directs that all funds belonging to the state shall be deposited monthly by the state treasurer in one or more national or state banks in the state, such bank to be designated by such board of auditors and the governor, and such banks shall pay to the state interest on the monthly balances for funds so deposited at the rate of not less than 3, or more than 4, per cent. per annum. Section 3 provides what bond shall be given by such banks, and that the same shall be approved by the governor and said board; and § 4 exempts the state treasurer and his bondsmen from liability for all money so deposited by reason of the failure, bankruptcy, or other act of such bank. It is conceded that the board of state auditors, after strict compliance with all the provisions of the statute, designated certain banks within the state wherein the public funds should be deposited, and so notified the defendant, who is state treasurer, and requested him to deposit the public funds accordingly. The treasurer declined to comply with such request, and it is sought in this action to compel compliance by mandamus. The defendant bases his refusal upon two grounds,—the first being that the act above mentioned was never passed by the legislative assembly of this state; and second, that, if so passed, the act is unconstitutional and void. The trial court ruled both points adversely to defendant, and he appealed the case to this court.

We shall notice but one ground of reversal. The act is assailed as in violation of § 61 of our constitution, which reads: "No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed." The equivalent of this provision is found in the constitution of nearly every state in the Union, and few provisions have been oftener before the courts for construction. Originally, the provision was highly remedial in character. Under the old practice of uniting several subjects in the title of one act, or

of stating one subject and adding "and for other purposes," much vicious legislation found its way to the statute books. Legislators, interested in one object, were forced to support others of which they did not approve in order to secure favorable action upon their own measures, and laws were passed of which the public had no intimation until they had gone beyond the stage when petition or remonstrance could avail. This practice was effectually struct down by the constitutional provision above quoted. Sworn to support the constitution, legislators have seldom, if ever wantonly violated this requirement. When violated, it has generally been through inadvertance. The courts, recognizing the character of the evil sought to be effaced, have been slow to rigidly apply the provision to cases where such evils did not, and could not exist, particularly when the result of such rigid application of the provision would be only less mischievous than the evil it was intended to cure. An examination of the cases will show that the author might have used stronger language when he said, in speaking of this provision: "There has been a general disposition to construe the constitutional provision liberally, rather than to embarrass legislation by a construction whose stricture is unnecessary to the accomplishment of the beneficial purposes for which it has been adopted." Cooley, Const. Lim. 176; and see the line of authorities there cited. In *Mauch Chunk* v. *McGee*, 81 Pa. St. 433, it is said that "useful and honest legislation should not be defeated by rigid adherence to the letter of the constitution, or pretext to be caught at to avoid legislation, when it can be fairly reconciled with the constitution." Legislation is often complex. The accomplishment of one purpose sometimes necessarily involves the accomplishment of another purpose. Refinement upon this constitutional provision, and the enforcement of a narrow construction, would greatly embarrass the legislature, and nullify a large percentage of most beneficial legislation. This court should be careful to destroy no legislation sanctioned by the law making branch of the state government unless such legislation be a clear violation of the constitutional requirement.

But we have no duty higher or more sacred than is the duty to preserve in all its integrity every provision in the fundamental law of the state. The provisions of our state constitution are, by the terms of the instrument itself, declared to be mandatory, —mandatory alike upon the legislature and upon this court. If the legislature in any act disregard the mandate, it is the duty of this court to nullify the act, and the fact that the abortive legislation may be highly beneficial and salutory in its nature can in no manner control that duty. Our constitutional provision is clear, direct and positive. "No bill shall embrace more than one subject, which shall be expressed in its title." What was the subject of the bill in this case? In § 85, Suth. St. Const., it is said: "It is a matter of some difficulty, in many instances, to determine precisely what is the subject of an act, by reason of the contrariety of its provisions and the complexity of its machinery and aims." The language is not inappropriate here. Generally speaking, the subject was the state funds; more specifically it was the security and augmentation of those funds; but neither generally nor specifically is the subject expressed in the title,—"An act creating the office of the board of state auditors and prescribing the duties thereof." Was the act passed for the purpose of creating that board? Was that the subject—the object—of the act? Clearly not. The board was simply an instrumentality for the accomplishment of some purpose, but what purpose no human foresight could determine from that title. Following that title, the legislature might with equal propriety have passed an act relating to any subject upon which the legislature could constitutionally authorize a board to act. We have held that, when the subject of the act was properly expressed in its title, the act might create the means and instrumentalities required for its own accomplishment, (*State* v. *Woodmansee*, 1 N. D. 246, 46 N. W. 970; *State* v. *Haas*, 2 N. D. 202, 50 N. W. 254;) but it has never been held, under this provision, that where the title announced only the instrumentality, the act itself might announce the subject upon which the instrumentality was expected to operate.

Were we disposed to be critical, we might say the title in this case does not even say that much, for it announced but one of several instrumentalities. The action of the governor and state treasurer is just as essential for the accomplishment of the purpose of the act as the action of the board. "It is required that an act shall contain but one subject, but that that be expressed in the title. The title thus made a part of an act must agree with it by expressing its subject. The title will fix bounds to the purview, for it cannot exceed the title subject, nor be contrary to it. * * * It is not enough that the act embraces but a single subject or object, and that all its parts are germane. The title must express that subject, and comprehensively enough to include all of the provisions in the body of the act." Suth. St. Const. § 87. A single glance discovers that the title in this case meets no single requirement there specified. As fully sustaining the text writer, see, *Astor* v. *Railroad Co.*, (N. Y.) 20 N. E. 594; *Boom Co.* v. *Prince*, 34 Minn. 79, 24 N. W. 361; *State* v. *Kinsella*, 14 Minn. 524, (Gil. 395;) *State* v. *Smith*, 35 Minn. 257, 28 N. W. 241; *Brown* v. *State*, 79 Ga. 324, 4 S. E. 861; *State* v. *Everage*, 33 La. Ann. 120; *Brooks* v. *People*, (Colo. Sup.) 24 Pac. 553; *Montgomery* v. *State*, 88 Ala. 141, 7 South. 51; *Igoe* v. *State*, 14 Ind. 239; *Board of Sup'rs of Sanilac County* v. *Auditor General*, 68 Mich 659, 36 N. W. 794; *Grubbs* v. *State*, 24 Ind. 295. In each of the foregoing cases, statutes were held unconstitutional, as in violation of the provision under discussion; but in no one of said cases, nor in any case to which we have been cited or that we have found, was the violation of that provision so palpable as in this case. As individuals, we may deplore the necessity that compels us to nullify a statute clearly beneficial to this state, but as a court our path is plain. The judgment below should be reversed, and the action dismissed; and it is so ordered.

Reversed. All concur.

(57 N. W. Rep. 85.)

STATE *ex rel* R. M. POLLOCK *vs.* H. F. MILLER *et al.*

Opinion filed November 21st, 1893.

Agricultural Colleges—Trustees—Power of Executive to Remove.

The governor has no power, under Ch. 95 of the Laws of 1893, to remove the trustees of the Agricultural College and Experimental Station from office.

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

Action by the State of North Dakota, at the relation of R. M. Pollock and others, against H. F. Miller and others, to try title to office. From an order overruling their demurrer to the answer, relators appeal.

Affirmed.

Wm. H. Standish, *Atty Gen'l* and *M. A. Hildreth*, for appellant.

Chapter 124, Laws 1887 was repealed by the legislature of 1893. Chapter 95, Laws 1893, re-enacts § 4 Ch. 124 of the Laws of 1887. Chapter 124, Laws 1887 was construed by Judge Tripp in the Cox case 6 Dak. 501. The re-enactment of this statute after a judicial construction of its meaning is to be regarded as a legislative adoption of the statute as thus construed. Sutherland on Stat. Construction § 333 and cases cited. The power of removal from office when conferred upon the governor of a state is not a judicial power, it is a political and administrative or executive power. *Hawkins* v. *Governor*, 33 Am. Dec. 346; *Attorney General* v. *Brown*, 1 Wis. 442; *State* v. *Doherty*, 13 Am. Rep. 131; *Sutherland* v. *Governor*, 23 Mich. 320; *Wilcox* v. *Peo.* 90 Ill. 186; *Donahue* v. *County of Will*, 100 Ill. 94; *People* v. *Whitlock*, 92 N. Y. 191; *State* v. *Hawkins*, 5 S. E. Rep. 232; *South* v. *Commissioners*, 5 S. W. Rep. 567.

The defendants have had a hearing after notice, the executive has passed upon the sufficiency of the testimony, he has found cause for removal and the court will not inquire into the sufficiency of the finding. *State* v. *Johnson*, 18 L. R. A. 414; *State* v. *Hawkins*, 3 West. Rep. 125; *State* v. *Warmouth*, 2 Am. Rep. 712;

Vicksburg, etc., R. R. Co. v. *Lowry*, 48 Am. Rep. 76; *Peo.* v. *Stout*, 19 How. Pr. 171; *Sutherland* v. *Governor*, 29 Mich. 320, *State* v. *Peterson*, 52 N. W. Rep. 655. Official discretion when once exercised is not subject to review by the court. *State* v. *Carey*, 2 N. D. 36.

Removal from office, deprives no one of life, liberty or property, neither does it impair contracts or inflict punishments. *City Council* v. *Sweeny*, 9 Am. Rep. 171; *Shibenville* v. *Culp*, 38 Ohio St. 18; *Cohen* v. *Wright*, 22 Cal. 319; *Butler* v. *Pennsylvania*, 10 How. (U. S.) 402; *Connor* v. *Mayor*, 5 N. Y. 395; *Smith* v. *Mayor*, 37 N. Y. 518; *McVeany* v. *Mayor*, 80 N. Y. 190; *Farwell* v. *Rockland*, 62 Me. 296; *Donahue* v. *County*, 100 Ill. 94.

Ball & Watson and *Seth Newman*, for respondents.

Respondents, it is urged, are state officers within the meaning of § 196 of the Const., providing for the impeachment of "the governor and other state and judicial officers * * * "for habitual drunkeness, crimes, corrupt conduct or malfeasance or misdemeanor in office." The trial of such officers must be by the senate. Sec. 199 Const. The constitution having provided that state officers may be removed by impeachment by the house of representatives and trial before the senate setting as a court for certain specific cases. The enumeration of this method and these causes excludes all others. Cooleys Const. Lim. 4th Ed. 78, *Lowe* v. *Com.* 3 Metc. 241; *Brown* v. *Grover*, 6 Bush. (Ky.) 1; *Com.* v. *Chambers*, 1 J. J. Marsh 160; *Com.* v. *Williams*, 42 Am. Rep. 204; *State* v. *Gilmore*, 20 Kan. 551; Meachem Pub. Officers 452; Throop Pub. Officers 341. Removal for cause is removal upon notice, and full hearing, and a judgment determining the guilt of the accused, and is a judicial proceeding, and the power exercised is a judicial power, fit and appropriate to be exercised only by the courts under our constitution. Meachem Pub. Officers 455; Throop Pub. Officers 379, *Page* v. *Hardin*, 8 B. Monroe 672; 25 Am. Law Review 199; *State* v. *Pritchard*, 36 N. J. L. 101; *Dullam* v. *Wilson*, 53 Mich. 392; *Stockwell* v. *Township*, 22 Mich. 341; *Peo.* v. *Nichols*, 79 N. Y. 582; *Peo.* v. *Fire Commissioners*, 72 N. Y. 445; *Peo.* v. *Harmon*, 56 Hun. 469; Murdocks Appeal 7 Pick. 304, S. C. 12 Pick.

263; Matter of Nichols, 6 Abb. N. Cas. 474; *Andrews* v. *King*, 77 Me. 224.

The "public examiners act" under which appellant claims power to remove is unconstitutional because of defective title. *State* v. *Haas*, 2 N. D. 202; *State* v. *Woodmansee*, 1 N. D. 246. Removal from office being a judicial proceeding the statute must provide for notice and opportunity to be heard. *Stuart* v. *Palmer*, 74 N. Y. 183. Law not establishing proceedings for removal, notice etc. is void. *Kennard* v. *Louisiana*, 92 U. S. 480; *Foster* v. *Kansas*, 112 U. S. 201.

CORLISS, J. The contest in this case is over the title to the offices of trustee of the North Dakota Agricultural College and Experimental Station. The defendants, being in actual possession of such offices, are sought by this action, to be removed therefrom, and the relators ask at the same time that the right to hold and exercise the functions of such offices be adjudged to be in them, and that they be given actual possesion of the same. The issue of law before us was raised in the court below by demurrer to defendants' answer to the complaint. The demurrer was overruled, and the relators have appealed from the order overruling the demurrer. The question before us is therefore whether the answer states a good defense, in view of the averments in the complaint. It appears from the pleadings that the defendants had been duly appointed to the offices which they were holding, and that their respective terms of office had not expired. Whatever title the relators have to the offices rests upon the action of the governor in removing the defendants from such offices, and in appointing the relators to fill the alleged vacancy created by such removal. We are pointed to Ch. 95 of the Laws of 1893 as containing the grant to the executive of this power of removal. It is not controverted that the proceedings were in all respects in conformity with the provisions of this law. The only question is whether at the end of those proceedings the governor had the power to remove the defendants from office. We are therefore called upon to construe this act. The first section

thereof provides for the appointment of a state examiner. The next three sections bear so directly upon this question that we will quote them in full: "Section 2. The duties of the state examiner are to examine at least once every year the books and accounts of the secretary of state, state auditor, state treasurer, clerk of the supreme court, commissioner of insurance, county treasurer, county auditors, and boards of county commissioners of each county, and such other county officers of any county, upon the request by the board of county commissioners. Section 3. It shall be the duty of the state examiner to assume and exercise constant supervision over the books and financial accounts of the several public, educational, charitable, penal and reformatory institutions belong to the state; to prescribe and enforce correct methods of keeping financial accounts of the said institutions by himself or a duly appointed deputy, and instruct the proper officers thereof in the due performance of their duties concerning the same; to examine the books and accounts of all public institutions under the control of the state, and of all private institutions with which the state has any dealing, once in six months. Section 4. It shall be his duty to order and enforce a correct, and as far as practicable, uniform system of bookkeeping [by state and county treasurers and auditors,] so as to afford a suitable check upon their mutual action, and insure a thorough supervision and safety of the state and county funds. He shall have full authority to expose false and erroneous systems of accounting, and when necessary instruct or cause to be instructed state and county officers in the proper mode of keeping the accounts. It shall be the duty of the state examiner to ascertain the character and financial standing of all present and proposed bondsmen of state and county officers. He shall require county treasurers as often as he shall deem necessary to make verified statements of their accounts and he shall personally or by duly appointed deputy visit said offices without previous notice to such treasurers, at irregular periods of at least once a year, or when requested by any board of county commissioners, and make a

thorough examination of the books, accounts and vouchers of such officers, ascertaining in detail the various items of receipts and expenditures; and it shall be his duty to inspect and verify the character and amounts of any and all assets and securities held by said officers on public account, and to ascertain the character and amount of any commissions, percentages or charges for services exacted by such officers without warrant of law. He shall report to the attorney general the refusal or neglect of state or county officers to obey his instructions, and it shall be the duty of said attorney general to promptly take action to enforce compliance therewith. He shall report to the governor the result of his examination, which shall be filed in the executive office, as well as any failure of duty by any financial officers, as often as he thinks required by the public interests, and the governor may cause the result of such examinations to be published, or at his discretion to take such action for the public security as the exigencies demand; and if he should deem the public interests require it, he may suspend any such officer from further performance of duty, until examination be had or such security obtained as may be demanded, for the prompt protection of the public funds." Section 5 relates to the fiscal affairs of counties, and the examiner is required to aid in any pending settlement, and is given full control of all books and records for that purpose. Section 6 makes it the duty of the examiner to visit once each year, without previous notice, "each of the bank, banking corporations and savings banks incorporated under the laws of this state; insurance, annuity, safe deposit, loan or trust companies and other monied corporations, and thoroughly examine into their affairs and ascertain their financial condition." His duties in this regard are set forth in detail, and the section closes in this language: "He shall forthwith report the condition of such corporations so ascertained, to the governor, together with his recommendations or suggestions respecting the same, and the governor may cause the same to be published, or in his discretion take such action as the exigences may seem to demand."

Section 7 requires all officers, state and county, and all officers and employes of the moneyed institutions mentioned, to aid the examiner in his investigations, by making returns and exhibits under oath, and makes it felony to refuse to do so when required, and makes it perjury to knowingly swear false concerning the same. Section 8 forbids any obstruction whatever of the examiner in the performance of his duties, and fixes the penalty therefor. Section 9 reads as follows: "Section 9. The state examiner shall report to the governor the result of his examinations on the first Monday in November of each year; he must also make a report upon any particular matter at any time when required by the governor and shall embody in such report an abstract of the condition and statistics of the several state institutions, and the county and state finances ascertained by him, which report shall be printed to the number of 500 copies and shall be included with other official reports in the volume of executive documents." The two remaining sections need not be noticed.

A casual examination discloses the fact that this statute is somewhat disconnected, crude, and incomplete; yet its construction is not difficult. The particular language which it is claimed confers this power of removal is found in the last portion of the fourth section, and is this: "He [the examiner] shall report to the governor the result of his examination, which shall be filed in the executive office, as well as any failure of duty by any financial officers, as often as he thinks required by the public interests, and the governor may cause the result of such examinations to be published, or at his discretion to take such action for the public security as the exigencies demand." We expressly refrain from expressing an opinion as to whether or not this language confers upon the governor the power of removal of any officer under any circumstances. A decision of such a question is not necessary to the decision of this case. Conceding, for the purposes of this case, that the contention of the relators that this ambiguous language vests the power of removal in the governor

so far as it embraces the officers to which it relates, we are clearly of the opinion that it does not relate to the officers of the various public institutions specified in § 3. We are met at the outset with the claim that contemporaneous construction of a similar statute has practically foreclosed our independent interpretation of the meaning of this law. We find nothing in the history of this State or the Territory of Dakota, so far as this and similar legislation is concerned, to warrant this claim. We in no respect retract any of the utterances of this court with reference to the force of contemporaneous interpretation of statute law. But we are clear that so extraordinary a power as that of removal from office without notice, without hearing, and without the existence of any legal cause (for removal for, under the terms of statute, the power conferred is subject to no limitation or condition) cannot be vested in the executive office by a single claim to the right to exercise such power with respect to officers of public institutions, made by the governor himself, when such claim, so far from being acquiesced in, was promptly challenged in the court Subsequently to the removal of the trustees of the Yankton Asylum by Gov. Church of the Territory of Dakota, no governor of the Territory or of the State of North Dakota had attempted to exercise such power before Gov. Shortridge attempted to remove the defendants in this case from their respective offices of trustees of the Agricultural College. We have referred to this power of removal as extraordinary, because, if it exists with reference to the officers of the various public institutions of the state, there is no limitation to it in the statute, and no right, under the terms of the statute, in the officer removed, to demand a specification of the grounds of his removal, or be heard at all in his defense. By the terms of the statute the action of the governor may immediately follow the filing of the examiner's report without notice to the officer, although his term has not yet expired. It is due to the governor to state that the facts of this case disclose the utmost fairness on his part in giving notice to the defendants, and in granting them a hearing, although the statute neither directly

nor by implication requires either notice or hearing to precede the contemplated action of the executive.

It is further urged that, at the time Ch. 95 was adopted by the legislature of this state, it had, so far as this question is concerned, received a construction by a District Court of the Territory of Dakota favorable to the relators, and that, therefore, the legislature must be presumed to have enacted it in the light of such interpretation, and with the purpose of having it incorporated in, and form a part of, the act itself. There are two answers to this contention. The decision which construed Ch. 124 of the Laws of 1887 was not the decision of the court of last resort. It was a *nisi prius* decision. See *Territory* v. *Cox*, 6 Dak. 501. We know of no case holding that such a construction of a statute is controlling, within the rule which incorporates in an act taken from another jurisdiction the settled construction thereof in such jurisdiction as the time it was enacted. But, in addition, we find that very material changes have been made in the law. The act of 1893 differs in several important particulars from the act of 1887, as will hereafter be shown. The section of Ch. 95 which it is insisted vests in the governor the power of removal is § 4. The section which declares it to be the duty of the examiner to examine the books and accounts of the public institutions of the state is § 3. Of course, the mere fact that the language which it is claimed gives the governor power to remove is not found in the same section which makes it the duty of the examiner to examine the books and accounts of the public institutions is not necessarily of controlling weight. The question still remains, what matters had the legislature in view when they conferred the alleged power upon the governor? This necessitates an analysis of § § 3 and 4. Section 3 makes it the duty of the examiner, among other things, to examine the books and accounts of all public institutions under the control of the state. This section is silent as to what is to be done with any report which the examiner shall make of the result of his examination. Indeed, it nowhere requires him to make any report at all of such examination. But

§ 9 declares that the examiner shall report to the governor the results of his examinations on the first Monday of November of each year; and this report, the section provides, shall be printed to the number of 500 copies, and shall be included with other official reports in the volume of executive documents. We have in this section a clear statement as to what shall be done with the report of all examinations, including examinations of public institutions. But this section does not contemplate nor authorize such action by the governor upon such report. The only sections which provide for any such action are § § 4 and 6. But it is not claimed that § 6 confers power of removal on the governor. We are left, then, to the construction of § 4 to settle the question. So far as this section provides for the making of any examination of the books and accounts of any public officers, it relates exclusively to financial officers. "He shall require county treasurers as often as he shall deem necessary to make verified statements of their accounts, and he shall personally or by duly appointed deputy visit said offices without previous notice to such treasurers, at irregular periods of at least once a year, or when requested by any board of county commissioners, and make a thorough examination of the books, accounts and vouchers of such officers, ascertaining in detail the various items of receipts and expenditures; and it shall be his duty to inspect and verify the character and amounts of any and all assets and securities held by said officers on public account, and to ascertain the character and amount of any commissions, percentages or charges for services exacted by such officers without warrant of law." After a provision having no relation to this question, the section continues: "He shall report to the governor the result of his examination, which shall be filed in the executive office, as well as any failure of duty by any financial officers as often as he thinks required by the public interests, and the governor may cause the result of such examinations to be published, or at his descretion to take such action for the public security as the exigencies demand; and if he should deem the public interests require it, he may suspend

any such officer from further performance of duty, until examination be had, or such security obtained as may be demanded, for the prompt protection of the public funds." It will be noticed that the word "examination" is in the singular number. It clearly refers to the examination already mentioned in the section *i. e.* the examination of the books, accounts, and vouchers of county treasurers. He is to report the result of this examination, and also the failure of duty of any financial officer, and thereupon the governor is, at his discretion, to take such action for the public security as the public exigencies demand. He is not to take such action when any report is filed, but only when the report mentioned in § 4 is made and filed,—*i. e.* a report as to the condition of the public funds in the hands of county treasurers, and the failure of any financial officer to perform his duty; and, to emphasize the view that the governor is to take action on the coming in of only reports as to financial officers, it is provided that he shall take such action for the public security as the exigencies demand. There is not a syllable in this section to indicate that the legislature had any other purpose than to guard the public funds against the dishonesty of financial officials when they conferred this general discretionary power on the governor. It is in such cases that he is to act for the public security. Whatever report he makes with reference to public institutions is required to be made, not by § 3 or § 4, but by § 9, and § 9 declares what shall be done after such report is made and filed. It shall be printed and included with other official reports in the volume of executive documents. It is a most strained construction which would include a report of the examination of public institutions in the words found in § 4, "He shall report to the governor the result of his examination," in view of the fact that the section refers to a distinct examination of the books, accounts, and vouchers of county treasurers; and these words immediately follow the provisions as to the making of such examination, and are in no manner connected with the examination mentioned in § 3. Section 9 gathers up in one report all the results of the examina-

tions made during the year. This report is to be filed and included with other official reports in the volume of executive documents. This is what is to be done with the result of the examination as to public institutions, and this is all that is to be done. No other report of such matter is comtemplated.

We come now to the change which has been made in the statute. Section 2 of Ch. 95 of the Laws of 1893 is not to be found in Ch. 124 of the Laws of 1887. This section makes it the duty of the examiner to examine, at least once a year, the books and accounts of several state, as well as county, officers. No argument can be made in favor of the position that the language of § 4, conferring power upon the governor, is applicable to the public institutions mentioned in § 3, which cannot with equal force be employed to show that this same language is applicable also to the officers mentioned in § 2. If then, the legislature literally intended to vast the power of removal of the officers of public institutions in the governor, it intended to vest in him the power to remove the state officers mentioned in § 2. But this would render the law to that extent unconstitutional. State officers can be removed from office only by impeachment. The legislature cannot vest in the governor the power to remove them from office for any cause. Const. § § 196, 197. Had Chief Justice Tripp, in the Yankton Asylum Case, (*Territory* v. *Cox*,) been compelled to impute to the legislature the intent to violate a constitutional provision in order to place upon the statute the construction he placed upon it in that case, he would never have reached the conclusion that he did. He would not have strained the language of § 4 only to reach the conclusion that the legislature had attempted to disregard the plain language of the constitution by essaying to confer upon the governor the power to remove a state officer. Sections 2 and 3 stand, under the terms of statute, upon the same footing with respect to the alleged power of removal. If it is not conferred in § 4 with respect to the officers mentioned in § 2, neither is it conferred with respect to the officers of the public institutions mentioned in § 3. Nor are

we satisfied with all the reasoning of the able and distinguished judge who decided the Yankton Asylum Case. He finds strong support for his position in that clause of § 4 which reads, "as well as any failure of duty by any financial officers." He argues from this that the prior provision which requires the examiner to make a report of his examination does not refer to financial officers. Otherwise, he inquires, why declare, in addition, that he shall also report any failure of duty by any financial officers? The answer seems obvious to us, without reaching the conclusion to which he felt impelled by this provision. The report which is referred to at first is a report of the examination of the books, accounts, and vouchers of county treasurers alone. There were other financial officers in the state, and therefore the examiner is to report, not only as to the dereliction of duty of county treasurers, but as well the failure of duty of any financial officers. Had not this clause been added, there would have been no power in the governor to act with reference to such officers; and it was therefore inserted to make the statute efficacious for the protection of all the public funds in the hands of all financial officers, and not merely those in the hands of county treasurers. Counsel for appellant did not realize to what position they would be driven by this contention that the legislature intended that the act of 1893 should be construed in accordance with the decision in the Yankton Asylum Case. If the legislature intended to adopt this construction in one respect, it follows that they intended to adopt it in its entirety. The words, "or at his discretion, to take such action for the public security as the exigencies demand," were construed in that case to vest in the governor the power of removal, and no other power. At page 518 of the opinion, Tripp, C. J., says: "That these words could have no other meaning than removal we have already seen." These same words occur in § 6 of the act of 1893, which makes it the duty of the examiner to examine all banks, banking incorporations, and savings banks, and also insurance, annuity, safe deposit, loan, or trust companies, and other moneyed corporations, and to make a report to the governor of

the condition of such corporations. Will it be seriously urged that the governor, under this same language, when used in this section has no other power than the act of the removal of the officers of such corporations, and that he actually has such power of removal? It is too clear to be controverted that the governor could not remove the officers of the private corporations mentioned in § 6. Were the legislature so anxious to set the seal of their approval upon the ruling of Chief Justice Tripp that they were willing that the language used by them in § 6 should have no significance, rather than they would mean anything different from the judgment of that court as to their true construction?

It is insisted that, unless the power of removal exists, the work of the examiner is futile, and the statute is stripped of its efficacy, so far as the public institutions are concerned. This reasoning loses sight of the fact that the conciousness of a public official that his conduct is constantly watched by the examiner will deter him from attempting to violate his trust. The chances of detection are greater, discovery of dishonestly will follow more closely the dishonest act, and the proof will be more easily attainable, because the examiner has full power to examine into all matters which could be ascertained only with great difficulty were there no one vested with authority to look into the officer's books and accounts. As a result of such examination, proceedings may be instituted in court, under the statute to remove the unfaithful officer, or he may be indicted. See, as bearing upon the question of removal by proceedings in court, § § 1387 to 1391, both inclusive, and § § 7080 to 7095, both inclusive, of the Comp. Laws. Were it not for constant supervision by the examiner, many officers would be able to conceal their official delinquencies until their terms of offices had expired. If the examiner performs his duty, wrongdoing in office will be speedily detected, and removal from office by proceedings in court under the statute will follow.

Several interesting canstitutional questions were discussed in the argument. But the views we entertain as to the construction of the statute render it unnecessary that we should settle them in

this case. We are unwilling to pass upon them until compelled to do so, as they relate to the power of the executive, under our constitution, to remove from office, and also to the power of the legislature to confer upon him the power of removal. The relators must fail, because the executive cannot destroy the title of defendants to the office, and has no power to appoint the relators to such office, there being no vacancy. *State* v. *Boucher*, (N. D.) 56 N. W. 142.

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

(57 N. W. Rep. 193.)

JOHN L. GRANDIN *et al vs.* E. G. LA BAR.

Opinion filed May 3rd, 1893.

Adverse Claimants to Public Lands—Jurisdiction.

Courts are without jurisdiction to declare the rights of parties to certain real estate while the title to such real estate remains in the United States, and a contest is pending in the interior department between one of the parties litigant and the grantor of the other to test their claims to the land. Until the title passes from the United States, exclusive jurisdiction to determine the rights of adverse claimants to such land rests in that department of government charged by law with the disposal of the public lands.

Railroad Grants—When Title Passes.

The grant of lands by congress to the Northern Pacific Railroad Company did not vest in said company, upon the definite location of its line, title to any lands within what is known as the "Idemnity Belt." Nor does the selection of such lands by the company, without the approval or sanction of the secretary of the interior in some manner expressed, pass any title to the railroad company; but such selection so far segregates the land selected from the public domain that any party subsequently seeking to acquire rights therein takes the same subject to the ultimate decision of the interior department as to the legality of such selection.

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

Action by John L. Grandin and William J. Grandin against E. G. La Bar to quiet title to land, and for an injunction. Plaintiffs had judgment, and defendant appeals.

Reversed.

S. B. Pinney & J. B. Robinson, for appellant.

Carmody & Leslie, (*F. M. Dudley* and *Ball & Watson*, of Counsel,) for respondent.

BARTHOLOMEW C. J. This case was before this court at the October term, 1891, upon an interlocutory order, and is reported in 2 N. D. 206, 50 N. W. 151. A full summary of the pleadings is given in that case, and need not be repeated here. It will answer our purpose to state that the plaintiffs and respondents claim to be the equitable owners of a certain quarter section of land in Traill County by virtue of a purchase from the Northern Pacific Railroad Company, made and recorded in 1876. The land is in what is known as the "Indemnity Belt" of lands granted by congress to said railroad company, and no patent therefor has ever been issued by the United States. It is alleged that the defendant and appellant is in possession of said land, and is cropping the same, and sapping the land of its goodness and strength, and that appellant is entirely insolvent. A decree is asked, declaring respondents to be the equitable owners of said land, and that appellant has no right, title, or interest therein, and perpetually enjoining appellant from tilling said land, or in any manner interfering therewith. The answer denies all the allegations of ownership contained in the complaint, and sets forth that the appellant is in possession of the land under the pre-emption laws of the United States; that said land was at the time of appellant's settlement thereon, and still is, public land of the United Sfates subject to pre-emption, and was so declared by order of the secretary of the interior, dated August 15th, 1887; and it further avers that a contest was and is pending before the commissioner of the general land office, between this appellant and respondents' grantor, to determine the rights of the respective parties in this particular tract of land.

The conclusion we have reached in this case renders it unprofitable and improper for us to discuss more than a single error assigned. While the pendency of a contest before the interior department between the appellant herein and respondents'

grantor to determine their rights to the land in controversy was pleaded in abatement of this action, yet the learned trial court seems to have regarded the plea as bad. No finding is made upon the question, and evidence was excluded that would have established the pendency of such contest. Whether or not such plea was bad depends upon the condition of the title. If the United States had parted with its title,—if the legal title had passed to respondents' grantor, the Northern Pacific Railroad Company,—then the interior department is without further jurisdiction in the matter, and all controversies about the title must be waged in the properly constituted courts. If, on the other hand, the legal title still remains in the general government, and has not been so entirely earned by some other party that nothing remains to be done except the mere ministerial act of issuing a patent to such party,—if any act remains to be done; or any controverted question of fact remains to be considered and passed upon, before any party is entitled to patent,—then the interior department is the tribunal constituted by law and authorized to hear and determine all questions pertaining to the rights of the respective parties to receive the patent. *Steel* v. *Refining Co.*, 106 U. S. 447, 1 Sup. Ct. 389; *Johnson* v. *Towsly*, 13 Wall. 72; *Moore* v. *Robbins*, 96 U. S. 538; *Marqueze* v. *Frisbie*, 101 U. S. 473; *U. S.* v. *Schurz*, 102 U. S. 396. If respondents recover in this case, it must be upon the strength of their title to, or rights in, the land in controversy. Absence of all title or right in appellant will not aid them. What then, is the nature of their title or right? It appears from the undisputed evidence in this case that in March, 1883, the land in controversy was selected by the agent of the Northern Pacific Railroad Company to indemnify said company for the loss of certain lands within the limits of their primary grant. A list of selections, and a list of lands in place lost to the company, was filed in the local land office at Fargo, and forwarded to the general land office in Washington. It is alleged and found as a fact that these selections were made under the direction of the secretary of the interior. The only evidence in the record of this fact,

if it can be called evidence, is a recital in an opinion of the secretary of the interior in the case pending in that department that such was the fact. But that opinion is not final; the case is still pending on a motion for rehearing, and hence there is nothing to support the finding that the selection was made "under the directions of the secretary of the interior." The record fails, also, to show that any action whatever was ever taken by the interior department upon the list of selections filed on March 19th, 1883, and which contained the land in controversy. Upon the record as made, it appears that this land was within the belt of lands from which the respondents' grantor was authorized to select lands to indemnify it for lands lost within the limits of the original grant; that such land had been "selected" by the Northern Pacific Railroad Company, and a list containing the land filed in the land office at Fargo, and forwarded to the general land office at Washington. What right or title to this land did the railroad company obtain by reason of these facts? It is urged by the respondents that the grant to the Northern Pacific Railroad Company by the act of congress approved July 2nd, 1864, was a grant in quantity and in *præsenti*, and that, upon the filing of the map of definite location, the title became fixed in the company, not only to the lands within the original grant then remaining subject to the terms of this grant, but also to so much of the odd sections in the indemnity belt as might be required to make good to the railroad company the full quantity of 20 sections per mile on each side of its line, and that this title passed by virtue of the grant; and that, where the whole of the odd sections within the idemnity belt was required to make up the deficiency, no selection was required,—that the entire belt was withdrawn from settlement by the act of congress; and that, where all the lands within the belt were not required to make up the deficiency, a selection was necessary, not to pass title, but to designate what land was subject to settlement. This we regard as the substance, though not the language, of respondents' argument.

The portion of the granting act here involved is as follows: "That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Paicific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternative 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 said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. * * * 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 by this act." These and similar provisions have been often before the courts, and we believe their scope to be well defined and declared, and respondents' contention is without substantial support in the authorities. That the grant was a grant in *præsenti* as to the lands subject to the grant that were situated

within the 40-mile limit has been often decided, and the cases are familiar; but beyond that limit it has never been held that the grant in *præsenti* extended, except in the single case of *Railroad Co.* v. *Barnes*, 2 N. D. 310, 51 N. W. 386. The other cases most relied upon as sustaining that position are *Railroad Co.* v. *Wiggs*, 43 Fed. 333, and *St. Paul & P. R. Co.* v. *Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. 389. An examination of these cases will disclose that they arose within what were states at the date of the granting act, and, consequently, where the 40-mile limit covered both the original grant and the indemnity belt. In *Buttz* v. *Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. 100, the court used this language: "The sixth section declares that, after the general route shall be fixed, the president shall cause the lands to be surveyed for forty miles in width on both sides of the entire line as fast as may be required for the construction of the road, and that the odd sections granted shall not be liable to sale, entry, or pre-emption before or after they are surveyed, except by the company. The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country or from knowledge of it, and is designated by a line on a map showing the general features of the adjacent country, and the places through or by which it will pass. * * * When the general route of the road is thus fixed in good faith, and information thereof given to the land department by filing the map thereof with the commissioner of the general land office or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections to the extent of 40 miles on each side." The case in 139 U. S. 11 Sup. Ct., it is true, holds that under the facts in that case the whole of the odd sections in the indemnity belt were required to make up the deficiency for lands in place lost, and that no selections whatever were required. Yet it is clear to us that such holding is based on the fact that, both by the law and by order of the secretary of the interior, such lands had been withdrawn and segregated from the public domain for the exclusive use and benefit of the Northern Pacific Railroad

Company. In speaking of the nature of the grant to the Northern Pacific Railroad Company, the court say: "As seen by the terms of the third section of the act, the grant is one in *præsenti;* that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, pre-emption, or other disposition, previous to the time the definite route of the road is fixed. The language of the statute is 'that there be, and hereby is, granted' to the company, every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future. The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but, when once identified, the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one in *præsenti;* that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route." That the court was there speaking exclusively of the lands within the original grant is clear from the fact that it is only from those lands that any reservations are made by reason of sales, grants, or pre-emptions. Nor is the case in 43 Fed. better authority for respondents' position. The case arose in California under the grant to the Southern Pacific Railroad Company, which has the same provisions substantially that are found in the grant to the Northern Pacific. Prior to the time the alleged rights of the defendant were initiated, the land had been withdrawn from settlement, both by the express terms of the statute, as stated in the opinion, and by the order of the secretary of the interior. The opinion does not treat of the date at which title to the company passed, but of the date after which no adverse rights could attach; and while it is not necessary for us to either indorse or reject all that is said on that point by the learned judge who

wrote that opinion, yet the case is certainly no authority for the position that title to indemnity lands passed to the beneficiary by virtue of the grant and in *præsenti*.

Nor do we find in the wording of the statute any support for respondents' position. It reads: "That there be, and hereby is, granted to the Northern Pacific Railroad Company * * * every alternate section of land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line." It is the "twenty alternate sections per mile" that constitutes the present grant. From those sections certain possible exceptions and reservations are made, and then follows a privilege to the company, in case of losses by reason of such exceptions and reservations, to select lands in other alternate odd numbered sections, "not more than ten miles beyond the limits of said alternate sections." But this privilege did not constitute a present grant. It vested in the railroad company a right through and by which, in the contingency specified, it might acquire title to the additional or indemnity lands. But it required something more than the existence of the grant, and the location and construction of the railroad in accordance with the terms of the grant, to vest the title to such additional lands in the company. It required a legal selection; and until such selection was made, and the legality of the selection in some manner established, the company could claim no right or interest whatever in any specific tract within the indemnity belt. *Ryan* v. *Railroad Co.*, 99 U. S. 382; *Grinnell* v. *Railroad Co.*, 103 U. S. 739; *Railroad Co.* v. *Herring*, 110 U. S. 27, 3 Sup. Ct. 485; *Kansas Pac. R. Co.* v. *Atchison, etc., R. Co.*, 112 U. S. 414, 5 Sup. Ct. 208; *St. Paul, etc., R. Co.* v. *Winona, etc., R. Co.*, 112 U. S. 720, 5 Sup. Ct. 334; *Wisconsin Cent. R. Co.* v. *Price Co.*, 133 U. S. 496, 10 Sup. Ct. 341; *U. S.* v. *Missouri, K. & T. R. Co.*, 141 U. S. 385, 12 Sup. Ct. 13; *Elling* v. *Thexton*, (Mont.) 16 Pac. 931; *Jackson* v. *LaMoure Co.*, 1 N. D. 238, 46 N. W. 449. The decision in *Railroad Co.* v. *Barnes*, 2 N. D. 310, 51 N. W. 386, upon the question here discussed, was reached upon the assumption

that the grant to the Northern Pacific Railroad Company was a grant in quantity absolutely; that the government was bound to withhold from settlement sufficient land to enable the railroad company to receive an amount equal to 20 sections per mile on each side of its road, and hence could dispose of no lands in the indemnity belt unless a sufficient quantity remained undisposed of to fill the requirements of the grant. We are entirely satisfied that this assumption was unwarranted. The grant fixed the *termini* of the contemplated line,—one upon Lake Superior, and the other upon Puget sound,—but the company was at liberty to construct the line upon any route that it deemed most feasible, within the boundaries of the United States, and north of the forty-fifth parallel; hence, the grant of an absolute quantity of land within 50 miles on either side of the line as it might ultimately be established could be satisfied only by the practical withdrawal from settlement of all land north of the forty-fifth parallel. But the grant, by its terms, contemplated that no lands should be withdrawn from the operation of the land laws until the definite location of the line of the road. At that time, and upon filing a map showing such location, the law withdrew from settlement the lands then remaining unappropriated in the odd numbered sections within the 40-mile limit. All other lands were still left by the grant subject to the ordinary operation of the land laws. The grant was a grant in quantity, subject to the two contingencies: *First*, that the title to the odd numbered sections within the 40-mile limit from the line, as definitely located, should at the time of such location remain in the United States, "not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights." If that should not be the case, then, *second*, that at the time such fact was established, and the company saw proper to exercise, and did exercise, its right to select other lands to indemnify it for lands so lost, there should remain in the odd numbered sections within the specified indemnity limit a sufficient amount of land, unreserved and unappropriated, and free from pre-emption or

other claims or rights, and to which the United States had a like full title, to indemnify the company, in acres, for all land lost in the primary grant. When the company receives all the lands thus designated within both the 40 and the 50 mile limit, then the terms of the grant are fully satisfied. It is proper to add that two members of this court were not qualified to sit in *Railroad Co.* v. *Barnes*, and, under a constitutional provision, District Judges were called in to sit with Chief Justice Corliss, who vigoriously dissented from the opinion of the majority in that case; and no judge of this court has ever concurred in or approved the decision in that case, and, so far as that decision is inconsistent with the views herein announced, it is expressly disapproved.

Respondents' grantor received no title to this land by virtue of its grant. Did it receive title by virtue of its selection? The statute requires the selections to be made "under the direction of the secretary of the interior." In *Jackson* v. *LaMoure Co.*, *supra*, this court said: "It is also necessary for that department [interior department] to determine whether the lands which the company desires to select for indemnity are open to selection,—whether there is not some prior claim upon them in behalf of settlers or others. It is therefore entirely proper that the secretary of the interior should have the right to approve or disapprove of the selection before it becomes final. This is clearly the meaning in the provision of the grant to the Northern Pacific, which declares that the indemnity lands shall be selected by the company 'under the direction of the secretary of the interior,' [citing *Elling* v. *Thexton*, *supra*, and *St. Paul, etc., R. Co.* v. *Winona, etc., R. Co.*, *supra*.] The statute must have the same construction that would be given it if the word 'approval' had been used in place of the word 'direction.'" The Supreme Court of Minnesota, in a very recent case, (*Resser* v. *Carney*, 54 N. W. 89,) construing this same grant, said: "The selection of indemnity lands, which was to be made 'under the direction of the secretary of the interior,' did not become effectual, nor did the title pass from the United States, at least until the selection was approved or in

some way sanctioned by the secretary of the interior." We think these views entirely sound. This approval may be evidenced by the issuance of a patent, or by the decision of the interior department in any given case that the selection was legal. From these views, it follows that the title to the land in controversy is still in the United States. Respondents are not entitled to the relief they pray, unless they have title to the land. It is clear from the record that a proceeding is now pending, and has been pending at all times since the commencement of this action, in the interior department, to settle the rights of the appellant and respondents' grantor in this particular land. The matter is still in *fieri*, and the exclusive tribunal for the settlement of the question, while the title still remains in the United States, is that department of government especially charged by law with the disposal of the public land. To avoid any confusion that might arise from a misapprehension of our holding, it is proper to add that while a selection by the company without approval of the secretary of the interior is inadequate to pass title to the company, yet such selection so far segregates the land selected from the public domain that no adverse claims can subsequently attach thereto except subject to the ruling of the interior department upon the legality of such selection, and the ultimate approval of such selection vests the title to the land thus selected in the railroad company as of the date of the selection. See *Musser* v. *McRae*, 44 Minn. 343, 46 N. W. 673. The District Court for Traill County is directed to reverse its judgment in this case, and enter judgment dismissing the complaint.

Reversed. All concur.

ON REHEARING.

(Dec. 7th, 1893.)

A rehearing was ordered in this case on the petition of respondents, and the case has been again fully argued. It is first urged upon us that the evidence offered by the defendant in the court below to show that a contest between defendant and plaintiffs' grantor, concerning this same land, was pending in the interior department,

was properly excluded. We did not recite that evidence in the original opinion, and will here state that plaintiffs have been permitted to introduce in evidence an authenticated copy of an opinion rendered in that contest by the secretary of the interior a short time prior to the trial below. Defendant sought to show that the contest was still pending, by showing that defendant had filed a motion for review before the secretary of the interior. For that purpose, S. B. Pinney, Esq., was placed upon the stand, and testified that he was the attorney for the defendant, La Bar, in the contest proceedings, and that he filed a motion for review in said case, and served a copy of said motion on the attorneys for the adverse party, and a paper which Mr. Pinney testified was a copy of said motion was offered in evidence. This paper, as well as the testimony of the witness, was objected to as irrelevant, incompetent, and immaterial, and both were excluded by the court. It is claimed that the parol evidence that the paper was a motion for review was not competent to establish the fact, and the paper itself was inadmissable, because not the best evidence, since § 891, Rev. St. U. S., provides that authenticated copies of papers in the land office shall be evidence equally with the originals. But that statute does not exclude the examined copy. It does not exclude what was before proper evidence. It simply makes that evidence which without this statute was not evidence.

It is urged, however, that it was not shown that the motion was made within the time prescribed by the rules of the department. A sufficient answer is that, when the evidence was excluded, the defendant had not rested, nor had the witness been excused. A party cannot put in all his evidence at once. The defect might have been cured in the further testimony. It was no ground for exclusion at that time. But it is proper to add that this court inadvertently went too far on this point in the original opinion We held this evidence improperly excluded, and then assumed that, if admitted, it would have been conclusive upon the question of the pendency of the contest, and hence ordered the complaint

dismissed. The plaintiff might have rebutted this evidence. The order should have been for a new trial.

It is contended, however, that the secretary of the interior was without jurisdiction to entertain a motion for review; that, when the United States parts with its title, the jurisdiction of the interior department ceases; and, granting that the approval of the secretary of the interior is necessary to pass title to lands selected by the Northern Pacific Railroad Company in the indemnity belt, yet, as stated in the original opinion, such approval may be shown by a decision in any given case, and as, in the opinion of the secretary filed in this case, the selection of the land in controversy was expressly approved, therefore the title at once passed from the general government, and stripped the interior department of jurisdiction. The position has nothing to recommend it except its novelty. It must be true in every jurisdiction that no judgment or decision can be final until the expiration of the time fixed by law or the rules of such jurisdiction in which to apply for a rehearing or review. Otherwise, a review would always be a farce. True, if no such application be made within the time limited, the decision at once becomes final from the date of its rendition; but, if such application be made, it suspends the operation of the decision, and if, on the review, a different conclusion be reached, the former decision becomes of no force or effect whatever. But counsel's brief is devoted principally to an attempt to establish the proposition that the title of the United States to the lands within the indemnity belt of the Northern Pacific Railroad Company passed by the grant of upon the filing of the map of definite location of its line, and hence the jurisdiction of the interior department had ceased, and all further controversies concerning the title to or right in this land must be waged in court. It was to this point that the original opinion was directed, and we will briefly add to what was then said, in order to more directly meet the objections urged by counsel. We stated that the grant was in *præsenti*, as to place lands. It is insisted that it is in *præsenti*, to the amount of 20

sections per mile, provided such amount can be found subject to the grant, and within the lateral limits of 50 miles from the line of definite location. Much stress is laid upon the wording of the grant. The language is "that there be, and hereby is, granted, * * * 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, * * * whenever on the line thereof," etc. This same language was held in *U. S.* v. *Burlington, & M. R. R. Co.*, 98 U. S. 334, to be a grant in quantity absolute. But in that case the grant was limited by no lateral lines whatever. It was simply an absolute grant of land to the amount of 10 alternate sections per mile. We think that case very instuctive in its bearing upon this case. The government had patented to the Burlington & Missouri River Railroad Company more than a million acres of land outside the 20 mile limit, which would have covered the 10 alternate sections in that case. By far the greater portion of the land thus patented was opposite the western portion of the line. Subsequently, an action was brought to annul these patents on the ground that the company was entitled to nothing outside of the 20 mile limit. The patents were sustained, the courts holding, as already stated, that it was a grant in qantity. But it was urged, also, that, if the company could go outside of that limit, it could not take land opposite one 20 mile section to make good losses accruing opposite a section further east. Said the court: "When no lateral limits are assigned, the land department of the government, in supervising the execution of the act of congress, should undoubtedly, as a general rule, require the land to be taken opposite each section." It appeared that the map of definite location was filed in June, 1865, but the land outside the 20 mile lateral limit was not withdrawn from sale until May, 1872. "Between the definite location of the road in 1865 and the withdrawal of lands outside the 20 mile limit in 1872, the greater part of the land opposite the eastern sections of the road was disposed of by the government, and therefore most of the land covered by

the patents lies opposite the western sections." It would seem perfectly clear that, if title to land outside the 20 mile lateral limit passed to the company upon filing the map of definite location, then the government could not have disposed of the land opposite the eastern section after the filing of such map, and the railroad company, under the rule there declared as to the duty of the land department, would have been required to exhaust all lands in the alternate sections opposite each 20 mile section of the road before it could ask indemnity, for losses opposite one section, out of lands opposite a section further west. The case is direct authority against the position, even in that case, that title to land outside a 20 mile lateral line passed from the government upon filing the map of definite location. True, there was no specified lateral limit in that grant; but in the subsequent case of *Wood* v. *Railroad Co.*, 104 U. S. 329, it was held that the filing of the map of definite location, followed by the immediate withdrawal from sale of all alternate sections within a lateral limit of 20 miles, at once appropriated such lands to the satisfaction of the grant, and no selection within that limit was necessary, because if all remained unreserved and untaken, yet it required all to fulfill the terms of the grant; but "the grantee could only go beyond that limit when it was found that there was a deficiency remaining after all within it had been appropriated."

But the reasons which impel us to hold that, under the grant to the Northern Pacific Railroad Company, nothing passed upon filing the map of definite location except the place lands, are much stronger than under the grant to the Burlington & Missouri River Railroad Company. The general granting language is the same, but in the case of the Northern Pacific that language is followed by an indemnity clause, that necessarily confines it and limits it in its operation. The language is "that there be, and hereby is, granted to the Northern Pacific Railroad Company, * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile on each side of said railroad line, as said

company may adopt, through the territories of the United States, * * * and wherever 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 of right, 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 said sections or parts of sections shall have been granted, sold, reserved or occupied by homestead settlers or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." Respondent says this is a grant of no particular sections, but is a grant of a specific amount, to be taken from alternate sections. The indemnity clause says: "And whenever prior to said time, any of said sections or parts of sections shall have been sold," etc. What sections? If no specific sections were intended, who can say that any of "said sections" have been sold? If the grant was a grant in *præsenti*, to be perfected by the fillng of the map of definite location, of a specific quantity of land, provided it could be found in the alternate sections of a lateral limit of 50 miles, then either there would be no deficiency, or, if there were a deficiency, it never could be compensated, because the 50-mile limit could not be passed, and the privilege which the corporation took under the indemnity clause was the right to indemnify itself for losses sustained within a given territory, but limited to that same territory for its compensation. Again by the grant, the indemnity belt is to extend "not more than ten miles beyond the limits of said alternate sections." If no specific sections were intended, what power can fix the lateral limit? Now, if we say that the present grant was of every alternate section designated by odd numbers, to the amount of 20 alternate sections in number per mile on each side of the line of road, then it is readily determined whether or not any of "said sections" were sold, and, if so, the corporation goes beyond those

sections for its indemnity, and into another belt, 10 miles in width. It goes there, not because the additional land was originally granted to it, but because it was given the privilege to go there in case it failed to obtain certain lands which were originally granted on condition, to-wit: on the condition that at the time of the filing of the map of definite location such land should not be appropriated in the manner in the statute specified. The one construction makes the act an harmonious whole. The other makes it incomprehensible in all its parts. The construction of that grant is for the Federal Courts, but we cannot hold that it was a grant in *præsenti* of indemnity lands until the Federal Courts have clearly so decided. We are cited to know such holding. The case of *St. Paul, & P. R. Co.* v. *Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. 389, is again urged upon us with confidence. We have already distinguished that case, and we repeat the distinguishing feature: There the land was withdrawn from sale, and it affirmatively appeared that all the land within the alternate indemnity sections would not make good the losses in that jurisdiction, and it is expressly stated that selection by the secretary was not required for that reason. Here, it is not shown that all lands in the indemnity sections were required to make good losses sustained, and it expressly appears that the land was not withdrawn from sale. Moreover, that case would seem, by the subsequent case of *U. S.* v. *Colton, Marble & Lime Co.* 146 U. S. 615, 13 Sup. Ct. 163, to be limited to contests between railroad companies under conflicting grants.

Since the original opinion herein was filed, the case of *Railroad Co.* v. *Araiza*, 57 Fed. 98, which arose in the southern district of California, has been published, and it is relied upon as authority for respondents' position. It will not bear that construction. It is a substantial repetition of *Railroad Co.* v. *Wiggs*, 43 Fed. 333. In each case the land had been patented to a settler, and the action was brought in equity to declare the patentee a trustee for the railroad company. Both actions arose in California, where the lateral limit to the indemnity land was only 30 miles. In each

case the land was required to make up the deficiency in place lands, and in each the rights of the settler were initiated after the land was withdrawn from sale, both by the operation of the grant and by order of the department. The case in 57 Fed. is based upon the Buttz case, in 119 U. S. 55, 7 Sup. Ct. 100, for, after quoting from that case the same language quoted in our original opinion, the court says: "The language of the sixth section of the two acts, being in substance, and almost literally, the same language of the Supreme Court above quoted, is equally applicable to the case here. If, as there held, the law itself withdrew from sale or pre-emption the odd sections to the extent of 40 miles on each side of the road represented by the map of general route, manifestly, it withdraws from sale or pre-emption the odd sections within the limits named in the grant on each side of the line of road, as fixed by the map of definite location. Such being the true construction of the statute as declared by the Supreme Court, it would seem to result necessarily that all of the odd sections within the indemnity, as well as in the primary, limits of the grant contained in the act of July 27th, 1866, were withdrawn from sale or pre-emption without regard to the order of withdrawal promulgated by the secretary of the interior through the commissioner of the general land office, and consequently they were not open to entry or settlement at the time of defendant's entry and settlement thereon." To distinguish that case, we need only remember that the land here in controversy is beyond the 40 mile limit, withdrawn by virtue of the grant, and there was no order of withdrawal in force at the time of defendant's settlement. We by no means overlook the fact in the original opinion that the selection of indemnity lands was, under the grant, to be made by the company. We give that language full force. The selection segregates the land, and if approved, cuts off all claimants subsequent to such selection. But is does not pass title. A grantee cannot pass title to himself. This grant, as we have seen, did not pass title. It gave only a right to select. It requires the approval of the selection to pass title. It will not do to say that

the selection itself, where the land is subject to selection and a corresponding loss exists, passes title. The law does not so declare, and land titles must not rest upon a foundation so uncertain. Every man is entitled to trace his title through an authorized record. It must not be left to stand one day, and fall the next, as he may or may not be able to prove certain facts.

There is but one more point upon which we care to add anything to the original opinion. It is urged that, granting that respondents stand simply upon an unapproved selection, yet they have a right to maintain this action to restrain the injurious acts of a mere trespasser. The proposition begs the question. We are required to assume that appellant is a trespasser, while, if his contention be sustained, he is a pre-empter lawfully in possession of a portion of the public domain; and that is the essence of the contest which appellant sought to show was pending before the secretary of the interior. Applications to file pre-emption declaratory statements upon unapproved selections were expressly recognized by the order of August 15th, 1887, revoking the former order of withdrawal of these lands. But of what avail could such application be if the applicant is not permitted to maintain his settlement? The fact that this land is segregated by selection does not preclude an application to make a filing thereon. It only subjects such application to the final ruling on the selection. It is urged that in *Wisconsin Cent. R. Co.* v. *Price Co.*, 133 U. S. 496, 10 Sup. Ct. 341, plaintiff, standing only upon unapproved selection, was permitted to maintain an action to remove a cloud from the title. The point is not very clear, as the case is reported. The decision does not mention it. In that case the land came through the state, and it is recited in the opinion that the selections made by the state agent had never been approved by the secretary of the interior. The action was brought in April, 1884. The fourth finding of fact by the trial court—and which does not appear to have been questioned—reads: "That on the 25th day of February, 1884, the plaintiff received a patent from the state for all of said lands, and thereby acquired the absolute title in fee to

the same," and the statement of facts by Mr. Justice Field recites that in April, 1884, the plaintiff was the owner of certain lands situated, etc., and had a patent for them from the state, bearing date on the 25th of February, 1884. In that state of the record it cannot be said that plaintiff stood only upon an unapproved selection. For the error already noticed, the former order herein will be modified, and the trial court directed to reverse its judgment and order a new trial. With that modification, we adhere to our former opinion. All concur.

(57 N. W. Rep. 241.)

MORTGAGE BANK & INVESTMENT CO. *vs.* E. G. HANSON, *et al.*

Opinion filed January 3rd, 1894.

Lien Upon Realty—Clause in Chattel Mortgage Construed.

A. executed to B. a chattel mortgage upon the crop to be grown during three specified years on certain described real estate, partly owned, and partly leased, by the mortgagor. The granting clause was of "all that personal property described as follows," etc. Following the description was the following covenant: "It is especially covenanted and agreed that this mortgage is a lien upon said land and the use thereof during said time." The *habendum* covered only the "personal property aforesaid," and all the provisions relating to the power of sale and the sale were confined to personal property. *Held*, that the instrument did not constitute a mortgage on real estate.

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

Action by the Mortgage Bank & Investment Company against Edward G. Hanson and others to foreclose a mortgage. From an order overruling his demurrer to the complaint, defendant Hanson appeals.

Reversed.

H. C. Meacham and *James F. O'Brien*, for appellant.

A. S. Drake, for respondent.

BARTHOLOMEW, C. J. The single question in this case arises upon the construction of a written instrument, which is in the

following words and figures: "Know all men by these presents, that this mortgage, made the 24th day of September, in the year one thousand eight hundred and eighty-nine, by John J. C. Brown, of Cando, County of Towner, Territory of Dakota, mortgagor, to Mortgage Bank & Investment Company, mortgagee, witnesseth: That the said mortgagor, being justly indebted to said mortgagee in the sum of two hundred sixty-seven and 56-100 ($267.56) dollars, which is hereby confessed and acknowledged, has, for the purpose of securing the payment of said debt, granted, bargained, sold and mortgaged, and by these presents does grant, bargain, sell and mortgage unto the said mortgagee and its assigns, all that certain personal property described as follows, to-wit: All crops, of every name, nature, and description, to be sown, grown, planted, cultivated, or harvested during the years, A. D. 1890, 1891, and 1892 on the following described real estate, owned or leased by the said mortgagor, to-wit: The northwest quarter and the northeast quarter of section number twelve, (12,) township number one hundred and fifty-seven, (157,) of range sixty-seven, (67,)—being first mortgage on the N. W. ¼, and second on the N. E. ¼, there being $252.95 ahead to Emil Bender, and $157.21 to McCormack H. Mch. Co., $95.75 subject to a prior mortgage to Mortgage Bank & Investment Company of $276.00, due October 1st, '89, and hereby renewed; also, my one-half interest in 50 acres on the N. ½ N. E. ¼, and S. E. ¼ N. E. ¼, and N. E. ¼ S. E. ¼, being Bradish's land rented by me. And it is especially covenanted and agreed that this mortgage is a lien on said real estate and the use thereof during said time, and that any purchaser or lessee of said real estate, or any portion thereof, takes the same subject to this mortgage, and covenants and agrees to cultivate the same for the benefit of the mortgagee herein during said time, or until said debt hereby secured is paid. And, in case said crops are not properly sown, planted, cultivated, or harvested, the said mortgagee has the right to enter on said land, and do all that is necessary to properly put in and harvest such crops, reimburse himself for all labor and expense out of the proceeds thereof, the

portion remaining to be applied on the debt hereby secured. All the said property being now in the possession of said mortgagor in the County of Towner and territory aforesaid, and free from all incumbrance, except as above described. To have and to hold, all and singular, the personal property aforesaid, forever, as security for the payment of the note and obligation hereinafter described: provided, always, that these presents are upon this express condition: That if the said mortgagor shall pay, or cause to be paid, unto the said mortgagee, its executors, administrators, or assigns, the sum of two hundred sixty-seven and 56-100 dollars, according to the conditions of three certain promissory notes payable to the Mortgage Bank & Investment Company, viz: One for $50, dated Sept. 24th, '89, due Sept. 1st, 1890, with interest at 12 per cent. per annum until paid; and one for $16.50, dated September 24th, 1889, due Sept. 1st, 1890, with interest at 12 per cent.; one for $270, dated April 3d, 1889, due Oct. 1st, 1889, with interest at 12 per cent., $75 being paid on the last note this date,—and any subsequent note given as a renewal or extension, then these premises to be void and of no effect; but, if default shall be made in the payment of said sum of money, or the interest thereon, at the time the said notes shall become due, or if any attempt shall be made to dispose of or injure said property, or to remove said property from said County of Towner, or any part thereof, by the mortgagor or any other person, or if said mortgagor does not take proper care of said property, or if said mortgagee shall at any time deem itself insecure, then, thereupon, and thereafter it shall be lawful, and the said mortgagor hereby authorizes said mortgagee, its executors, administrators, or assigns, or its authorized agent, to take said property wherever the same be found, and hold or sell and dispose of the same, and all equity of redemption, at public auction, with notice as provided by law, and on such terms as said mortgagee or its agent may see fit; and said mortgagee may become the purchaser of said property at said sale, retaining such amount as shall pay the aforesaid note and interest thereon, and an attorney's fee of one hundred dollars,

($100,) and such other expenses as may have been incurred, returning the surplus, if any there may be, to the said mortgagor or its assigns; and the said mortgagor hereby waives demand and personal notice of the time and place of sale. And, as long as the conditions of this mortgage are fulfilled, the said mortgagor to remain in peaceful possession of said property, and in consideration thereof he agrees to keep said property in as good condition as it now is, and harvest the same at his own proper cost and expense, and to keep the said crops insured in the Phœnix Insurance Company of North Dakota to the extent of the mortgagee's interest; and on failure to so insure and keep the same insured, as aforesaid, the said mortgagee is hereby authorized to insure the same at the proper cost and expense of the mortgagor, or it may declare the whole amount secured thereby due and payable, and may foreclose the same in the manner and form hereinbefore provided."

This instrument was duly signed, witnessed, acknowledged, and recorded as a real estate mortgage, and also filed in the proper office as a chattel mortgage. The grantee named in said instrument brought an action in equity to foreclose, both upon realty and personalty. The makers of the notes and grantor in the mortgage were made defendants, and also one Edward G. Hanson. Hanson alone defends. As to him it is alleged in the complaint that he is a subsequent purchaser of a portion of said real estate, to-wit: the N. E. ¼ of section 12, from said Brown, and as against him a foreclosure is asked upon said land. He demurred to the complaint as not stating a cause of action against him, and, the same being overruled, he elected to stand thereon, and appeals to this court. If the instrument sued upon constitutes a mortgage upon said land for the payment of the debts therein described, then the action of the trial court must be affirmed; otherwise, reversed. We have quoted the exceedingly verbose instrument in full, as our interpretation must rest exclusively upon its wording. The language is unusual. The portion relied upon as converting the instrument into a mortgage on realty is as follows: "And it

is especially covenanted and agreed that this mortgage is a lien on said real estate, and the use thereof, during said time, and that any purchaser or lessee of said real estate, or any portion thereof, takes the same subject to this mortgage, and covenants and agrees to cultivate the same for the benefit of the mortgagee herein during said time, or until said debt hereby secured is paid." Title 3 of our Civil Code furnishes us a full guide to the interpretation of contracts. It is there said, (§ 3556, Comp. Laws:) "The whole of a contract is to be taken together so as to give effect to every portion if reasonably practicable, each part helping to interpret the others." Again, § 3563 reads: "However broad may be the terms of a contract it extends only to those things concerning which it appears that the parties intended to contract." Keeping these two principles in view, we have no difficulty in reaching a conclusion in this case. The granting clause in the instrument covers "all that certain personal property described as follows, to-wit:" and the property described consists of crops to be grown in 1890, 1891, and 1892 on certain lands in part owned, and in part leased, by the mortgagor. Then follows the covenant declaring said mortgage to be a lien "on said real estate, and the use thereof during said time." The purpose of that covenant is clear. It was simply an effort to hold the crops for the years specified in case of a change of possession of the land on which the crops were to be grown. It required the party who may subsequently purchase or lease the land to cultivate the same for the benefit of the mortgagee. An instrument which is a lien on land for a term of years is simply a lien on the use of the land for said time. The expression, "a lien on said real estate, and the use thereof, during said time," is tautological, but not more so than other portions of the instrument. If we say that it was the purpose to create a lien upon the land independent of the use, then we violate the granting clause, which covered "all that certain personal property," etc. We also convict the mortgagor of attempting to mortgage land which he held under lease. We do violence to every part of the instrument. The *habendum* says:

"To have and to hold, all and singular, the personal property aforesaid," etc.; and all the provisions relating to the power of sale, and the sale, and insurance are confined to personal property. The clause relied upon, when construed literally, may be broad enough to include land, but, when viewed in the light thrown upon it by the other provisions in the same instrument, it is clear that the parties intended to contract only concerning personal property; and hence, under the rule of construction prescribed by the legislature, the contract must be limited to that class of property, and is a chattel mortgage only, and appellant's demurrer was well taken. The District Court will reverse its judgment, and sustain the demurrer.

Reversed. All concur.

(57 N. W. Rep. 345.)

JAMES RIVER LUMBER CO. *vs.* HENRY DANNER.

Opinion filed December 28th, 1893.

Mechanic's Lien—Priority to Mortgage.

The priority of lien on a building given to one who furnishes material, as against an existing incumbrance on the land, by the provisions of § 5480, Comp. Laws, does not exist, unless the building or improvement on which such priority of lien is claimed was wholly erected subsequently to the attaching of the lien of the incumbrance, and the lien claimed to be prior thereto is for work done or material furnished in such erection. Such priority of lien exists only when the holder of such lien can have the building or improvement sold, and removed from the land, without unlawfully invading the rights of the earlier incumbrancer.

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

Action by the James River Lumber Company against Henry Danner to enforce a mechanic's lien. From a judgment for defendant plaintiff appeals.

Affirmed.

S. L. Glaspell, for appellant.

Nickeus & Baldwin, for respondent.

CORLISS, J This appeal brings before us a contest for priority of lien. The strife is between a mortgagee of real property and the holder of a mechanic's lien thereon. So far, the mortgagee has been successful. The trial court decided that the respondent's mortgage lien was prior to that of the appellant, as to the entire property. The appellant does not challenge the correctness of this ruling, so far as the land itself is concerned, but insists that his lien upon the building on the land is superior to that of the respondent's mortgage. We must examine the facts: On May 7th, 1886, the respondent, being the owner of the land, agreed to sell it to one Bauer; and on July 23, 1887, he executed to Bauer a deed for the premises, taking back from Bauer a mortgage to secure a portion of the purchase money. The building on the land at the time the contract of sale was entered into was a brewery. Subsequently, and before the deed was delivered, this building was partially destroyed by fire. The building consisted of several parts, but all under one roof. As the extent of the ravages of the fire throws direct light on the question whether an entirely new structure was erected, or only the remains of an old one added to, we must quote the finding of the court on that subject. It is as follows: "While defendant Bauer was in possession of the premises aforesaid, the said brewery and ice house buildings were partially destroyed by fire; that is to say, the frame or wooden portion of the same, above the stone foundations, was almost wholly destroyed. Nearly all of the third story of the southern or main ice house was burned, leaving the three floors (this part of the building was three stories high) and all that part of the buildings beneath the floor, and leaving also, unburned, a small part of the siding and studding of the third story. There remained of the ice house number two, unburned, two floors and all beneath them, and a small part of the siding and studding, this part of the building being two stories only. The northern ice house was nearly all burned, a small part of the siding, studding, and stone walls, only, remaining of that part of the building called the 'Brewing Room;' there remaining after the fire the

first story and a small part of the second, (this part is two stories high;) the balance burned. These various rooms are all under one roof, and make but one building." The consideration for the sale from Danner to Bauer was $21,000. The building was insured, and the insurance money was paid to Danner, who credited the same on the purchase price, and took back a mortgage from Bauer for $9,000. Subsequently to the execution, delivery, and recording of this mortgage, the appellant furnished materials which were used in the rehabilitation of this partially destroyed structure. It is for the balance remaining due for such materials that it claims a lien on the building paramount to the lien of the mortgage. It is clearly not a case of the erection of an entirely new structure. The finding of fact which we have quoted is fatal to such a view, and, in addition, the courts find that the portion of the building which escaped the fire was worth $3,240.

We will now turn to the statute upon which appellant relies for support: Section 5469, Comp. Laws, gives a lien to any person who shall furnish any material for any building, erection, or other improvement upon land. Section 5480, which is the important section, declares that "the lien for the things aforesaid or work, shall attach to the buildings, erections or improvements, for which they were furnished or done, in preference to any prior lien or incumbrance, or mortgage upon the land upon which the same is erected or put and any person enforcing such lien, may have such erection, building or other improvement, sold under execution, and the purchaser may remove the same within a reasonable time thereafter." We are clear that it was not the purpose of the legislature to give one who had furnished materials to repair an existing structure a lien on the entire building superior to a mortgage thereon at the time the materials were furnished. This would take from the mortgagee a portion of his security without his consent. It would be an unconstitutional invasion of a property right. See *Meyer* v. *Berlandi*, 39 Minn. 438, 40 N. W. 513; *Croskey* v. *Manufacturing Co.*, 48 Ill. 481. The appellant does not claim that he would have the entire building

sold and removed. He contends that he can sell all of the building which was constructed after the fire. But neither law nor equity has ever decreed the demolition of a structure as a mode of satisfying a lien, nor does the statute lend countenance to any such proposition. The lien is given upon the entire building. If any part can be sold, all can be sold. If all cannot be sold, no part can be sold. But it is further urged that the whole property should in such a case be sold, and the mortgagee given priority of lien upon the proceeds so far as they are derived from the land and the building as it was before the repairing of it was commenced, and the one who furnishes materials be given a first lien upon that portion of the proceeds which resulted from the improvement to the structure. What is there in the statute to warrant such an interpretation of the law? It is said that the lien which is to have precedence so far as the building is concerned is the "lien for the things aforesaid," and that such a lien is a lien for materials furnished to repair, as well as to erect an entirely new structure. But the statute must be construed as a whole. The § (5480) declares that the prior lien which it gives may be enforced by a sale of the building, and that the purchaser may have it removed. Now, is it not evident that it was the purpose of the legislature to vest in the furnisher of materials priority of lien upon the building only in cases where the building could lawfully be sold and removed by the purchaser without working an illegal invasion of the mortgagee's rights? The legislature could not authorize a sale of an entire building to pay the lien of one who had repaired it, with a recorded mortgage against the land existing at the time he made the repairs. There is nothing in the statute to warrant the construction that the one who furnishes the materials is to have a prior lien only upon a part of the building, or upon the materials themselves after they have been embodied in the structure, or that he may sell and have removed such materials, or any portion of the building. The statute gives the lien priority with respect to the entire erection, and to enforce this the holder of it may have the building sold free of any existing

lien upon the land, and the purchaser receives an absolute title, and may remove the building. The prior lien is one which justifies the sale and removal of the structure unaffected by any existing mortgage. But a lien for repairs upon a building covered by a mortgage would not justify a sale and removal of the building, as against such mortgage. We are therefore driven to the conclusion that the legislature never intended to give the furnisher of materials, in such a case, priority of lien upon the building. We have no right to ignore that portion of the section which provides for the enforcement of the priority of lien which the statute creates. The declaration of the section as to the mode of enforcing the right throws light upon the nature and extent of the right. Priority of lien is given in cases where the whole erection may be sold and removed without unlawful encroachment upon the rights of the mortgagee of the land. A familiar doctrine is applicable here. It is not invoked by counsel for respondent, but we deem it controlling. It is elementary that where a new right is created by statute, and a mode of enforcing it prescribed by the same act, that mode is exclusive. 1 Am. & Eng. Enc. Law, 184, and cases cited. The legislature, has given the one who furnishes materials a new right. It has conferred upon him priority of lien, as against a mortgage which would otherwise attach to buildings thereafter erected on the land, as part thereof prior to any subsequent mechanic's lien. Along with this statutory right goes the statutory remedy. The two are inseparably connected. No other remedy can be employed. The lien can be enforced as a prior lien only by a sale of the building as a distinct thing. It must be sold separate from the land, and the purchaser may thereafer remove it. Such priority of lien exists only when a new structure has been put upon the land subsequently to the execution of the mortgage, and the one who claims such prior lien must have contributed to the erection of such building, by the furnishing of materials or the doing of work. The remedy of sale and removal of the building is not given to enforce the lien generally, but merely to make

efficacious the priority of lien, as against an existing mortgage on the land. The one who furnishes materials has clearly a lien on the whole property,—land and all,—subsequent to the lien of the mortgage. This lien he enforces in the ordinary way. But this particular priorty of lien which the statute vests in him is to be enforced in the statutory manner, and in that manner alone. The priority of lien is upon the whole building. To enforce it, there is to be a sale of the whole building, and the purchaser may remove the whole building. Where this cannot be lawfully done, as against the mortgagee, the priority of lien does not exist. We do not care to discuss this question further. This work has already been done by the Supreme Court of Iowa, and by the powerful dissent of Chief Justice Stone in the case of *Wimberly* v. *Mayberry*, (Ala.) 10 South. 157-164, in which Judge Clopton concurred, the court standing three to two on the question. The Iowa Supreme Court has never departed from its earliest ruling on the point. *Getchell* v. *Allen*, 34 Iowa, 560; *Insurance Co.* v. *Slye*, 45 Iowa, 616; *O'Brien* v. *Pettis*, 42 Iowa, 294. See, also, Phil. Mech. Liens, p. 402; *Taylor* v. *Railroad Co.*, 4 Dill 570; *Steam Heater Co.* v. *Gordon*, 2 N. D. 246, 50 N. W. 708. The case before us is not one where, after the commencement of a building, a mortgage is taken upon the property. In such a case the lien for work subsequently done dates from the commencement of the building, as we have already held. *Steam Heater Co.* v. *Gordon*, 2 N. D. 246, 50 N. W. 708. See, also, cases cited in the opinion, at p. p. 251, 252, 2 N. D., and p. 708, 50 N. W. The work on this partially destroyed brewery was not begun until some time after the recording of the mortgage. The ruling of the trial court was clearly right, and the judgment is therefore affirmed. All concur.

(57 N. W. Rep. 343.

N. O. GRANHOLM *vs.* C. SWEIGLE, *et al.*

Opinion filed December 5th, 1893.

Guardian Ad Litem—Personal Liability for Costs—Contempt—Construction of Statute.

Section 5200 reads: "Where costs are adjudged against an infant plaintiff the guardian by whom he appeared in the action must be responsible therefor and payment thereof may be enforced by attachment." Construing said section, *held*: *First*, that the obligation of the guardian to pay such costs arises upon the law, and does not in any degree depend upon an order of court directing the guardian to pay such costs; and hence, where such an order is made, it cannot be enforced by a proceeding as for a contempt of court against the guardian. Disobedience of such an order does not constitute a contempt of court. *Second*, No *ca. sa.* attachment proceedings—such as exist in the State of New York—have been authorized by any statute in this state whereby a guardian can be taken into custody and imprisoned for the nonpayment of such costs. *Third*, The nonpayment of such costs does not constitute a tort or a fraud, within the meaning of § 15 of the state constitution, and hence the omission to pay (not being a contempt of court) would not authorize a court to arrest and incarcerate the guardian for nonpayment upon any civil process whatsoever. Accordingly *held*, further, where in such case, after entry of judgment for costs against an infant plaintiff, the District Court, after hearing the guardian upon an order to show cause, ordered that the guardian be imprisoned in the county jail until the said costs were paid, that such order was without warrant of law, and null and void.

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

Action by N. O. Granholm, by A. E. Sunderhauf, guardian *ad litem*, against C. Sweigle and C. F. Sweigle. There was judgment for defendants for costs of suit, and from an order committing the guardian for contempt in failing to pay the costs he appeals.

Reversed.

W. E. Purcell, for appellant.

Curtiss Sweigle, for respondents.

WALLIN, J. In this action the appellant was appointed guardian *ad litem* for the plaintiff, who was an infant. A judgment for the costs of the action was entered against the infant plaintiff, and, payment of such costs having been demanded of the appellant by the defendants' counsel, and payment thereof having been refused, the defendants' counsel upon an affidavit made by him,

applied to the District Court, and obtained an order of the court requiring the appellant to "show cause why attachment should not be issued to enforce the payment of such costs as by law provided." Upon the return day of the order a hearing was had before the court, and, among other things done, the appellant filed his own affidavit, containing among other things, the following: "That he is not a trustee, and no property came to his hands belonging to N. O. Granholm; that he is a citizen and resident of the State of North Dakota; that he has no property or funds out of which the judgment in the above entitled action can be paid, and that he is not able to pay the same." After hearing counsel, the District Court decided that no cause was shown "why said attachment should not issue," whereupon the court made its final order in the proceeding, which order, so far as it is material, is as follows: "Therefore you are hereby commanded forthwith to attach the person of A. E. Sunderhauf, guardian of the plaintiff in the above entitled action, and confine him in the county jail of the County of Richland, State of North Dakota, until such time as the costs adjudged against said plaintiff be and are fully paid; said costs amounting to the sum of $21.60." An exception was saved to the last mentioned order, and Sunderhauf appeals from such order to this court. A motion to dismiss the appeal was made in this court, but, inasmuch as the motion was based upon grounds which, in our opinion, are untenable, we have denied the same, and shall, in view of the importance of the question involved, dispose of the case upon its merits, without discussing the points in detail made upon the motion.

The attachment proceeding is based upon a section of the Code of Civil Procedure relating to costs, (Comp. Laws, § 5200,) which is as follows: "When costs are adjudged against an infant plaintiff the guardian by whom he appeared in the action, must be responsible therefor and payment thereof may be enforced by attachment." The section in question was borrowed at an early day by the territorial legislature from the State of New York, where the same language appears as § 316 of the New York Code

of Civil Procedure. At least two cases arising under the statute have been decided at general term by the Supreme Court of New York. The first and leading case is that of *Grantman* v. *Thrall*, 31 How. Pr. 464, and the case cited was approved in *Linner* v. *Crouse*, 61 Barb. 289. In the case first cited the court at special term refused to grant an order imprisoning the guardian *ad litem* for refusing to pay the costs which had been adjudged against the infant plaintiff. In that case, as in the case at bar, the guardian made affidavit disclosing to the court his want of means, and inability to pay the costs. The special term order was reversed on appeal to the general term, the court of review holding, in substance, that the poverty of the guardian could not be urged as a defense to an order of commitment for nonpayment of such costs. In the opinion, *Johnson*, J., speaking for the court, says: "Nor do I see that the question of contempt of court arises in the case. It is simply a liability which the statute creates, and to enforce payment of which it gives this process. It does not depend upon any order of the court, but results simply from the adjudication against the infant plaintiff." It is clear from the reasoning, and the court so holds, that the refusal of the guardian *ad litem* to obey the order of the court directing him to pay the costs in question was in no sense a contempt of the court which made the order. The refusal of the guardian to pay such costs was simply a breach of an obligation which arose under the statute, and which was complete before the court made any order in the summary proceeding. In the State of New York there is a statute in the nature of a *ca. sa.* proceeding which creates and regulates a remedy by attachment of the person, and points out distinctly the cases in which such remedy is available. This statutory remedy is doubtless referred to in the words used in the section in question, *i. e.* "and payment may be enforced by attachment." We have no similar statutory provisions in this state, and consequently the machinery existing in the State of New York for the enforcement of the liability of the guardian by attachment of his person is wholly wanting in this jurisdiction.

See 2 Rev. St. N. Y. marg. p. 534. The arrest and bail statute of this state (Comp. Laws, §§ 4944, 4971) is ancillary to a civil action, and has, of course, no application to this case, which is not a civil action, so far as the appellant is concerned, but is a proceeding by motion made on a summary application after judgment in an action between other parties.

We have seen that the courts of New York, in construing the same statute, have held that the failure of the guardian of an infant plaintiff to pay the costs ajudged against the infant does not constitute a contempt of court. We concur in this construction of the statute, and hence must hold that the order appealed from cannot be sustained as an order made in a proceeding instituted to punish a contempt of court. We must conclude therefore that the order of the District Court directing the incarceration of the appellant was without legal warrant. If the refusal of the guardian to pay such costs were an act of a fraudulent or tortious nature he could have been preceeded against by a civil action, and taken into custody under the arrest and bail statute. If not a tortious act, (and we think it was not,) the appellant would be protected from arrest and imprisonment by § 15 of the state constitution, which provides that "no person shall be imprisoned for debt unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law, or in cases of tort, or where there is a strong presumption of fraud." The term "debt," as employed in § 15, *supra*, is manifestly used in a broad sense, and hence will embrace such obligations to pay money as arise upon the law, as well as those which arise upon contract. It is conceded that no similar provision is found in the constitution of the State of New York.

It appears from what has been already stated that the order of the District Court incarcerating the appellant was without any legal warrant, even if made upon the assumption that the act of the guardian in refusing to pay the costs was a tort. A party guilty of a tort must be proceeded against by a civil action, and cannot be summarily dealt with by a mere motion proceeding,

had in an action between other parties. The order appealed from being void in its inception, must be reversed, and the proceeding upon which it was based must be dismissed, and this court will so direct. All concur.

(57 N. W. Rep. 509.)

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RY. CO. *vs.* SAMUEL K. NESTER.

Opinion filed December 16th, 1893.

Striking Out Evidence—When Refused.

Where there is any competent evidence in the testimony of a witness, a motion to strike out his entire testimony is properly overruled.

Condemnation Proceedings—Jury Trial—Waiver.

Where condemnation proceedings were commenced under the statute in force prior to the adoption of § 14 of our state constitution, specifying the manner of taking private property for public use, and the land owner participated in such proceedings, and, after the report of the commissioners was filed, demanded a jury trial, as in the statute provided, he thereby waived the benefit of the constitutional provision, and cannot at the trial in the District Court before the jury be heard to allege the unconstitutionality of the statute.

Waiver of Irregularities by Failing to Take Exceptions.

By failing to file exceptions to such report, and demanding a jury trial, he waived all irregularities and informalities in the proceedings upon which the commissioners' appraisement was based.

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

Condemnation proceedings by the Minneapolis, St. Paul & Sault Ste. Marie Railway Company against Samuel K. Nester. From the judgment rendered, defendant appeals.

Affirmed.

Winterer & Winterer and *S. L. Glaspell*, for appellant.

G. K. Andrus, *L. W. Gammons* and *Alfred H. Bright*, for respondent.

BARTHOLOMEW, C. J. This action originated is condemnation proceedings. There was an award of damages to appellant by commissioners, from which he appealed to the District Court, where, upon trial, his damages were assessed by a jury at a slightly increased amount; and from judgment in his favor for such amount, with costs, he appeals to this court. There is but one error assigned that bears upon the amount of the verdict, and we wish to discuss that at this point.

Respondent, at the trial, called two witnesses who testified generally as to the character and value of appellant's land, and of the land taken for right of way purposes, and the damage to appellant's farm by such taking; and on cross-examination it was drawn from each witness that, in estimating such damages, he took into consideration the benefit to appellant's farm arising from the construction of respondent's road. Appellant's counsel moved to strike out the testimony of each witness, and the motions were denied. This was clearly right. There was some competent evidence in the testimony of each witness, and the motions went to the whole testimony, instead of being limited to such portions as gave the total damage as estimated by the witness. The court was careful, however, that no wrong should result from this mistake of counsel; for in the charge the jury were told, under four different forms, that, in arriving at the amount of their verdict, they must not consider any benefits to appellant arising from the construction of the road.

Turning to the difficult questions presented, we find the following entry in the abstract: "And said cause came on for hearing and trial at a regular term of the District Court in and for Barnes County, North Dakota, on the 16th day of December, A. D. 1892. And at the beginning of the trial, and before any witnesses had been sworn, the defendant, Samuel K. Nester objected to the jurisdiction of the court to hear and determine this action, and moved that all proceeding herein be dismissed, for the reason that no proper petition has ever been filed, that no

petition has ever been filed describing the lands of the defendant, Samuel K. Nester, and no legal notice of the appointment of commissioners was ever served upon him, and the court is without jurisdiction generally." And again, after the evidence was all in: "The defendant now moves the court to dismiss this proceeding for the following reasons: *First*, the court is without jurisdiction; *second*, the defendant had no notice and was not a party to the proceedings had before the commissioners were appointed; *third*, there is a variance as to the width of the strip demanded in the original petition that is required in this proceeding; *fourth*, there is no evidence that the plaintiff is a corporation; *fifth*, there is no evidence here of the necessity for the taking of the property described in the petition." The point urged under these exceptions is that the court was without jurisdiction. By that it is not meant that the District Court had not jurisdiction in condemnation proceedings properly brought before it. But it is claimed that, by reason of certain precedent irregularities, the jurisdiction was defeated; and it is specially urged that, under § 14 of our state constitution, the statute under which these proceedings were initiated—and which statute was in force prior to the adoption of the constitution—became a nullity, because inconsistent with the constitutional provision. Said § 14 is as follows: "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived." These proceedings were commenced by respondent under § § 3000 and 3001 of the Comp. Laws. These sections, with great particularity of detail, provide for an application by petition to the Judge of the District Court for the appointment of commissioners to assess damages for right of way in cases where

the parties cannot agree. We need not specifically further notice the provisions of the statute, nor need we specify the irregularities in the appointment of, and proceedings before, the commissioners, of which appellant now complains. It is enough to say that he went before the commissioners, and contested the question of damages. Neither at that time nor in the trial court did he join issue upon the allegations of respondent's right to condemnation proceedings, or of the necessity of taking the land condemned. After the commissioners had filed their report, he made demand for a trial by jury, as provided by the statute, and alleged that he "hereby demands a trial by jury, as is provided by § 3000 of the Comp. Laws." The record suggests this inquiry: Is appellant in a position to question the constitutionality of this law, by the terms of which he transferred the case into the trial court? Clearly not. He went before the commissoners, and sought the benefit of this law. Subsequently, he voluntarily chose to pursue a remedy provided by the statute in preference to a common-law remedy that was open to him. By these acts he has waived any benefit of the constitutional provision. Such should be the law in reason, and such is the law upon authority. Cooley, Const. Lim. 216; End. Interp. St. § 537, and cases there cited.

Could appellant, at the trial in the District Court, urge, as against the jurisdiction of that court, any irregularities in the preceding condemnation proceedings? This, too, must be answered in the negative. The statute provides "that the report of the commissioners may be reviewed by the District Court on written exceptions filed by either party in the clerk's office within sixty days after the filing of such report; and the court shall make such order therein as right and justice may require, either by confirming, modifying, or rejecting the same, or by ordering a new appraisement on good cause shown; or either party may within thirty days after the filing of such report file with the clerk a written demand for a trial by jury; in which case the amount of damages shall be assessed by a jury, and the trial shall be conducted and judgment entered on the verdict in the same manner

as in civil actions in the District Court." Clearly, two courses are left open to a dissatisfied party. He may except to the report, and thereby raise all questions of law as to its legality and sufficiency; or he may demand a jury trial, in which event his damages shall be assessed by a jury through a regular trial in court. But it was never contemplated that both should be used at the same time, or that the latter included the former. When exceptions are filed, it is the report of the commissioners that is to be tested. It may be affirmed, modified, or rejected, and a new appraisement may be ordered. Necessarily, this is done by the court, and there is no place in the proceeding for a jury. On the other hand, when a jury trial is demanded, the whole matter of compensation is in the jury's hands. Their verdict, whether more or less than the commissioner's appraisement, measures the amount of the land owner's recovery. The appraisement, as a measure of damages, becomes absolutely immaterial, and all the steps by which it was reached become likewise immaterial. Mills, Em. Dom. § 324. The learned trial court tried the case upon the theory that the only question involved was the amount of compensation. This was clearly correct, and upon that question the only error assigned is the one relating to the admission of testimony heretofore discussed. The judgment of the trial court is in all things affirmed. All concur.

(57 N. W. Rep. 510.)

ELIZA LUDLOW *vs.* THE CITY OF FARGO.

Opinion filed December 19th, 1893.

Municipal Corporations—Duty to Keep Streets Free From Obstructions.

Cities which have been organized or reorganized under the general law of this state (Comp. Laws, § 844 *et seq.*) are charged with full power and responsibility in the matter of the streets, sidewalks, and crossings within their limits; and the duty of establishing streets and removing obstructions therefrom is a duty expressly enjoined by the statute. In performing such duties, cities are liable in a civil action to persons who, in the exercise of due care, receive injuries caused by negligent acts done either by the city officials or others who are acting for the city and under its authority. The cities so organized and governed are impliedly liable for damages caused by their wrongful or negligent acts, and no express statute making them liable is necessary. Accordingly, *held*, that the following instruction, given by the trial court to the jury, is not error: "The general rule is that, in the case of a highway, a municipal corporation is answerable in damages for the lack of ordinary and reasonable care, and is held to the same rule of negligence which is expected of private persons in the conduct of their business involving a like danger to others."

Liability to Traveler—Notice of Defect.

A ditch was dug across one of the public streets of the City of Fargo by workmen acting under the authority of the city. The workmen left the ditch ungarded, and without a light to warn the public of danger. After dark the plaintiff was driving along said street, and drove into the ditch, and was thrown from her carriage and injured. *Held*, that these facts show that the obstruction in the street which caused the injury complained of was the result of the direct act of the city, and in such a case the plaintiff was not obliged, in order to recover, to show either actual or constructive notice to the city of the existence of the obstruction.

Evidence—Sufficiency of.

Evidence examined, and *held* to be sufficient *prima facie* to show that the ditch which caused the injury was dug by workmen who were acting under the authority of the city.

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

Action for personal injuries by Eliza Ludlow against the City of Fargo. There was judgment for plaintiff, for $300, and defendant appeals.

Affirmed.

M. A. Hildreth, for appellant.

A city is not liable for the neglect of its officers unless made so by statute. *Chope* v. *City*, 78 Cal. 588; *Arnold* v. *San Jose*, 81 Cal. 618; *Crowell* v. *Sonoma County*, 25 Cal. 312; *Howard* v. *San Francisco*, 51 Cal. 52; *Winbigler* v. *Los Angeles*, 45 Cal. 38; *Trauter* v. *Sacramento*, 61 Cal. 271; *City* v. *Pearce*, 46 Tex. 525; *Detroit* v. *Blakeby*, 21 Mich 841, (4 Am. Rep. 450;) *Hill* v. *Boston*, 122 Mass. 346, (23 Am. Rep. 332;) *Morgan* v. *Hallowell*, 51 Me. 375; *Pray* v. *Jersey City*, 32 N. J. L. 394.

A city is not liable to private action for neglect to perform a corporate duty imposed by general law on all cities and towns alike, and from the performance of which they derive no compensation or benefit in their corporate capacity. *Hill* v. *Boston*, 122 Mass. 343; *Oliver* v. *Worcester*, 102 Mass. 489; *Harwood* v. *Worcester*, 153 Mass. 426; Beach on Pub. Corp. § 981 and 749; *Pollock* v. *Louisville*, 26 Am. Rep. 260; *Ham* v. *Mayor*. 70 N. Y. 458; *Child* v. *Boston*, 81 Am. Dec. 680, 15 Am. and Eng. Enc. Law 1141.

Fred B. Morrill, for respondent.

Where the duty to keep streets in repair is in terms enjoined upon the corporate authorities and they are supplied with the means to perform it, the corporation is liable, without an express statute declaring the liability to one injured by its neglect to discharge this specific duty. *Wrightman* v. *Washington*, 66 U. S. 39; *James* v. *City of Portage*, 5 N. W. Rep. 31; *Estelle* v. *Lake Crystal*, 6 N. W. Rep. 775; *Triese* v. *St. Paul*, 32 N. W. Rep. 857; *Klatt* v. *Milwaukee*, 10 N. W. Rep. 162; *Delger* v. *St. Paul*, 14 Fed. Rep. 567; *City* v. *Woodward*, 27 N. W. Rep. 110; *Plattsmouth* v. *Mitchell*, 29 N. W. Rep. 593; *Whitefield* v. *City*, 14 Am. St. Rep. 596; *Knightstown* v. *Musgrove*, 9 Am. St. Rep. 827; *Welter* v. *St. Paul*, 12 Am. St. Rep. 752; *Larson* v. *Grand Forks*, 3 Dak. 307, 19 N. W. Rep. 414. The ditch was dug by workmen in the employ of the city and under the direction of the street commissioner—this was the act of the city—and the doctrine of actual or implied notice has no application. *Wilson* v. *Troy*, 18 L. R. A. 449; *Pettengill*, v. *Yonkers*, 116 N. Y. 558; *Walsh* v. *New York*, 107 N. Y. 220;

Turner v. *Newburg*, 109 N. Y. 301; *Brusso* v. *Buffalo*, 90 N. Y. 679; *Nelson* v. *Canistoe*, 100 N. Y. 89; *Barnes* v. *District of Columbia*, 91 U. S. 540.

WALLIN, J. The action is brought to recover damages for personal injuries received by the plaintiff while driving along a public street within the City of Fargo, about 9 o'clock at night. The principal facts are undisputed. A small trench had been dug across the street, and was left unguarded, and no lights, fence or other warnings to the public were placed at or about the ditch. The plaintiff drove into the ditch, and was thrown from her carriage and injured. The evidence shows that one Maurice Holcomb directed the ditch to be opened, and the ditch was dug by him and others who were working under his direction. The excavation was made Saturday afternoon, and the accident occurred the Sunday evening next following. Holcomb testified that he was street commissioner of Fargo at the time in question, and was asked the following, among other, questions: "Q. Did you have a man there employed by the city, and did you direct him to do it? A. Yes, sir. I had a man to work at different places. Q. Did they did this ditch under your direction? A. As I said, I don't know as I can answer that question without explaining myself. It was at the time of the high water here last March. It had thawed, and then froze up again quite suddenly, and froze all the water boxes full of ice, and when it commenced to thaw and rain it flooded this part of town so that many sidewalks were under water, and we were trying to dispose of the water as best we could, and turn it in a different direction whenever we found it swollen. I took out the Saturday afternoon gang up to this little church, where this ditch was, and the water came up covering the sidewalk. I sent a man over, and the water was driving across the street, and I opened a little channel there so that the water, instead of backing any further up the church steps, would run across, and go into the culvert on the other side. I directed the man to open it." No city ordinance or other evidence was introduced tending to show that

the office of street commissioner of the city of Fargo ever existed or had ever been created prior to the trial or at any time. At the close of the testimony, defendant's counsel requested the court to take the case from the jury chiefly upon the grounds following: "The plaintiff has failed to establish that defendant had either actual or constructive notice of the ditch in question; (2) that there is no sufficient evidence to show any negligence on the part of defendant, its officers, agents, or servants." The request was denied, and defendant saved an exception to the ruling. The court instructed the jury, in substance, that corporations, like individuals, are responsible in damages for injuries caused by their negligence, and particularly "that in case of highways a municipal corporation is answerable in damages for the lack of ordinary and reasonable care." Defendant excepted to such instruction.

In his brief, counsel for appellant says: "The single question presented to this court is whether, under our statute, the defendant is liable." The only proposition advanced or discussed by the appellant's counsel is thus stated: "A city is not liable for the neglect of its officers unless made so by statute." To sustain this view counsel cites several cases from California, among them *Chope* v. *City of Eureka*, 78 Cal. 588, 21 Pac. 364; also *City* v. *Pearce*, 46 Tex. 525; *Hill* v. *City of Boston*, 122. Mass. 346, and other cases. We quote further from the brief of appellant's counsel: "In the case of *Chope* v. *City of Eureka*, which was an action brought for alleged personal injuries caused by the plaintiff falling into an excavation for a sewer within the corporate limits of defendant, the court say: 'It has long been the settled law of this state that a municipal corporation is not liable for personal injuries to individuals such as that claimed to have been sustained by the plaintiff where there is no statutory provision declaring such liability.'" Counsel further proceeds as follows: There is a dissenting opinion in the above case, in which § 1024 of Dillon on Municpal Corporations is quoted and indorsed. The section of Dillon quoted is undoubtedly good law, but it does not appear to be in

point, or in any way effect the case at bar. It refers to cases where streets have been rendered unsafe by the direct act, order, or authority of the municipal corporation. There can be no question as to the soundness of this proposition." The section thus indorsed by counsel as undoubtedly sound reads as follows: "Section 1024. Where streets have been rendered unsafe by the direct act, order, or authority of the municipal corporation (not acting through independent contractors, the effect of which will be considered presently,) no question has been made, or can reasonably exist, as to the liability of the corporation for injuries thus produced, where the person suffering them is without fault, or was using due care. Even in those states in which a municipality is not held impliedly liable to a private action for neglecting to keep its streets in repair, it is yet held to be liable if it, or its officers under its authority, by positive acts place obstructions on the streets, or by such acts otherwise render them unsafe, whereby travelers are injured." We fully agree with counsel that the law as above stated by Judge Dillon is "undoubtedly good law." It is now elementary law that municipal corporations as well as natural persons are liable for injuries suffered in consequence of their direct acts. *New York* v. *Sheffield*, 4 Wall. 189; *Chicago* v. *Hesing*, 83 Ill. 204. But we must differ with counsel as to his statement that the law as stated above "does not appear to be in point, or in any way affect the case at bar." On the contrary, we think the law as stated by Judge Dillon in § 1024, *supra*, embraces the facts, and must control the decision of this case. The testimony above set out makes it clear that the ditch which was the cause or occasion of plaintiff's injury was dug across one of the public streets of the City of Fargo, and was left until after dark, and until the accident occurred, without light, guard, or protection of any kind, and that the digging was done by those who were acting for the city, and working under its authority and pay.

Under the statute this court is required to take notice judicially of the various provisions of the general law governing the

organization of cities, and also notice the fact that Fargo was reorganized as a city under the provisions of such general law. Comp. Laws, § § 844, 847. Cities which are governed by the general law are clothed with extensive powers over a wide range of subjects. The council controls the city's finances, can levy taxes, and has other large sources of revenue. With respect to streets, sidewalks, and crossings within the city it has full and absolute control. It can not only open streets, and grade and improve the same, but it may "regulate the use of the same;" also "prevent and remove obstructions and encroachments upon the same;" also "provide for the closing of the same." Id. § 885, subds. 7-21. From the testimony in the record it appears that these statutory powers and duties were, at the time the ditch was dug, being actively exercised and performed by certain workmen, who were acting under the direction of a man who testified that he was street commissioner of the City of Fargo. The workmen, at the time the ditch in question was dug, were engaged in endeavors to remove accumulations of surface water which had backed up on the streets and sidewalks in the immediate vicinity of the ditch. The excavation itself was only one of a variety of means used by the workmen to draw off the surface water which had encroached upon the streets, and was then seriously obstructing the same. From this it appears that the statutory duties of the city with respect to the streets and sidewalks within the city were being performed by the workmen who dug the ditch and left it unguarded. At least one of the workmen was in the pay of the city, and, as has been shown, all of them were at the time the ditch was dug engaged in performing work upon the streets of the city which the city is bound to perform by the express terms of its charter. This evidence is not disputed, and, in our judgment, it shows at least *prima facie* that the ditch which was the cause of plaintiff's injury was dug and left unguarded and unlighted by men who were acting under the authority of the city itself. In other words, the negligent act was the direct act of the defendant. Of course, in such a case, the rule that requires actual or

constructive notice to the city of the existence of the defect or obstruction in the streets causing the injury does not apply. Where the city creates the obstruction which causes the damage by its own direct act, it will be conclusively presumed to have notice of the obstruction. *Ringelstein* v. *City of San Antonio*, (Tex. Civ. App.) 21 S. W. 634; *Mayor* v. *Sheffield*, 4 Wall. 189; *Wilson* v. *Troy*, (N. Y. App.) 32 N. E. 44.

Counsel calls attention to the fact that no evidence was offered tending to show that the city, at the time the ditch was dug, or prior thereto, had created the office of street commissioner, and hence that the city could not be held responsible for acts done by a person not shown to be an officer of the city. It is true that no ordinance or other evidence was offered tending to show that such an office as street commissioner existed in the city at or prior to the time in question, and courts cannot take judicial notice that any city organized under the general law has such an office as street commissioner, because no such office or officer is named in the statute. Comp. Laws, § 893. Holcomb's testimony was competent to show that he was the acting street commissioner only when offered in connection with evidence that there was such an officer in the city. Holcomb's evidence would tend to show that he was at least a *de facto* officer, but there can be no such thing as a *de facto* officer until an office is shown to exist *de jure*. "The idea of an officer implies the existence of an office which he holds. It would be a misapplication of the terms to call one an officer who holds no office, and a public office can exist only by force of law." This language is quoted from an opinion of Mr. Justice Field. It will be found cited, with other authority in point, in Throop, Pub. Off. § 638. It therefore does not appear technically that the excavation in question was made under official authority. We think, however this does not relieve the city from liability in a case like this, where the evidence shows that the wrongful act was done by persons engaged in doing work which the law requires the city to do, and one of whom at least is shown to have been in the pay of the city at the time. While it

must be confessed that there is some conflict of judicial opinion upon the point, we think that the decided weight of authority will support the view that incorporated cities are impliedly liable for their wrongful acts where there is no express statute which makes them liable. This is the holding of the Federal Courts. *Weightman* v. *Washington Corp.*, 1 Black, 40; *Nebraska City* v. *Campbell*, 2 Black, 590; *Robbins* v. *City of Chicago*, 4 Wall. 657; *Barnes* v. *District of Columbia*, 91 U. S. 540, and numerous cases cited in the opinion. In the case last cited the court say "that a municipal corporation, holding a voluntary charter as a city or a village, is responsible for its mere negligence in the care and management of its streets. In this respect there is a distinction between the liability of such a corporation and that of a *quasi* corporation, like a county, town, or district. Whether or not this distinction is founded on sound principle, it is too well settled to be disturbed." See, also, *District of Columbia* v. *Woodbury*, 136 U. S. 450, 10 Sup. Ct. 990; Dill. Mun. Corp. § 1018, uses the following language: "Where the duty to keep streets in repair is in terms enjoined upon the corporate authorities, and they are supplied with the means to perform it, there is little difficulty, we think, in holding the corporation liable on the general principle of law, without an express statute declaring the liability." This rule was applied by the late Territorial Supreme Court in *Larson* v. *Grand Forks*, 3 Dak. 307, 19 N. W. 414. The doctrine of implied liability has the the support of a decided preponderance of authority, and we think also the better reason. We deem it unnecessary to make reference to additional cases, as those already cited fully sustain the doctrine of implied liability. As we find no error in the record, the judgment should be affirmed, and such will be the order of this court. All concur.

(57 N. W. Rep. 506.)

JESSIE B. FISHER *vs.* ANTOINE BOUISSON.

Opinion filed December 28th, 1893.

Foreclosure of Mortgage by Assignee—Allegations in Complaint.

An allegation that a mortgage has been assigned to plaintiff, coupled with an averment that plaintiff is the holder and owner of the notes secured by the mortgage, sufficiently shows title to the notes, as well as mortgage, in the plaintiff, although the notes and mortgage appear to be payable to another person.

Allegation of No Other Proceedings—Sufficiency.

A complaint, upon its face, must show whether any proceedings have been had at law, or otherwise, for the recovery of the debt secured by the mortgage. Such complaint must show that no other proceedings than those referred to therein have been had for such purpose. Therefore, *held*, that an averment that no other foreclosure proceedings had been instituted than proceedings to foreclose by advertisement which had been enjoined, is not a compliance with the statute, (§ 5434, Comp. Laws,) and the complaint is therefore vulnerable to demurrer.

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

Action by Jessie B. Fisher against Antoine Bouisson and others to foreclose a mortgage. From an order overruling a demurrer to the complaint, defendant appeals.

Reversed.

John W. Maher, for appellants.

James F. O'Brien, for respondent.

CORLISS, J. Plaintiff's complaint in an action brought to foreclose a mortgage on real property has been demurred to, on the ground that the complaint fails to state a cause of action. The demurrer has been overruled. The defendants appeal. The sufficiency of the complaint is assailed in three particulars. We will discuss them in their order. *First*, it is said that it does not appear that the principal sum secured by the mortgage was due when the suit was commenced The mortgage secure a principal note and several coupon interest notes. The principal note was made payable June 1, 1894, but it contains a provision that, if any interest shall remain unpaid 10 days after it becomes due, the principal and accrued interest shall, at the election of the holder

of the note, become due and collectible by suit or otherwise forthwith, or at any time thereafter, without further notice, as fully as though made payable on demand. At the time the suit was brought, the interest had been in default much more than 10 days, and the complaint contains an allegation that plaintiff elected, under the foregoing provision, to treat the whole sum as due. No demand was necessary. The contract declared that the whole sum in such a case should become due and collectible by suit, without further notice. In providing that it should become due as fully as though payable on demand, there was no intention to require a demand before suit, thus overthrowing the explicit declaration in the same sentence that no other notice should be necessary. The construction of this clause is that the note in such contingency should become as fully due, at the election of the owner, as though no time of payment had been specified. It becomes a note payable immediately. The complaint, therefore, shows that the principal note was due before suit was brought, and no demand was necessary.

It is urged that the complaint is defective, in that it fails to show any title to the principal and interest notes in the plaintiff. The notes and mortgage were executed to the Farmer's Trust Company. There is no direct allegation that these notes, or any of them, have ever been assigned to plaintiff; but there are allegations in the complaint that the mortgage itself has been assigned, and, in addition, there are averments that the plaintiff is the holder and owner of the several notes. It is true that a mere assignment of the mortgage would not necessarily carry with it the notes; but we regard the averment of the transfer of the mortgage, in connection with the allegation that plaintiff is the holder and owner of the notes, as an averment of the assignment of the notes themselves to the plaintiff. Ownership is a fact. Averment of it in a complaint will admit of evidence to establish it. The court might, on motion, compel the plaintiff to be more specific as to the manner in which he obtained title to the notes. But on demurrer the complaint is good. *Brown* v. *Richardson*, 20 N. Y.

473; *Burrall* v. *Railroad Co.*, 75 N. Y. 211-218; *Treadway* v. *Wilder*, 8 Nev. 97; Bliss. Code Pl. § 233; 2 Jones, Mortg. § 1457; *Hays* v. *Lewis*, 17 Wis. 210; *Reeve* v. *Fraker*, 32 Wis. 243; *Foster* v. *Trowbridge*, (Minn.) 40 N. W. 255.

It is also insisted that the complaint fails to show whether any proceedings have been had at law, or otherwise for the recovery of the debt secured by the mortgage. Comp. Laws, § 5434. It is apparent from this and the following section that the complaint must show whether any proceedings to collect the debt have been instituted at any time, and if an action has been brought upon the debt, and judgment recovered, the plaintiff must show that execution has been issued and returned unsatisfied, in whole or in part, before he can maintain a suit to foreclose the mortgage given to secure the debt. The plaintiff must himself show that no proceedings have been had to collect the debt, or if they have been had, just what has been done in such proceedings; and, if it appears that these proceedings have resulted in a judgment upon which no execution has been issued, the foreclosure action must, under § 5436, be dismissed. The language of § 5434 is plain and peremptory: "In an action for the foreclosure or satisfaction of a mortgage, the complaint shall state whether any proceedings have been had at law, or otherwise, for the recovery of the debt secured by such mortgage, or any part thereof; and, if there has, whether any and what part thereof has been collected." The complaint in this action fails to state what proceedings have been had to collect the debt. It sets forth an attempt to foreclose the mortgage by advertisement, and the issuing of an injunction restraining such proceedings; but it nowhere appears that no other proceedings have been instituted to collect the debt. The pendency of several suits upon the principal and different coupon interest notes or the existence of a number of judgments upon such notes, would not be inconsistent with the allegations of the complaint. Plaintiff merely avers that he made an unsuccessful effort to foreclose by advertisement, and that no further steps were taken before the commencement of the action for the

foreclosure of the mortgage. Nothing is said as to whether anything had been done to collect the debt independently of foreclosure proceedings. It is this very fact which the statute requires to be stated in the complaint. The complaint is silent with reference to it. The statute is imperative. The complaint shall state "whether any proceedings have been at law, or otherwise, for the recovery of the debt secured by the mortgage, or any part thereof." We think that the failure of the plaintiff to comply with this requirement of the statute was fatal to his complaint, on demurrer, and the demurrer, therefore, should have been sustained. The order overruling the demurrer is reversed, and the District Court is directed to enter an order sustaining the demurrer. All concur.

(57 N. W. Rep. 505.)

PEOPLE'S BANK OF ST. PAUL *vs.* SCHOOL DISTRICT NO. 52.

Opinion filed December 16th, 1893.

School District Bonds—Strict Compliance with Statute

Where a statute authorized the issue of municipal bonds payable in not less than 10 years from date, bonds issued thereunder, payable in 11 days less than 10 years from date, are void, even in the hands of a *bona fide* purchaser.

Independent Liability of District.

The invalidity of such bonds does not affect the liability, if any, of the municipality, independently of the bonds.

Bona Fide Purchasers—Notice of Law.

It is elementary that even *bona fide* purchasers of negotiable municipal securities are charged with knowledge of all the requirements of the statute under which the securities were issued.

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

Action by the People's Bank of St. Paul against School District No. 52, Barnes County, to recover interest on certain bonds. There was judgment for plaintiff, and defendant appeals.

Reversed.

Edgar W. Camp, for appellant.

Among the provisions of law authorizing the issuance of the bonds in question, of which plaintiff was bound to take notice was the following: "The bonds may be made payable in not less than ten nor more than twenty years from their date." These bonds were dated Sept. 12th, 1884 and are payable on or before Sept. 1st, 1894. School districts have no power to issue negotiable paper save in the manner and form prescribed by law. 15 Am. and Eng. Enc. Law, 1234. *City of Benham* v. *Ger. Am. Bk.*, 144 U. S. 173; *Farmers Bank* v. *School District*, 6 Dak. 255; *Capital Bank* v. *School District*, 1 N. D. 479. It is within the power of a state to prescribe the form in which municipal bonds shall be executed in order to bind the public for their payment. If not so executed they create no legal liability. *Anthony* v. *Jasper Co.*, 101 U. S. 693; *Coler* v. *Cleburne*, 131 U. S. 162; *Norton* v. *Dyersburg*, 127 U. S. 160; *Barnum* v. *Okolona*, 13 Sup. Ct. Rep. 638. *Benham* v. *Bank*, 144 U. S. 173; *Barnett* v. *Denison*, 12 Sup. Ct. Rep. 819; *Brownell* v. *Greenwich*, 22 N. E. Rep. 24. The bonds provide for their payment at Sanborn, D. T., with New York Exchange.—It is contended that this provision rendered the bonds non-negotiable. Sections 4456, 4462, Comp. Laws. *Hughitt* v. *Johnson*, 28 Fed. Rep. 865; *Christian Co., Bank* v. *Goode*, 44 Mo. App. 129; *Windsor Savings Bank* v. *McMahon*, 38 Fed. Rep. 283; *Carroll Co. Sav. Bk.* v. *Strother*, 6 S. E. Rep. 313; *Lowe* v. *Bliss*, 24 Ill. 168; *Bank* v. *Bynum*, 84 N. C. 24; *Saxton* v. *Stevenson*, 23 Up. Can. 503; *Phila. Bk.* v. *Newkirk*, 2 Miles 442; *Read* v. *McNulty*, 78 Am. Dec. 467; *Fitzharris* v. *Leggett*, 10 Mo. App. 527; Edwards on Bills, 140.

G. K. Andrus, for also appellant.

Defendant having offered evidence tending to show fraud and want of consideration, the burden of proof shifted to plaintiff to show that it was a *bona fide* holder of the bonds, and that it purchased without notice of the defenses alleged. *Vosburg* v. *Diefendorf*, 119 N. Y. 357; *Farmers, etc., Nat. Bk.* v. *Noxon*, 45 N. Y.

762; *Grocers Bank* v. *Penfield*, 69 N. Y. 502; *Comstock* v. *Hier*, 73 N. Y. 273; *Seymour* v. *McKinsty*, 106 N. Y. 240. The provisions of statute authorizing the issuance of bonds must be strictly pursued and the purchaser is chargeable with notice of the requirement of law under which they are issued. *Ogden* v. *Daviess Co.*, 102 U. S. 634; *Marsh* v. *Fulton Co.*, 77 U. S. 676; *First Nat. Bk.* v. *Dist. of Doon*, 53 N. W. Rep. 301; *Hayes* v. *Halley Springs*, 114 U. S. 120; *Harshman* v. *Knox Co.*, 122 U. S. 306; *Colęr* v. *Cleburne*, 131 U. S. 162.

White & Hewit, for respondent.

The provision for payment of currect exchange does not render the instrument non-negotiable. *Hastings* v. *Thompson*, 55 N. W. Rep. 968. *Smith* v. *Kendall*, 9 Mich. 241; *Johnston* v. *Frisbie*, 15 Mich. 286; *Bullock* v. *Taylor*, 39 Mich. 137; *Leggett* v. *Jones*, 10 Wis. 35; *First Nat. Bank* v. *Dubuque*, 52 Ia. 378; *Morgan* v. *Edwards*, 53 Wis. 599.

The statute fixing the time when the bonds should be made payable is directory. A substantial compliance is all required. *Clarke* v. *Schatz*, 24 Minn. 300; *St. Paul & M. P. B. Co.* v. *Stout*, 47 N. W. Rep. 974. The point that these bonds were not issued in the manner and form provided by law, was not raised in the court below and cannot be raised here for the first time. 1 Am. and Eng. Enc. Law, 624.

CORLISS, J. The plaintiff has recovered judgment against the defendant upon certain interest coupons of bonds issued by the defendant. That judgment is assailed here on several grounds. We find it unnecessary to allude to them all. In our judgment the bonds are void upon their face. It is elementary that power to issue such municipal securities is derived wholly from statute. The statute may prescribe the conditions on which such power shall be exercised. It may also declare what terms shall be embodied in the bonds it authorizes to be issued. The donee of the power must take it burdened with all statutory requirements, as well with respect to the terms of the bonds to be issued as with

regard to the conditions on which they may be issued. The statute authorizing defendant to issue bonds provides that they "may be made payable in not less than ten nor more than twenty years from their date." The bonds which were issued under this power were dated September 12, 1884, and were in terms payable September 1, 1894. They were therefore made payable in less than 10 years from their date. We do not see how such a bond can be regarded as being authorized by the statute. There is no more power to issue bonds payable 11 days less than 10 years from date than 9 years less. If the question is to depend upon the magnitude of the departure from the statutory requirement, it will be impossible to know where to draw the line. If we ought not to draw it at the period of 11 days, on what principle can we draw it at 30 days, or 6 months, or a year? Authority to issue bonds payable in not less than 10 years from date is not authority to issue them payable in less than 10 years. There is an eminent authority in favor of this view. *Norton* v. *Town of Dyersburg*, 127 U. S. 160, 8 Sup. Ct. 1111; *Barnum* v. *Town of Okolona*, 148 U. S. 393, 13 Sup. Ct. 638; *Brownell* v. *Town of Greenwich*, (N. Y. App.) 22 N. E. 24; *Hoag* v. *Town of Greenwich*, (N. Y. App.) 30 N. E. 842; *Potter* v. *Town of Greenwich*, 92 N. Y. 663. In the case in 148 U. S. and 13 Sup. Ct. the bonds were payable in from 11 to 17 years from date. Under the statute the time of payment was not to extend beyond 10 years from date. Therefore as to some of the bonds, the violation of the statute was only to the extent of making them payable a year later than the statute prescribed; and yet these bonds were held void on this ground. The court did not indicate that the extent of the violation was at all material to the inquiry whether the law had been disregarded. Mr. Justice Shiras, in his opinion says, "Accordingly if, in the present instance, the legislature of Mississippi, in authorizing the town of Okolona to subscribe for stock in a railroad company, and to pay for the same by an issue of bonds, prescribed that such bonds should not extend beyond ten years from the date of issuance, such limitation must be regarded as in the nature of a restriction on the power to

issue bonds. * * * Our conclusion upon the whole case is that the town of Okolona had no power to issue the bonds in suit.' While the statute refers to the date of the bonds as the period within not less than 10 years from which the bonds shall be payable, yet it may be that the true spirit of the provision requires that the time shall be computed from the time of actual issue, where interest is payable only from such time, and not from date, subject of course, to the right of an innocent purchaser to rely upon and be governed by the date of the bonds, when the bonds on their face show that they were payable in not less than 10 years from the date of issue. But this consideration will not help the plaintiff, as it is averred in the complaint that the bonds were not only dated September 12, 1884, but were actually executed and delivered on that day. They also bore interest from that day. No injustice will result from a rigid enforcement of the requirements of the statute in this regard. While the bonds are void, the holder of them can fall back upon the original tranaction, and recover. If he has loaned money to the municipal corporation which it had authority to borrow, he can recover it in a proper action. The want of power in such a case merely affects the form of security issued to evidence the loan. The written obligation is void. Whatever liability there exists independent of such obligation remains undisturbed. *Hoag* v. *Town of Greenwich*, (N. Y. App.) 30 N. E. 842-844.

Plaintiff cannot derive any benefit from its claim that it is an innocent purchaser, because, under all the authorities, even *bona fide* purchasers of such securities are charged with knowledge of the terms of the statute under which the bonds are issued. *Barnett* v. *Denison*, 145 U. S. 136, 12 Sup. Ct. 819. In this case the terms of the statute informed the plaintiff that the bonds must be payable in not less than 10 years from their date, whereas upon their face they appeared to be, and were in fact, payable in less than 10 years from date. We were not cited to any case holding contrary to our ruling; but we have discovered an authority in the Federal Supreme Court which at first glance would appear to be in

conflict with the later cases in that court,—*Rock Creek* v. *Strong*, 96 U. S. 271. The question presented in that case for decision was whether the bonds were void because payable 30 years and 35 days from the date of execution, when they only drew interest at the expiration of 35 days from date, or, in other words, during only the period of 30 years. The bonds were dated September 10, 1872, and were made payable 30 years from October 15, 1872. The statute provided that the bonds should be payable in not more than 30 years from date. It did not appear, as it did in this case, that the bonds were delivered the day they were dated, and, as they were not registered until October 17, 1872, there was some reason for inferring that the real date of issue was October 15, 1872. What makes the essential difference between that case and the one before us, and makes it conclusive that the real date of the bonds, as fixing the time they were to run, was October 15, 1872, is the fact that interest was payable only from that date, and not from September 10, 1872, the nominal date of the bonds. Said the court: "Their legal effect is precisely what it would have been had the date inserted been October 15, instead of September 10, 1872." Had these bonds borne interest from September 10, 1872, the case would have been entirely different. That, then, would have been their actual, as well as their nominal, date. In so far as the case is opposed to the later decisions of the same court it is, of course, in effect overruled by them.

It is urged that this specific point cannot be raised here, because it was not raised in the court below. This rule has no application where it appears that the objection could not have been obviated if made in the trial court. As plaintiff itself avers that the nominal date is also the date of execution and delivery, and therefore the actual date, there is no escape from the conclusion that the bonds are void. Nor is it true that the point was not raised below. The court, against the objection of the defendant, directed a verdict for the plaintiff. To this ruling of the court the defendant excepted. This ruling was erroneous. A verdict should have been directed for the defendant. This error

was an error of law occurring at the trial. It is properly before us. It is for this error that we reverse the order and judgment herein; the action being upon the coupons themselves, and there being no evidence on this record establishing the validity of the debt independently of these bonds. The order and judgment are reversed, and the District Court is directed to dismiss the action. All concur.

(57 N. W. Rep. 787.)

JAMES B. POWER *vs.* J. D. LARABEE.

Opinion filed January 8th, 1894.

Execution Sale—Inadequacy of Price—Sale En Masse—Redemption—Waiver or Right.

Plaintiff in execution sold over 1,700 acres of defendant's land for $96. The land was worth at least $6,800. It was sold in a lump, although consisting of 11 distinct parcels. Defendant, however, attempted to redeem from the sale, and took from the sheriff, and had recorded, a certificate of redemption. In a suit brought by plaintiff in the execution, who had purchased at the sale, to have this certificate of redemption annulled, defendant asserted the validity of his redemption, setting forth facts in his answer to excuse his failure to redeem in time. Defendant paid the balance due on the judgment after receiving credit for the sum for which his property was so sold under execution, and claimed the benefit of such credit by receiving and filing a satisfaction of the entire judgment. He also waited until 16 months had elapsed since the sale, and 4 months since the time for redemption had expired, before questioning the sale. *Held*, that he had waived his right to have the sale set aside for inadequacy of price, and because of the irregularity in selling separate parcels in one mass.

Redemption Adequate Remedy.

Where defendant knows of the sale, and has a fair opportunity to redeem, he cannot have the sale set aside because of inadequacy of price, as the redemption right affords him ample protection against a sacrifice of his property.

Motion to Vacate Sale of Property En Masse.

Where defendant's right of redemption is injuriously interfered with by a sale of several parcels in a lump, the sale will be set aside on motion, if attacked in a reasonable time.

Motion to Vacate Sale—When in Time.

Ordinarily, the defendant must move to vacate the sale for irregularity at least before the redemption period has expired.

Sale of Property in Lump—Voidable.

The sale of separate parcels in a lump does not render the sale void. It is only voidable.

Purchase by Plaintiff.

Nor is a sale void or voidable merely because there is no one present at the sale but the sheriff and the plaintiff, who is the only bidder. Such a sale might, however, under certain circumstances, be set aside.

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

Action by J. B. Power against J. D. Larabee to cancel a certificate of redemption of land sold on execution. From an order vacating the sale, plaintiff appeals.

Reversed.

J. E. Robinson, for appellant.

A statutory direction to sell land on execution in parcels, where it consists of distinct tracts is directory merely and not peremptory. A sale *en masse* is voidable but not void and a motion to vacate the sale comes too late after the year of redemption. Freeman on Ex. 296; *Griswold* v. *Stoughton*, 84 Am. Dec. 409-403; *Cunningham* v. *Cassidy*, 17 N. Y. 276; *Smith* v. *Randall*, 6 Cal. 47; *Vigareaux* v. *Murphy*, 54 Cal. 351; *San Francisco* v. *Pixley*, 21 Cal. 57; *Tillman* v. *Jackson*, 1 Minn. 183; *Lamberton* v. *Bank*, 24 Minn. 218-288; *Bunker* v. *Rand*, 19 Wis. 253, 88 Am. Dec. 684; *Vilas* v. *Reynolds*, 6 Wis. 214; *Raymond* v. *Holburn*, 23 Wis. 57, 99 Am. Dec. 105; *Rector* v. *Hart*, 8 Mo. 448, 41 Am. Dec. 650; *Mohawk Bank* v. *Atwater*, 2 Paige 54; *Cunningham* v. *Felker*, 26 Ia. 117; *Roberts* v. *Flemming*, 53 Ill. 196; *Johnson* v. *Hovey*, 9 Kan. 61; *Bell* v. *Taylor*, 14 Kan. 277; *Wilson* v. *Bronnenberg*, 81 Ind. 193; *Aldrich* v. *Wilcox*, 10 R. I. 405.

The sheriff is presumed to have done his duty and his affidavit is not competent to impeach his official acts. Smith, on Sheriffs 216; *Sheldon* v. *Payne*, 7 N. Y. 453; *Baker* v. *Duffee*, 23 Wend. 289; *Fitzgerald* v. *Kimball*, 86 Ill. 396. By comfirmation the sale is

made the act of the court and the judicial sanction cures all defects and irregularities. Freeman on Ex. 304; *Osman* v. *Traphagen*, 23 Minn. 80; *Voorhies* v. *Bank of U. S.*, 10 Pet. 449; *Montgomery* v. *Samonoy*, 99 U. S. 490; *Koehler* v. *Ball*, 2 Kan. 160, 83 Am. Dec. 451.

The right to avoid a sale *en masse* may be waived by acts of ratification or by neglect to assert the right in time. *Cunningham* v. *Cassidy*, 17 N. Y. 276; *Vilas* v. *Reynolds*, 6 Wis. 214; *Roberts* v. *Flemming*, 53 Ill. 196; *Osman* v. *Traphagen*, 23 Minn. 80; *Griswold* v. *Stoughton*, 84 Am. Dec. 409; *Vigareaux* v. *Murphy*, 34 Cal. 354.

G. K. Andrus & Herman Winterer, for respondent.

There can be no public sale without bidders or bystanders. *Picketts* v. *Unangst*, 15 Penn. St. 90, 53 Am. Dec. 572. A sheriffs sale made with no bidders or bystanders present except the plaintiff is collisive and invalid. *McMichael* v. *McDermott*, 17 Penn. St. 353, 55 Am. Dec. 560. A sale *en masse* or for grossly inadequate price is void. Herman on Ex. 223; *Lurton* v. *Rodgers*, 22 N. E. Rep. 866; *Cohen* v. *Menard*, 24 N. E. Rep. 604; *Ollis* v. *Kirkpatrick*, 28 Pac. Rep. 435; *Garvin* v. *Han*, 18 S. W. Rep. 731; *Jackson* v. *Newton*, 18 Johnson 362; *Weaver* v. *Lyon*, 5 At. Rep. 782; *Bean* v. *Hoffendorfer*, 2 S. W. Rep. 556; *Grim* v. *Reinbold*, 23 At. Rep. 1129; *Fletcher* v. *McGill*, 10 N. E. Rep. 651; *Branck* v. *Foust*, 30 N. E. Rep. 631.

CORLISS, J. The appeal is from an order vacating an execution sale of real estate. At the sale the plaintiff in the execution bid in the property for $96. One of the grounds on which the validity of the sale is attacked is the inadequacy of the price for which the property was sold. There was over 1,700 acres sold at the sale, and it appears that the land was worth at least $4 an acre. That this in adequacy is so gross as to shock the conscience cannot be doubted. In addition it appears that the sheriff of the sale utterly failed to comply with the statute which requires him to offer the land for sale in separate parcels. There were no less than 11 distinct tracts sold in a lump, without even an

attempt to sell them separately. "When the sale is of real property consisting of several known lots or parcels they must be sold separately." Comp. Laws, § 5144. While we are not prepared to say that after a sale has been fairly advertised and conducted, and is regular in every respect, it should be set aside on the sole ground of the inadequacy of the price bid, yet, where the statute requiring a sale in separate parcels has been so grossly violated as in this case, we would have no hesitation in setting aside the sale, were it not for the statute which permits the judgment debtor to redeem from the sale at any time within a year. We cannot see how the debtor can appeal to the inadequacy of the price as a reason for having the sale vacated. The law allows him to overthrow such a sale, to protect him against a sacrifice of his property. Where his title is divested at the sale, his only remedy to protect himself from loss is by attacking the sale itself. But, where a right to redeem after the sale is vested in him by statute, it is not necessary for him to attack the sale to save a sacrifice of his property. Indeed, he will always find it more to his advantage to redeem. By redemption he can wipe out the sale, and destroy the lien of the judgment upon the land, for a trifling sum in comparison with the value of the property on which the judgment was a lien. If the amount bid is less than the amount of the judgment, the defendant, by redemption, secures the same benefit which would accrue to him should the plaintiff voluntarily release the land from the lien of the judgment on payment of only a portion thereof, the land on which it was a lien being worth many times the amount so paid. Where the defendant has full knowledge of the sale, and an opportunity to redeem, the injustice resulting from a sale for an inadequate price will fall, if at all, upon the plaintiff, who may find that the defendant has by redemption secured the release of very valuable property from the lien of a judgment on the payment of a paltry sum upon redemption, leaving the greater portion of the judgment unsecured. It will be an interesting question, when it arises, whether the judgment creditor himself may not have a sale

set aside for gross inadequacy of price when, through excusable mistake on his part, or conduct on the part of the defendant tending to create fears as to the title of defendant, the plaintiff has been deterred from bidding the reasonable value of the land and the full amount due upon his claim, or, in case that amount exceeds the value of the land, has been deterred from bidding the reasonable value of the same. The authorities fully sustain us in our ruling that the right of redemption, where defendant has had knowledge of the sale, and an opportunity to exercise his right of redemption, affords him ample protection against a sacrifice of his property through a sale for an inadequate price. 2 Freem. Ex'n, p. 1050, note; *Mixer* v. *Sibley*, 53 Ill. 61; *First Nat. Bank* v. *Black Hills Fair Ass'n*, (S. D.) 48 N. W. 852-854; *Coolbaugh* v. *Roemer*, (Minn.) 21 N. W. 472.

But there is connected with a sale for an inadequate price, in this case, an irregularity in the shape of the sale of 11 distinct parcels in a lump. What effect has this irregularity in taking the case out of the rule we have just enunciated? The statute makes it the duty of the sheriff to sell separately several known lots or parcels. He should not sell them in a lump. Section 5144, Comp. Laws: "And when the sale is of real property consisting of several known lots or parcels they must be sold separately." This statute was violated. Eleven distinct parcels were sold as one piece. But should the sale be set aside on this account? That depends upon the purpose of the statute and the particular facts of this case. The sheriff is required to sell each parcel separately, for two reasons. One is that the land may bring the best price, and that no more than enough to pay the lien shall be sold; and the other is to enable the defendant to redeem any one or more of the parcels, without being compelled to redeem all the land sold. When sold in a lump it is impossible for him to redeem less than the whole, because their is no basis for redemption of any particular parcel or parcels. Now, so far as the object of the statute is to secure the best price for the property at the sale, the defendant, who has the right to redeem, and has a

fair opportunity to exercise that right, has no interest in the matter. He will always be benefited by a sale like the one in the case at bar, where the property brings less than its value, and less than the amount due upon the judgment. He can redeem, and by redemption he frees his property from a lien for less than the amount due upon the lien, and less than the value of the property. The person who is interested in a sale of separate parcels, so far as the price to be obtained is concerned, is the plaintiff; and it is quite significant that the defendant is not to decide whether the property shall be sold in a lump, or in parcels, against the rights of the plaintiff to have it sold in separate parcels, the statute merely declaring that the defendant may direct the order in which the several parcels shall be sold. Comp. Laws, § 5144. But in so far as a sale in lump interferes with the defendant's right to redeem any particular parcel or parcels, and compels him to redeem property which may not be worth redeeming, and in order to redeem the parcels of value to pay something additional on account of the necessity of redeeming that which it may not be profitable for him to redeem, the duty of the sheriff to sell in separate parcels is absolute. Two parcels of land are sold, one valuable to the owner, the other mortgaged for all it is worth. If sold in a lump, it is impossible to tell how much of the price was bid for the parcel worth nothing to the defendant. The exercise of the right of redemption, therefore, affords him no adequate protection. By reason of the sheriff's failure to obey the statute, the defendant in such a case, if he cannot have the sale set aside, must pay what is bid for both the worthless and the valuable parcel and redeem both, when it would be profitable for him to redeem only one. But if it should appear that the smaller parcel sold was worth more than the total price bid for the whole property, then it would be clear that the defendant had not been prejudiced by the sale in a lump, because it would be profitable for him to redeem such smaller piece by the payment of the total price bid for the whole; and it would be still more profitable for him to be able to redeem at the same time, and in addition, all

the other parcels for the same sum. But in this case we are unable to determine clearly that the defendant has not been prejudiced by the sale of the several parcels in one mass. One parcel consists of only about three acres, and its value may not be more than a trifling sum. Where there is a sale in parcels for an inadequate price, the right of redemption is a sufficient protection against sacrifice; but where the right of redemption is interfered with by selling several parcels in a lump, then it is the duty of the court to set aside the sale, unless the purchaser can show that no possible injury with respect to his redemption right could have resulted to defendant by the disregard of the statute requiring sale in separate parcels. As sustaining our view that in such a case the sale should be set aside, see *Berry* v. *Lovi*, 107 Ill. 612; *Lurton* v. *Rodgers*, (Ill. Sup.) 29 N. E. 866; *Branck* v. *Foust*, (Ind. Sup.) 30 N. E. 631; *Wright* v. *Dick*, (Ind. Sup.) 19 N. E. 306; *Smith* v. *Huntoon*, 134 Ill. 24, 24 N. E. 971; *Graffman* v. *Burgess*, 117 U. S. 180, 6 Sup. Ct. 686; *Cohen* v. *Menard*, (Ill. Sup.) 24 N. E. 604; *Fletcher* v. *McGill*, (Ind. Sup.) 10 N. E. 651.

But we are not necessarily called upon to decide whether the sale should have been set aside under these conditions, as it is apparent that the defendant, by his conduct and delay, has waived his right to attack the sale. He has repeatedly recognized and treated it as valid. He attempted to redeem from the sale, and before this attempted redemption he paid the balance due upon the judgment, and took a satisfaction of the judgment, and had it placed on record. Merely paying the balance of the judgment might not be construed as an acquiescence in the sale; but when after making the payment, the defendant accepted and recorded a satisfaction of the entire judgment, he claimed the benefit of the partial payment resulting from the sale of his land. In his letters to plaintiff's counsel he distinctly states that it is his purpose to redeem. There is no hint to be found in any of them that he claims that the sale is invalid for any reason. To clear up all doubt as to his purpose to abide by the sale, he attempted to redeem therefrom. The sheriff, assuming the redemption to have

been legally made, issued to him a certificate of redemption, which he received and had placed on record. The plaintiff in the execution, who purchased at the sale, having instituted an action to have the redemption certificate annulled, the defendant answered the complaint by asserting anew the validity of the sale, averring that he had redeemed from the sale, and setting forth facts which he claimed excused him from redeeming within the statutory period. To still further emphasize his election not to attack the sale, he waits, not only until after the expiration of the redemption period, but four months thereafter, before making the motion to set aside the sale. Whether the defendant's attempt to redeem was successful, it would not be proper for us to decide in this case. Nor do we wish to be understood as deciding that defendant might not, by suit in equity, be allowed to redeem even after the time had expired, upon making a proper showing excusing his failure to redeem within the statutory time. See, in this connection, *Graffman* v. *Burgess*, 117 U. S. 180, 6 Sup. Ct. 686; *Tice* v. *Russell*, (Minn.) 44 N. W. 886; *Campbell* v. *Leonard*, (Ill. Sup.) 24 N. E. 65; *Trotter* v. *Smith*, 59 Ill. 240; *Honnihan* v. *Friedman*, 13 Ill. App. 226; *Palmer* v. *Douglas*, 107 Ill. 204; *Insurance Co.* v. *White*, 106 Ill. 67; *Griffin* v. *Coffey*, 9 B. Mon. 452; *Adams* v. *Kable*, 6 B. Mon. 384; *Lucas* v. *Nichols*, 66 Ill. 41; *Lurton* v. *Rodgers*, (Ill. Sup.) 29 N. E. 866; *Branck* v. *Foust*, (Ind. Sup.) 30 N. E. 631. But defendant is not seeking to redeem. He is attacking the sale itself. So far he has been successful, despite the fact that the whole trend of his conduct was an emphatic recognition of the sale. It cannot be doubted that a defendant, by his conduct, may waive his right to attack an execution sale as irregular. "Most of the irregularities on account of which sales are set aside may be waived by the parties interested; and this waiver may be presumed from their apparent acquiescence, as well as proved by direct and positive evidence." 2 Freem. Ex'n, § 307; *Tooley* v. *Gridley*, 41 Am. Dec. 628; *Crawford* v. *Ginn*, 35 Iowa 543. See, also, *Rowe* v. *Major*, 92 Ind. 206; *Maple* v. *Kussart*, 53 Pa. St. 348; *McConnell* v. *People*, 71 Ill. 481. The two remedies

are inconsistant. Redemption proceeds upon the theory that the sale is valid and is to stand. After a party has chosen this remedy, has pursued it persistently and has manifested no purpose to attack the sale until after the time for redemption has expired, he cannot, at that late day, change front, and question the validity of the sale he has repeatedly, and for a long time, recognized and affirmed. We do not wish to be understood as intimating that the motion to set aside the sale was made in time. There must be a period after which an execution sale will not be disturbed. All the authorities agree on this point, and there seems to be much force in the view that the defendant must move in a reasonable time, and that, where there is a right of redemption vested by the statute in the defendant, this reasonable time is measured by the statutory period of redemption. 2 Freem. Ex'n, p. 1039, § 307; *Stewart* v. *Marshall*, 4 G. Greene, 75; *Lurton* v. *Rodgers*, (Ill. Sup.) 29 N. E. 868; *Abbott* v. *Peck*, 35 Minn. 499, 29 N. W. 194; *Griswold* v. *Stoughton*, 2 Or. 61; *Raymond* v. *Pauli*, 21 Wis. 531; *Fletcher* v. *McGill*, 110 Ind. 395-406, 10 N. E. 651, and 11 N. E. 779; *Vigoureux* v. *Murphy*, 54 Cal. 346; *Cunningham* v. *Felker*, 26 Iowa, 117; *Fergus* v. *Woodworth*, 44 Ill. 374-378; *Raymond* v. *Holburn*, 23 Wis. 57; *First Nat. Bank* v. *Black Hills Fair Ass'n*, (S. D.) 48 N. W. 852; *Love* v. *Cherry*, 24 Iowa, 210. While it is true that as against the plaintiff, who has bought in the property, the court may set aside a sale even after the redemption period has expired, this can be done only by a proper showing excusing the delay in making the motion. *Fletcher* v. *McGill*, 110 Ind. 395-406, 10 N. E. 651, and 11 N. E. 779; *Lurton* v. *Rodgers*, (Ill. Sup.) 29 N. E. 866; *Branck* v. *Foust*, (Ind. Sup.) 30 N. E. 631; *Land Co.* v *Walker*, (Iowa,) 43 N. W. 294. See, also, *Fletcher* v. *McGill*, (Ind. Sup.) 10 N. E. 651; *Bean* v. *Hoffendorfer*, (Ky.) 2 S. W. 556. It is not necessary for us to decide whether defendant has excused his delay in attacking the sale, as we are clear that he has waived his right to assail it. The learned judge who set aside the sale filed an opinion in which he held that a failure to sell in separate parcels rendered the sale void. We

cannot agree to this proposition. Both principle and authority are against it. The sale is voidable. The defendant may ratify it by his conduct. He may lose his right to assail it by his delay in questioning its validity. We refer to some of the authorities holding that the sale is merely voidable. See authorities cited in 2 Freem. Ex'n, § 296, p. 985, note 7; 12 Am. & Eng. Enc. Law, 216, and cases; *Hudepohl* v. *Mining Co.*, 94 Cal. 588, 29 Pac. 1025; *Reynolds* v. *Tenant*, 51 Ark. 84, 9 S. W. 857; *Lewis* v. *Whitten*, (Mo. Sup.) 20 S. W. 617; *Hoffman* v. *Buschman*, (Mich.) 55 N. W. 458.

The sale appears to have been regarded by the learned judge as void also for the reason that there was no one present thereat except the sheriff and plaintiff's attorney. This ruling was placed upon that provision of the statute requiring the sheriff to sell to the highest bidder. Comp. Laws, § 5144. The reasoning is that there must be at least two bidders at the sale; otherwise, there is no highest bidder. We are clear that this is a too narrow construction of the statute,—one which was never contemplated by the legislature. It would defeat every sale unless the plaintiff could induce some one to bid upon the property. What the statute clearly means is that, after the public have been fairly notified of the sale, the property shall be sold for the best price that can be obtained. It is not necessary that there should be more than one bidder to make a sale a sale at public auction. It is sufficient if the public have been fully advised of the sale by legal publication of notice, and have the right to attend and bid. Those who do not attend the sale assert by their conduct that they do not wish the property at any price. Must the plaintiff's right to collect his judgment be forever stayed because he, alone, is willing to buy the property? We have no doubt on this point on principle, and we are able to cite eminent authority to support our view that the absence of all other bidders did not of itself render the sale either void or voidable. *Learned* v. *Geer*, 139 Mass. 31, 29 N. E. 215; 2 Freem. Ex'n, § 308, pp. 1046, 1047. Such a sale might, under certain circumstances, be set aside, but this case does not present such circumstances. The order vacating the

sale is reversed, and the court is directed to enter an order denying the motion to set aside the sale. All concur.

WALLIN, J., (concurring.) I think the sale of the realty was not rendered absolutely void by the sale of separate parcels in solido, without first offering the parts separately; nor do I think the sale was made void because no one bid at the sale except the creditor; but in my judgment the sale was clearly irregular under § 5144, Comp. Laws, because the parcels were not separately offered before being struck off in mass. Such an irregularity in the sale of real estate upon execution would, for reasons stated at length in the opinion by Judge Corliss, furnish sufficient ground for setting aside the sale by a direct application to the court, made by motion in the action in which the execution issued. The practice of moving by motion in the action to set aside irregular sales is well established, and is a speedy and convenient remedy. But in the case under consideration I am quite clear, for reasons stated fully in the opinion by Judge Corliss that the debtor has lost his right to make the application. He has been guilty of great laches as to time, and has also impliedly waived his rights by his conduct with reference to the sale. I fully concur with the views expressed by Judge Corliss as to the proper disposition to be made of the case, but I prefer to limit my concurrence to the grounds I have mentioned, and do not care to express an opinion upon other features discussed in said opinion.

The order should be reversed.

(57 N. W. Rep. 789.)

JULIUS ROSHOLT *vs.* THEA MEHUS.

Opinion filed January 8th, 1894.

Homestead—Abandonment.

Where a married woman leaves the home of herself and husband, the title to which was in the husband, and remains away nearly three years before claiming any homstead interest in the property, but the husband remains in constant occupancy of the land, keeping his home thereon, such absence alone will not constitute abandonment by the wife of her homestead rights. Whether or not, in such a case, a wife could, under any circumstances, forfeit her homestead rights under our statute, not decided.

Divorce—Effect on Homestead Rights.

In divorce proceedings, it is competent for the court to assign the homestead to the innocent party, either absolutely or for a limited period; but, where the decree in the divorce proceedings is silent upon the question, the homestead will, upon the dissolution of the marriage, remain in the possession of the party holding the legal title thereto, discharged from all homestead rights or claims of the other party.

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

Action by Julius Rosholt against Thea Mehus to determine adverse claims to land. There was judgment for defendant, dismissing the action, and plaintiff appeals.

Reversed.

F. W. Ames and *Carmody & Leslie*, for appellant.

J. H. Bosard, for respondent.

BARTHOLOMEW, C. J. This action was brought to determine adverse claims to a quarter section of land in Steele County. It was heard on an agreed statement of facts, from which the court made two conclusions of law: *First*, that plaintiff was not the owner in fee simple of the land; and, *second*, that defendant was entitled to the possession of the land. The judgment simply dismissed the complaint on the merits, with costs. Plaintiff appeals, and assails the conclusions as not warranted by the facts. On June 10, 1882, one Torkel Mehus, husband of the respondent, Thea Mehus, obtained a patent to said land under the federal

homestead law. Torkel Mehus and respondent continued to reside on said land as their homestead until May, 1887. At that time there were living three minor children, the issue of their marriage. In May, 1887, the respondent, Thea Mehus, taking her minor children with her, left the said Torkel Mehus, and has not lived with him since that time. Torkel Mehus continued in possession of the land, and made his home thereon until the sale thereof, hereinafter mentioned. In January, 1890, the respondent, as the wife of Torkel Mehus, and in behalf of herself and her minor children, attempted to file a declaration of homestead under § § 2458 and 2459, Comp. Laws, and the declaration was recorded in the office of the register or deeds of Steele County. In October, 1890, she brought an action of divorce against Torkel Mehus, on the ground of his adultery; and in January, 1891, the District Court granted her a decree absolute on that ground, and gave her the custody of the three children. In her complaint she prayed the allowance of a reasonable sum for maintenance of herself and children out of the property of her said husband. The decree gave her a gross sum of $250, and $20 per month for the support of herself and children. No order whatever was made relative to the homestead, nor was it mentioned in the complaint. On the 9th day of September, 1891, Torkel Mehus executed a warranty deed of said premises to the appellant, Rosholt. Appellant was a purchaser for value, with no notice of any claim of respondent upon the land, except the constructive notice given by the record of the homestead declaration and the record in the divorce proceedings. Apellant claims under the deed, and respondent claims a homestead interest in the land.

What was the condition of this land as to the homestead character at the time of the rendition of the divorce decree? We think it was the homestead of Torkel Mehus and his family, including this respondent. The legal head of the family had remained in constant occupancy of the land as his home. This preserved its homestead character. The actual presence of the wife is not required for the inception or preservation of the

homestead right, so long as the husband is the head of the family. *Johnson* v. *Turner*, 29 Ark. 280; *Williams* v. *Swetland*, 10 Iowa, 51; *Bradford* v. *Loan & Trust Co.*, 47 Kan. 587, 28 Pac. 702. Without holding that a wife can forfeit her homestead interest in her husband's home, or estop herself from claiming the same by anything short of a contract, but assuming such to be the law, it is yet certain that this record shows no such forfeiture or estoppel. The record does not disclose when the adultery upon which respondent based her action for divorce occurred. If prior to her leaving home, her absence would not imperil her rights, (*Earle* v. *Earle*, 9 Tex. 630;) but, if subsequent, yet it does not appear that she left her home and abandoned all intention to return. It does not appear that she left the jurisdiction, or attempted to establish a home elsewhere. Her effort to file a declaration of homestead would indicate an intention to return. It has grown to be familiar law that, in the absence of express statutory provisions, absence from the homestead for any reasonable time will not amount to abandonment when the *animus revertendi*, always exists, and no other home is created. We repeat, respondent's homestead right existed at the date of the rendition of the decree of divorce, but it so existed by virtue of the fact that she was a member of the family of Torkel Mehus, who with his family, had established his home and their home thereon, and whose occupancy had been continuous. Her rights were in no manner strengthened by the fact that she attempted to place a declaration of homestead on record. Such declaration does not create homestead rights (*Cole* v. *Gill*, 14 Iowa, 527; *Yost* v. *Devault*, 9 Iowa, 60;) nor do we think, although we do not find the point ruled, that it takes the place of continuous occcupancy after the inception of the homestead, except where, as in Minnesota, there is an express statutory provision to that effect. But even then, we suppose, the statute in no manner affects the question of actual abandonment, but might, in a subsequent contest, shift the burden of proof. In this state, when the head of a family owns land in excess of the amount allowed by law for a homestead, and

the land is in one body, and the family resides thereon, the homestead may be selected in any form that may be desired up to the quantity allowed by law as a homestead. Recording a declaration of homestead gives notice to all purchasers, and all parties dealing with or extending credit to the owner, of the exact land claimed as a homestead. This, we think, is the main, and perhaps exclusive, reason for the provision, because a failure to make and file the declaration does not render the homestead liable in execution. It only devolves upon the officer holding the execution the duty of selecting, platting, and recording the homestead. But since respondent's homestead rights vested exclusively upon the fact that she was a member of the family of Torkel Mehus, and since the divorce effectually severed that relation, it follows that her homestead right was destroyed, unless preserved by the statute or the decree. That decree severed the family relation theretofore existing between Torkel Mehus and Thea Mehus. She was no longer a member of his family. She was neither his wife nor his widow, and could claim none of the homestead rights given by law to the wife or widow. The occupancy which created and had preserved for her a homestead right in that land ceased instantly when she ceased to be a member of the family of Torkel Mehus.

But it is claimed that, by virtue of a new relation then created, the homestead right devolved upon her. It is urged that when respondent was devorced from her husband, and given the custody of the minor children, she became the head of the family, and that under such circumstances, when the wife is the meritorious cause of the divorce, she does not, by obtaining a divorce, forfeit her homestead right. The position thus broadly taken does not meet our approval. Whatever support it has in the books originated in *Vanzant* v. *Vanzant*, 23 Ill. 536. In that case the complainant was the divorced wife, who had been given the custody of the minor children. After asserting her right to the homestead as against the defendant, who was a creditor of the husband, the court say: "The spirit and policy of the homestead

act seem to demand this concession, and to regard the complainant, for this purpose, as a widow and the head of a family." The court immediately adds: "But there are other circumstances disclosed by the record which fortify the claims of the complainant to the enjoyment of this property. In the first place, it is abundantly proved that the property was purchased with her own means, and, in the next place, that the court decreeing the divorce assigned it to her as alimony, and for which she holds the deed of the master in chancery, executed under the decree of the court." It is proper to add, also, that the premises, at the time of the divorce, were in the possession of a tenant, who immediately attorned to the divorced wife, and the court held that to be equivalent to actual occupancy by her. This case was followed by *Bonnell* v. *Smith*, 53 Ill. 375, where, also, the wife obtained the divorce and custody of the children, and was decreed the homestead absolutely as alimony, and the court without discussing the matter, stated: "She therefore held it in a double right,—as alimony, under the decree of the court, and as her homestead, by operation of the statute." In this state a decree of divorce which granted to the meritorious wife the homestead absolutely as alimony would forever protect her possession, except in the enumerated cases, where a homstead is liable, irrespective of any construction of the homestead law. But in *Sellon* v. *Reed*, 5 Bliss. 125, also 21 Myer's Fed. Dec. 639, and which arose in Illinois, the decree in the divorce case made no such disposition of the homestead. The fee was in the husband, or we so gather from the case. In the divorce action the meritorious wife obtained custody of the child and alimony in gross. Nothing was said about the homestead, she was in possession, and remained in possession with the child, and she was held entitled to possession, as against her divorced husband's grantee. The case is ruled on the Vanzant case. These cases have been pressed upon us with much confidence, as being a construction by able courts of a homestead law not materially different from our own. The question is now raised for the first time in this jurisdiction. Its decision will

announce a rule of property to be followed hereafter. That rule should be supported by sound judicial reasons. We are forced to say, when it is sought to carry the rule indicted in *Vanzant* v. *Vanzant*, to the extent that is here claimed, that it fails to find support in sound reason, and is entirely unnecessary for the protection of the family. It is true that the homestead estate is created for the benefit of the family, and not for the benefit of the husband and father. *Fore* v. *Fore*, 2 N. D. 260, 50 N. W. 712. And it is true that courts liberally construe homestead laws, for the purpose of effectuating their wise and beneficent intentions, to the end that no family, through the misfortune of poverty or the death of its legal head, may be deprived of shelter, and where the homestead consists of a farm, as in this case, of support. But all the reasons which have induced the law to favor the wife or widow in the matter of homestead rights are entirely absent in cases of divorce. There is no action known to the law wherein the entire property of both parties is brought more directly within the grasp and control of the chancellor than the action for divorce. In this action the chancellor reviews not only the marital rights and wrongs of the respective parties, but their financial status and financial needs. He requires absolute information as to the number, age, and condition of all minor children. He knows it is the duty of the husband and father to support the family and educate the children. He knows that, in case of the death of the husband and father, the law places its hand upon so much of his property as constituted his homestead, and devotes it exclusively to the accomplishment of those purposes which it was the duty of the husband and father to accomplish while living. Where a divorce a viculo is granted to an innocent wife, and she is given the custody of minor children, it is the duty of the chancellor, so far as the circumstances will permit,—and his power in that respect is plenary,—to compensate the innocent family for every right it has lost by reason of the legal separation from an offending husband and father. Under our statute, the court may in such cases require the husband to give security for any payments

ordered to be made to the wife, or for the maintenance of the family or the court may place the entire estate of the husband in the hands of a receiver, in order to secure such payments or maintenance, and the homestead, as such, is specially placed in the control of the court. The statute says, (§ 2585 Comp. Laws:) "The court, in rendering a decree of divorce, may assign the homestead to the innocent party, either absolutely or for a limited period, according to the facts in the case and in consonance with the law relating to homestead." It would appear from this language that the legislature, so far from intending that the homestead should pass to the innocent party by virtue of the statute alone, thought it necessary to give the court express power to so dispose of it by decree. We are entirely unable to see any good reason why, after the chancellor, in the exercise of the broad and liberal discretion in him vested, has given the innocent family every protection the circumstances admitted or their needs required, the law should then step in, and transfer to them, at the expense of the husband, another and very material estate, to-wit: the homestead owned and theretofore occupied by him. Particularly must this be true when, as in this case, the decree of divorce casts upon the husband the continuing duty of supporting that family, by compelling him to pay a certain monthly payment. It is not to be believed that the law will then grasp the very property out of which the husband must realize the money to make those payments, and transfer it to the family, and yet hold him for the payments. We deem it better for the innocent party, better for the fee owner, better as a rule of property, that the interests of the respective parties in the homestead should be fixed by the decree in the divorce proceeding; and, when that decree is silent, the homestead, like all other realty, must remain in the possesion of the party holding the record title, discharged of all homestead rights and claims of the other party; and this we deem the result of the better authorities. *Heaton* v. *Sawyer*, (Vt.) 15 At. Rep. 166; *Wiggin* v. *Buzzell*, 58 N. H. 329; *Biffle* v. *Pullman*, (Mo. Sup.) 21 S. W. 450. The District

Court for Steele County will reverse its judgment, and enter a decree granting the relief prayed for in the complaint.

Reversed. All concur.

CORLISS, J., (concurring.) The respondent, in effect, claims that she had the right, after she had ceased to be the wife of the owner of the property used by them both as a homestead, to eject her former husband therefrom, notwithstanding the fact that he owned the fee. A homestead right is not property which can be sold. It possesses no value independent of the right to possession. If the respondent has a homestead right in the property in question, she has a right to occupy the premises, and she has no other or differenf right. She can occupy them during the balance of her life. Her right of possession is inconsistent with the husband's right of occupancy. They are divorced. The family tie is broken. Unless they remarry, it is contrary to public policy that they should live together as formerly under the same roof. The divorce was granted because the court decided that they ought not to inhabit the same home. The homestead right survives the divorce. *Doyle* v. *Coburn*, 6 Allen, 71; *Biffle* v. *Pullman*, (Mo. Sup.) 21 S. W. 450. In whom is it vested? It cannot belong to both parties. While the family was a unit, it belonged to the family; but, after the union of the family had been destroyed, the homestead right must then have vested exclusively in either the husband or the wife. How can it be claimed that the decree of divorce vested it exclusively in the former wife? That decree, so far from transferring the right from the husband to the wife, struck from under her the very foundation of her claim to a homestead right. This right was given to her as a wife, and after his death she might enjoy it as a widow. After the divorce, she was not his wife, and could never be his widow. The right was given to her because of the duty of the husband to provide her with a home. After the divorce the husband, as such, owed her no such duty. He thereafter owed her no duty whatever as husband. He has ceased to be her husband. Whatever a wife can claim from her former husband after divorce is not as his wife,

but under the terms of the decree of divorce itself. If this gives her the homestead, she can have it. If this gives her alimony, she can have it. But she can have no more. If the decree gives her neither the homestead nor alimony, she is entitled to nothing. Her former husband is no longer bound to furnish her a home. But the decree of divorce in this case did in fact require the husband to pay the respondent monthly alimony for her support. The word "support" embraces not only food, fuel, and rainment; it also includes shelter,—a home to live in. The husband is ordered by the court not to provide her a home, much less to surrender up to her his own home. He is directed to furnish her with a certain amount of funds, with which she is to procure a home for herself. Must the husband, in addition, yield up to her his own home? The mere granting of a divorce cannot work a destruction of the husband's rights, and vest them exclusively in the former wife. Nor is it material that the divorce was for the husband's guilt. There is no statute which in the remotest manner warrants the rule that the husband's guilt should of itself, when followed by a divorce, work the destruction of his homestead right in favor of his former wife. His guilt is a circumstance which will weigh heavily with the chancellor in regulating, by his decree, the future duty of the guilty husband to the women he has wronged. It will lead the chancellor to give the wife the amplest possible support out of the husband's estate and earnings. Frequently it will constrain the court to award to her the homestead, especially when, as in this case, the wife is given the custody of the children. Our statute expressly authorizes the court to do this: "The court in rendering a decree of divorce, may assign the homestead to the innocent party, either absolutely or for a limited period, according to the facts in the case, and in consonance with the law relating to homestead." Section 2585, Comp. Laws. This statute is conclusive against the theory of respondent that the mere fact of a granting of a divorce assigns the homestead right to the innocent party. The statute declares that this assignment must be embodied in the decree itself. The

best possible time to settle all such matters is when all the facts and circumstances are before the court granting the divorce,—the number, age, and sex of the children; the value of the estate of the husband; his capacity to earn money; the degree of his guilt; the position of the parties in society; and such facts as bear upon the questions who should have the custody of the children, and whether it will be better to allow the wife to live on the homestead, or be supported by the husband elsewhere. There is no danger that denying to the mere granting of a decree of divorce for the husband's guilt the effect to assign the homestead right to the wife will work her any injustice. She can and will be fully protected in and by the decree. There is nothing in the fact that the decree awarded to the respondent the custody of the children. When, in such a case, the decree is silent on the point, the father is bound to support the minor children in the wife's custody the same as before divorce. They are still his minor children. The divorce in this case recognized this duty. It required the husband to pay the wife alimony for the support, not only of herself, but of the children intrusted to her care. She was to be paid money by the father to provide a home for them, as well as for herself. So far as the children themselves are concerned, it is clear that their rights depend upon the will of their parents, or the one who is entitled to the homestead. The consent of a child is not necessary to the alienation or abandonment of the homestead. The father having conveyed the fee to another, and thereby destroyed his homestead right, the derivative right of the children was by this conveyance destroyed; the consent of the mother to the conveyance being no longer necessary, she having ceased to be the father's wife. The statute gives the wife or widow the homestead right in her husband's real estate used by them as a home. When there is neither a wife nor a widow to claim a joint right with a husband he is the sole owner of such homestead right when he is the owner of the property itself. This is true of the wife, also, as to property owned by her.

Her husband's homestead rights in such property cease when he ceases to be her husband, unless continued in him by the decree of some court of competent jurisdiction.

(57 N. W. Rep. 783.)

STATE *vs.* THEODORE F. KERR.

Opinion filed February 19th, 1894.

Indictment "In the Name and by the Authority of the State."

Where an indictment is properly entitled "*State of North Dakota* v. *A. B*," and shows on its face that it was properly presented by "the grand jury of the State of North Dakota in and for the County of Griggs," it sufficiently appears therefrom that the prosecution is carried on in the name, and by the authority, of the State of North Dakota.

Intoxicating Liquor—"Sell and Give Away."

An indictment that charges "that at said time and place the said A. B. did sell and give to one C. D., as a beverage, certain intoxicating liquors, to-wit, one-half pint of whisky," is not bad for duplicity. It is a general rule that where a statute mentions several things disjunctively as constituting one and the same offense, all punishable alike, and the whole may be charged conjunctively in a single count, as constituting a single offense.

Election Between Offenses.

When the evidence showed more than one sale of whisky by the defendant to the person named in the indictment within one year prior to the finding of the indictment, and when the witness could not fix the date of any particular sale, it was not error in the trial court to refuse to require the prosecution to elect upon which specific sale it relied for conviction.

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

Theodore F. Kerr was convicted of selling intoxicating liquors unlawfully, and brings error.

Affirmed.

Taylor Crum for plaintiff in error.

The prosecution is not carried on in the name and by the authority of the State of North Dakota. Section 97, Art. 4 Const. *Saine* v. *State*, 14 Tex. App. 144; *Hay* v. *Peo.*, 59 Ill. 95; *Cox* v. *State*, 34 Am. Rep. 746; *State* v. *Hazeldahl*, 2 N. D. 521.

The indictment charges both the sale and giving away in one count and therefore charges more than one offense, and is not direct and certain as regards the particular circumstances of the offense charged. *State* v. *Pischel*, 20 N. W. Rep. 848; *Smith* v. *State*, 48 N. W. Rep. 823; *State* v. *Henn*, 40 N. W. Rep. 564; *Peo.* v. *Dumar*, 13 N. E. Rep. 327; *State* v. *Vorey*, 43 N. W. Rep. 324; *State* v. *Smith*, 2 N. D. 515.

W. H. Standish, Atty Gen'l for defendant in error.

The indictment may charge the commission of the several acts conjunctively and as constituting altogether one offense. *State* v. *Bielby*, 21 Wis. 206; *Davis* v. *State*, 100 Ind. 154; *Fahnestock* v. *State*, 102 Ind. 156; *Clifford* v. *State*, 29 Wis. 327; *Brown* v. *Com.* 8 Mass. 59; *Peo.* v. *Casey*, 72 N. Y. 393; *Com.* v. *Dolan*, 121 Mass. 374; *Barnes* v. *State*, 20 Conn. 232; *State* v. *Schweitzer*, 27 Kan. 499.

BARTHOLOMEW, C. J. This was a prosecution by indictment for a violation of the statute prohibiting the sale of intoxicants. The indictment was in the following words: "State of North Dakota, County of Griggs—ss.: District Court, Fifth Judicial District. *The State of North Dakota* v. *Theodore F. Kerr.* Indictment. The grand Jury of the State of North Dakota in and for the County of Griggs upon their oaths present that heretofore, to-wit: on the first day of May, in the year of our Lord one thousand eight hundred and ninety-three, at the County of Griggs, in said State of North Dakota, one Theodore F. Kerr, late of said County of Griggs and state aforesaid, did commit the crime of unlawfully selling and giving away intoxicating liquors as a beverage, committed at follows, to-wit: That at said time and place the said Theodore F. Kerr did sell and give to one Julius Stevens, as a beverage, certain intoxicating liquors, to-wit, one-half pint of whisky." This was duly signed by the foreman of the grand jury and the state's attorney, and presented in open court May 11, 1893. The defendant filed the following demurrer to the indictment, ommitting title: "Now comes the defendant, and demurs to the indictment filed herein on the 11th day of May, 1893, for

the reason that the same does not state facts necessary to constitute a public offense; and for the further reason that the same is not in concise and ordinary language, sufficient to apprise the defendant of the exact nature of the charge against him; and for the further reason that the prosecution does not, on its face, purport to be carried on in the name, and by the authority, of the State of North Dakota." The demurrer was overruled, and exception saved. A subsequent motion to quash raised the point that defendant was not apprised by the indictment whether he was charged with selling or giving away intoxicants, and that he was charged with both. This motion was also overruled, and exception saved. The trial resulted in a verdict of guilty, and defendant sued out a writ of error from this court.

It is first urged by plaintiff in error that it does not appear from the indictment that the prosecution is carried on "in the name and by the authority, of the State of North Dakota," as required by § 97 of the state constitution. We had occasion to discuss the provision in *State* v. *Hazledahl*, 2 N. D. 527, 52 N. W. 315, and we call attention to the authorities there cited. In that case we said: "The information is not entitled in an action in which the state appears as a party, nor in any action; nor does the information aver in terms or indirectly, that the defendant is prosecuted either in the name, or by authority of the state;" and this was held to be "a plain violation of the explicit mandate of the state constitution." But an inspection of the indictment in this case discloses that it supplies the specific defects which led us to hold the information bad in the Hazledahl case. By § 7241, Comp. Laws, the title to the action, "specifying the names of the parties," is made a part of the indictment. Hence it appears from the indictment that the prosecution is in the name of the state, and by the state, which means by the authority of the state. Further, the indictment is presented by "the grand jury of the State of North Dakota in and for the County of Griggs." It thus appears, indirectly but certainly, that the prosecution was carried on in the name, and by authority, of the state. That is all that

the constitutional provisions requires. It is not necessary that such facts should be specifically recited. See *State* v. *Thompson*, (S. D.) 55 N. W. 725, where, under the same constitutional provision, an indictment indentical with the one in this case on the point in question was sustained.

The second assignment of error presents the point, both under the demurrer and motion to quash, that the indictment charged in the same count both selling and giving away, and was therefore not direct and certain as regards the particulars of the offense charged, and was bad for duplicity. Section 7244, Comp. Laws, declares that the indictment must charge but one offense. Does this indictment charge more? We think not. Section 1, Ch. 110, Laws 1890, reads as follows: "Any person, association or corporation, who shall, within this state, directly or indirectly, manufacture any spirituous, malt, vinous, fermented or other intoxicating liquor, or shall import any of the same for sale, or gift as a beverage, or shall keep for sale, or sell, or offer for sale or gift, barter or trade, any of such intoxicating liquors, as a beverage, shall for the first offense be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than two hundred (200) dollars nor more than $1,000, and be imprisoned in the county jail not less than ninety days nor more than one year; and for the second and every successive offense, shall be deemed guilty of a felony, and be punished by imprisonment in the state's prison for a period not exceeding two years and not less than one year; provided, that registered pharmacists under the laws of this state may sell intoxicating liquors for medicinal, mechanical, scientific, and wine for sacramental purposes as hereinafter provided." Under this statute the offense may be committed in several different methods, but these methods are stated in the disjunctive. The indictment charges that the defendant "sold and gave." It is said in Bishop on Criminal Procedure, (volume 1, § 436:) "It is common for a statute to declare that if a person does this, or this, or this he shall be punished in a way pointed out. Now, if, in a single transaction,

he does all these things, he violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore, an indictment upon a statute of this kind may allege, in a single complaint, that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction 'and' where the statute has 'or' and it will not be double, and will be established at the trial by proof of any one of them." In *State* v. *Bielby*, 21 Wis. 204, the complaint charged that the defendant did vend, sell, deal and traffic in, and give away spirituous and intoxicating liquors, etc. The court said: "It is objected that the complaint is bad for duplicity because the several acts named in the statute, if charged separately, would each constitute a distinct offense. This may be so, but still the complaint is not double. An indictment in such case may pursue language of the statute charging the commission of the several acts conjunctively, and as constituting altogether one offense, in which case there can be but one conviction and one punishment, as for one offense." In *Com.* v. *Dolan*, 121 Mass. 374, the court said: "Whether the defendant exposes or keeps for sale, or both keeps and exposes it, is but one offense, and a complaint charging both is good, and is supported by proof of either." See, also, *Clifford* v. *State*, 29 Wis. 327; *State* v. *Schweiter*, 27 Kan. 499; *People* v. *Casey*, 72 N. Y. 393; *Com.* v. *Atkins*, 136 Mass. 160; *Davis* v. *State*, 100 Ind. 154, and *Fahnestock* v. *State*, 102 Ind. 156, 1 N. E. 372. If this sound and salutary principle was less firmly established by the decisions, we should be required to apply it in this case, because § 17 of the prohibition act declares that the giving away of intoxicating liquors shall be deemed an unlawful selling, within the provisions of the act. The indictment charges nothing more than a selling under the statute, and would be sustained by proof of either a technical sale or a gift.

Plaintiff in error further urges that it was error to allow the state to prove separate and distinct acts, when only one act was charged, and upon defendant's request the state should have been required to elect upon which act it relied. The learned counsel

relies upon *Boldt* v. *State*, 72 Wis. 7, 38 N. W. 177; but in that case the evidence covered sales at different dates, to different parties, of different intoxicants, and the court charged: "If you are satisfied by the evidence, beyond a reasonable doubt, that the defendant did, * * * on the 10th day of May, or the 11th day of June, 1886, or at any day between these two days, sell to any one, deal in to any one, vend to any one, or give away to any one, with intent to evade the law of this state, spirituous, malt, ardent, or intoxicating liquors or drinks, your verdict should be guilty." The Supreme Court of Wisconsin refused to sustain a conviction under these circumstances. But the facts in the case at bar are very different. There was but one witness sworn for the state, and that was the party to whom it was charged the plaintiff in error sold half a pint of whisky. There was no evidence showing sales to any other party, or of any different kind or quantity of liquor. The charge of the court was confined to a sale to that specific party, of that specific kind and quantity of liquor, but was not specific as to the time of the sale, the court charging that, if the sale was made within one year prior to the finding of the indictment, that was sufficient. The date of the sale, while placed within a year, was not definitely fixed by the evidence. But the evidence did tend to show that the witness procured whisky of plaintiff in error on more than one occasion during the year. Plaintiff in error is a physician, and proprietor of a drug store. The witness says that he sometimes purchased the whisky on a prescription from the plaintiff in error, and sometimes without such prescription. The witness was unable to state any specific dates. Under these circumstances we think the refusal of the trial court to require the prosecution to elect the particular sale upon which it would rely for conviction was not error. Such a requirement, if it had any effect, would tend directly to defeat justice. Plaintiff in error knew, when the indictment was read to him, that it would be sustained by proof of the sale of one-half pint of whisky to Julius Stevens at any time within a year prior to the finding of the indictment. He must be prepared to meet

and repel evidence of such sales. He cannot plead surprise. Moreover, we think a conviction in this case will bar any other prosecution against plaintiff in error for the sale of whisky to Julius Stevens at any time prior to the finding of the indictment herein. See *State* v. *Smith*, 22 Vt. 74; *State* v. *Crimmins*, 31 Kan. 376, 2 Pac. 574. This latter case is an exact precedent for our holding. That opinion embraces two cases. The evidence showed different sales to different parties in each case. The court required the prosecution to elect as to the person to whom the sales were made, and the prosecution did so elect. But the evidence showed different sales to the person thus selected. The defense then sought to compel the prosecution to elect upon which of several sales of particular liquor to a specific person it would rely for conviction. This the court refused to do; and the Supreme Court of Kansas, in sustaining the ruling, after adverting to the general doctrine requiring an election, said: "But, while the prosecution is required to elect in such cases, he is required to elect only in furtherance of justice, and the rule is never carried to the extent of working injustice. A court in such cases has some discretion, and it should exercise that discretion in the interests of justice. In the present case the court required the prosecution to elect, and he did elect, but he failed to make the election as definite and certain as the defendant desired. In each case the election was to rely for conviction upon a sale of whisky, in one case made by the defendant to George Dunham, and in the other case made by the defendant to William Thornton. In either case the only thing indefinite or uncertain was the date of the sale; but the prosecutor could not have made the election much more definite in this particular, for the evidence itself was not as definite as it ought to have been. The defendant in each case was informed by the information, the evidence, and the election, taken together, with respect to the person to whom the liquor was sold, the place where sold, and time when sold, though the time was not fixed very definitely, and the liquor claimed to

have been sold was whisky. * * * We think the election of the county attorney, under the circumstances of the present case, was sufficient."

Lastly, it is claimed that the verdict lacks support in the evidence. We think otherwise. It would be useless to reproduce the testimony, but we think the verdict has support both in the testimony of the state and in that of plaintiff in error himself when on the stand. Finding no error in the record, the judgment is affirmed.

CORLISS, J., concurs.

WALLIN, J., (concurring specially.) I concur with my associates in affirming the judgment of conviction. Defendant, upon being arraigned, interposed a demurrer to the indictment upon the grounds stated in the opinion of the Chief Justice; but defendant omitted to demur either upon the ground that the indictment charged more than one offense, or upon the ground that it was not direct and certain as regards the offense charged, or the particular circumstances of the offense charged. Both of said omitted objections are available to a defendant, and may be raised by demurrer, (Comp. Laws, § § 7292, 7242, and subd. 2, § 7249;) but both of said objections are waived by omitting them from a demurrer interposed, or by a failure to demur at all, (Comp. Laws, § 7300.) The trial court having overruled defendant's demurrer to the indictment, defendant was permitted to file a motion to quash and set aside the indictment upon precisely the same two grounds of demurrer, which, as already said, were not assigned as causes of demurrer, but were omitted from the demurrer. The motion to quash was, for reasons which are manifest, properly overruled. The objections came too late, and did not come in proper form. Under the system of criminal practice and procedure existing in this state, there is no room or place for a motion to quash or set aside an indictment or information upon any ground which is available by demurrer, and no such motion should be allowed at any time, and especially should not be

allowed after a demurrer has been overruled. Before demurring to an indictment, certain enumerated objections thereto, and perhaps others, may be raised by motion to set aside; but, if such motions are overruled, the statute expressly requires the defendant to either demur or plead "immediately." Comp. Laws, §§ 7283, 7286. After a verdict of guilty, the defendant interposed a motion in arrest of judgment, and, among other grounds of such motion, assigned the same grounds above referred to as being omitted from the demurrer, and afterwards incorporated in defendant's motion to set aside and quash. The motion in arrest of judgment was denied, and the ruling is assigned as error. The ruling certainly was not error as to the two objections omitted from the demurrer. The objections were not available upon a motion in arrest of judgment. Defendant could waive such objections, and had waived them, by failing to assign such objections as causes of demurrer to the indictment. Comp. Laws, § 7452. It is clear that the indictment contained a statement of facts sufficient to constitute a public offense; and I think it further clearly appears that the prosecution was conducted in the name, and by the authority, of the State of North Dakota. Defendant did not except to any feature of the instructions given to the jury, and after a careful reading of such instructions I am convinced that the law applicable to the case was clearly and fairly stated to the jury. There is, in my judgment, ample evidence in the record to sustain the verdict.

(58 N. W. Rep. 27.)

NOTE:—Where there were two counts in an indictment, one for giving away, and the other for selling spirituous liquors, a verdict of guilty was sustained. *Bruguier* v. *United States*, 1 Dak. 5, 46 N. W. Rep. 502. It is not necessary to describe in the indictment the premises where liquor is sold, the person to whom sold, or the particular kind or quality of liquor sold. *Peo.* v. *Sweetser*, 1 Dak. 295, 46 N. W. Rep. 452. Upon the conviction of two or more jointly indicted for the sale of intoxicating liquor the judgment must be several against each for the full penalty. *Peo.* v. *Sweetser*, 1 Dak. 295, 46 N. W. Rep. 452. The evidence of one witness that he purchased whisky, is sufficient to sustain a conviction. *Territory* v. *Pratt*, 6 Dak. 483. For decisions under "Local Option Law" see *Territory* v. *Pratt*, 6 Dak. 483; *Territory* v. *O'Connor*, 5 Dak. 397.

Article 20 of the state constitution is not self executing. *State* v. *Swan*, 1 N. D. 5, 44 N. W. Rep. 592. This article was legally adopted as part of the constitution.

State v. *Barnes*, 3 N. D. 319, 55 N. W. Rep. 883. The "Prohibition Law" Ch. 110, Laws 1890, is not in conflict with § 61, Art. 2 of the constitution which provides that "No bill shall embrace more than one subject which shall be expressed in its title." *State* v. *Haas*, 2 N. D. 202, 50 N. W. Rep. 254; *State* v. *Barnes*, 3 N. D. 319, 55 N. W. Rep. 883. This act was legally passed and does not inflict cruel and unusual punishments. *State* v. *Barnes*, 3 N. D. 319. By an opinion of the Supreme Court of the United States filed April 28th, 1890—it was held that imported liquors remaining unsold in the original packages in the hands of the importer were not subject to the jurisdiction of the state by reason of the commerce clause of the federal constitution. *Leisy* v. *Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681. In August, 1890, the "Wilson Bill" was approved. It provides that intoxicating liquors taken into any state are to be subject to the laws of such state, not exempting original packages. 26 Stat. L. 313 Supp. Rev. St. U. S. 779. This is a valid enactment and not a delegation of legislative power. No new act of the legislature is required to put this law in force within the state. *State* v. *Frazer*, 1 N. D. 421, 48 N. W. Rep. 343; *in re* Speckler, 43 Fed. Rep. 653; *in re* Van Vleit, 43 Fed. Rep. 761.

STATE *vs.* LOUIS G. MARCKS, *et al.*

Opinion filed February 19th, 1894.

Assault With Dangerous Weapon—Lesser Offense Included.

The offense of an aggravated assault with a dangerous weapon, committed with intent to do bodily harm, as defined by § 6510, Comp. Laws, necessarily includes in its commission a simple assault, but the offense does not necessarily include in its commission the offense of assault and battery.

More than One Offense Charged—Demurrer.

Accordingly, *held*, construing § 7244, Comp. Laws, where defendants were charged in the information with the aggravated assault defined in § 6510, and with such charge there was blended in the same count a sufficient charge of assault and battery, that it was error to overrule a demurrer to the information interposed upon the ground that it stated more than one offense.

Conviction for Assault and Battery—Judgment Arrested.

Upon the trial the jury were instructed, in effect, that if the evidence failed to show beyond a reasonable doubt that the defendants were guilty of the aggravated assault charged, but did show them to be guilty of assault and battery, they could find defendants guilty of the latter offense. The jury returned a verdict of guilty of assault and battery. A motion in arrest of judgment was overruled. *Held* error, construing § 7429, Comp. Laws.

Error to District Court, McIntosh County; *Lauder*, J.

Louis G. Marcks and Joseph Miller were convicted of assault and battery, and bring error.

Reversed.

Gaffy & Gunderson and *Charles Mitschrick*, for plaintiffs in error.

The information charges "with intent to injure." The express language of the statute should have been followed. *State* v. *Clark*, 45 N. W. Rep. 910; *State* v. *Harrison*, 45 N. W. Rep. 777; *People* v. *Keefer*, 18 Cal. 636; *People* v. *Jacobs*, 29 Cal. 579.

The information attempts to charge two separate and distinct offenses, the lesser not being included in the greater. *Turner* v. *Judge*, 50 N. W. Rep. 310; *Moore* v. *Peo.*, 26 Ill. Ap. 137; *Swecden* v. *State*, 19 Ark. 205; *State* v. *Smith*, 52 N. W. Rep. 320.

W. H. Standish, Att'y Gen'l. and *A. W. Clyde, States Attorney*, for the state.

WALLIN, J. The plaintiffs in error were arraigned and tried upon an information filed against them by the state's attorney of McIntosh County, and were convicted of assault and battery, and sentenced to pay a fine of $75 each, and be imprisoned in the county jail for a period of 10 days. Motions in arrest of judgment and for a new trial were made and overruled, and a bill embracing exceptions was settled. Such portions of the information as are deemed important in the decision of the questions raised on the record are given below: "Comes now A. W. Clyde, state's attorney, within and for said county and state, and herewith informs said court and says that a public offense, namely, the crime of assault with intent to do bodily injury, has been committed by said defendants in the manner following, to-wit:" The information then sets out that the defendants were, at the time and place stated, armed with dangerous weapons, which are described, and that being so armed, the defendants "did willfully, unlawfully, feloniously, and without justifiable or excusable cause, assault, and with said dangerous weapons then and there, and with great force and violence, strike, beat, cut, bruise, and dangerously wound and injure one Andreas Gunther, with the intent on the

part of them, the said Louis G. Marcks and Joseph Miller, and each of them, then and there, unto the said Andreas Gunther, to do bodily harm and injury; contrary to the statute in such case made and provided, and against the peace and dignity of the State of North Dakota." To the information plaintiffs in error filed separate demurrers, and alleged the followiug causes of demurrer: "*First*, that said information does not substantially conform to the requirements of the statute in that the offense is not stated; *second*, that more than one offense is attempted to be charged in said information; *third*, that the facts stated do not constitute a public offense." The demurrers were overruled, and defendants excepted to the ruling; whereupon the parties pleaded not guilty, and were tried before a jury. At the close of the testimony, the court instructed the jury as follows: "The jury are instructed that if you fail to find the defendants, beyond a reasonable doubt, guilty of the crime alleged in the information, to-wit, assault with a dangerous weapon with intent to do bodily harm, then and in that case you may, if you find beyond a reasonable doubt, that defendants are guilty of the crime of assault and battery, render a verdict against them for the crime of assault and battery." An exception was saved to the above instruction to the jury. The following is the verdict: "We, the jury, find the defendants guilty of the crime of assault and battery,"—to which verdict the defendants excepted. Among other errors assigned in this court are, *first*, that the court erred in overruling the demurrers; *second*, erred in giving said instructions to the jury; *third*, erred in overruling defendants' motions in arrest of judgment; *fourth*, erred in denying defendants' motion for a new trial.

The information is obviously framed to charge the defendants with committing the statutory felony defined in the first part of § 309, Pen. Code, (§ 6510, Comp. Laws.) This particular offense was not, however, named nor correctly described in general terms in the formal accusation which precedes the stating or charging part of the information. In the preliminary accusation the pleader has used certain language which indicates a purpose to frame

the information under said section, but the language falls short, in that it omits to state that the assault was made with dangerous weapons, and thereby only a simple assault is stated. Such an error ought to be avoided, as the introduction is important, although not essential. The error is not one of substance.

The information is in one count, and an examination will show that the language employed in its stating or charging part is a good deal involved, and far from being lucid as a statement of the offense sought to be charged. But, in our opinion, when the language is taken all together and fairly construed, it will be found to embrace the essentials of the statutory offense of an assault with a dangerous weapon, made without justifiable or excusable cause, and with intent to do bodily harm. The only difficulty in reaching this conclusion arises with reference to the words used in charging the intent with which the assault was made and the person upon whom it was made. Such averments are, of course, vital in charging the statutory offense defined in § 6510, and it must be confessed that the information contains no independent allegations which charge the defendants with assaulting Andreas Gunther with the felonious purpose named in the statute. But the accusation of an armed assault is made in terms, and closely connected with this charge are averments charging defendants, then and there, with an assault and battery committed with the same weapons upon the person of Andreas Gunther, with the specific felonious purpose named in the statute. The averment is certainly inartificial, and not to be commended, but we have concluded that the words employed incorporate a charge to the effect that defendants, when armed with dangerous weapons, and without justifiable or excusable cause, made an assault upon Gunther, with the felonious intent of doing him bodily harm. From this conclusion it follows that the demurrer to the information upon the ground that the facts stated do not constitute a public offense was properly overruled.

But it also clearly appears that the information embodies a charge against defendants of committing another offense, *i. e.* the

common-law offense of assault and battery. The last named offense is one which is independent of the statutory felony defined in § 6510, and does not constitute an element of that offense. It is true that the information charges, in effect, that the assault and battery was committed with dangerous weapons, and with the felonious intent stated in the statute; but, after striking out such averments as surplusage, (and they are surplusage,) there is still left a sufficient charge of the independent crime of assault and battery. It follows that the demurrer to the information upon the ground that it stated more than one offense was well taken, and it was therefore error to overrule the same. For this error the judgment of conviction must be reversed. The information being fatally defective, no conviction under it can be sustained. The question presented upon this branch of the demurrer arises upon § 7244, Comp. Laws, which reads: "The indictment must charge but one offense." We have quite recently had occasion to construe this statute. See *State* v. *Smith*, (N. D.) 52 N. W. 320. The case we are now considering is ruled by that cited.

As prosecutions under the statute in question are frequent, we will, as a guide for future cases arising under it, dispose of one other assignment of error. As has been seen, the trial court instructed the jury, in effect, that if the evidence satisfied them beyond a reasonable doubt that the defendants were not guilty of the felonious charge, but were guilty of assault and battery, they could find defendants guilty of the offense of assault and battery. The jury returned a verdict for assault and battery. An exception to the instruction was saved, and a motion for a new trial was made. We think, however, that the point could have been as well presented on a motion in arrest of judgment, which was also made. Code Cr. Proc. § 425; Comp. Laws, § 7452. We are of the opinion that it was error to overrule the motion in arrest of judgment, not simply alone, and because the information was invalid in that it charged two offenses, but upon the further ground that no conviction for assault and battery can be had under an information

charging the particular felony created by § 6510 of the statute. We are clear that assault and battery is not a lower degree of the statutory crime, and that it is not an essential element in the greater offense. A simple assault is necessarily a part of the aggravated assault, but an assault and battery is not. Under the statute of this state, (§ 7429, Comp. Laws,) "the jury may find the defendant guilty of any offense the commission of which is necessarily included in that upon which he is charged in the indictment." *State* v. *Johnson*, (N. D.) 54 N. W. 547, (3 N. D. 150.) Under the rule of exclusion, this section must be so construed as to exclude all offenses which are not necessarily included in the commission of the higher offense charged in the information or indictment. The offense described in § 6510 is one which can be and often is consummated without a battery, and hence assault and battery is an offense not necessarily included in the commission of the statutory felony. It matters not that in this case the information charges an assault and battery, when armed with dangerous weapons, and with intent to do bodily harm. These averments charge no offense other than simple assault and battery, which offense, as has been seen, is not an essential element of the felony charged in the information. *Turner* v. *Muskegon, Circuit Judge*, (Mich.) 50 N. W. 310; *Territory* v. *Dooley*, (Mont.) 1 Pac. 747; *People* v. *Keefer*, 18 Cal. 637; *State* v. *White*, 45 Iowa. 325. The essential averments in describing the crime defined in the first part of § 6510 are few and simple. No battery should be charged even in those cases in which the proof will show that a battery was in fact committed in the act constituting the felonious assault. For the reasons already stated, the judgment of conviction in this case must be set aside, and case remanded for further proceedings, not inconsistent with this opinion. All concur.

(58 N. W. Rep. 25.)

GLOBE INVESTMENT CO. *vs.* A. T. BOYUM, *et al.*

Opinion filed February 19th, 1894.

Appeal—Assignments of Error.

Appellant having failed to assign errors, the judgment is affirmed, under court rule No. 15.

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

Action by the Globe Investment Company, successors of the Dakota Mortgage Loan Corporation, against Ause T. Boyum and John S. Boyum. There was judgment for plaintiff, and defendants appeal.

Affirmed.

J. E. Bishop, for appellants.

Fred B. Morrill, for respondent.

CORLISS, J. The appellant has failed to assign any errors on this appeal as required by court rule No. 15. For this omission the judgment will be affirmed, inasmuch as we see nothing in the record to justify us in relaxing the rule. All concur.

(58 N. W. Rep. 339.)

KELLOGG, JOHNSON & CO. *vs.* O. H. GILMAN, *et al.*

Opinion filed February 19th, 1894.

Inconsistency Between Verdict and Judgment.

Where in an action against a firm composed of two persons, the jury renders a general verdict only, in favor of plaintff and against defendant, it is error for the court, while such verdict remains in the record, to render judgment against the plaintiff, dismissing the action as to one member of the firm, with costs.

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

Action on promissory note by Kellogg, Johnson & Company, a

corporation, against O. H. Gilman and another. From the judgment rendered, plaintiff appeals.

Reversed.

Phelps & Phelps, for appellant.

Sauter & Fraine, for respondents.

BARTHOLOMEW, C. J. This case must be reversed upon the sixth assignment of error. The other assignments need not be noticed, as the matters of which complaint is made may not occur upon another trial. Only so much of the case will be stated as is necessary for an understanding of the point ruled.

Plaintiff is a corporation. The defendants, O. H. Gilman and Gilman Lykken, were co-partners in the mercantile business under the firm name of O. H. Gilman & Co. It was a special partnership, O. H. Gilman being the general partner. This firm became indebted to plaintiff for goods purchased, and an action was begun on the indebtedness. Subsequently, plaintiff's agent visited defendants, and a settlement was reached. At that time, defendants owed plaintiff $1,133.95. Plaintiff offered to take $1,000 cash. Defendant Gilman Lykken learned that the bank would pay $1,000 for the firm's note for $1,133.95. Thereupon, the firm note for $1,133.95 was executed and delivered to plaintiff, and by plaintiff indorsed to the bank, and the $1,000 paid by the bank to the plaintiff. On the same day the plaintiff's agent, who then knew of the special partnership, without the knowledge or consent of Gilman Lykken, induced O. H. Gilman to execute to plaintiff the firm note for $100, apparently to make good, to that extent, the discount that plaintiff had suffered. It is upon this latter note that this suit is brought. Lykken knew nothing of the execution of the note until service of the summons. These facts were brought out in the evidence, and, at the close of the testimony, plaintiff moved the court to direct a verdict for plaintiff for the full amount of the note. The motion was granted, and, pursuant to the instruction, the jury returned a general verdict in favor of plaintiff and against defendants for the amount of the note. Subsequently, plaintiff moved for judgment against both

defendants, but the court ordered judgment on the verdict against O. H. Gilman, and in favor of plaintiff, for the amount of the verdict and costs. This judgment was duly entered. More than three months thereafter, the court ordered a further judgment against plaintiffs, dismissing the action as to Gilman Lykken, with costs. This judgment was also entered, and from it plaintiff appeals to this court, and assigns the rendition of the judgment as error, because contrary to the verdict. This assignment is clearly good. If there was error in the instruction to the jury, that error could not be cured by disregarding the verdict returned in accordance with the instruction. The verdict might be set aside for misdirection, on proper application. But a verdict that is general only must control, so long as it remains in the record, and any judgment on the verdict must correspond thereto. This is elementary. The District Court will reverse the judgment appealed from, and direct a new trial as against Gilman Lykken.

Reversed. All concur.

(58 N. W. Rep. 339.)

THOMAS HAVERON *vs.* H. T. ANDERSON, *et al.*

Opinion filed March 3rd, 1894.

Claim and Delivery—Burden of Proof.

Where, in an action to recover the possession of goods and chattels, the plaintiff alleges, as ground of action, that he is the owner of the property, and plaintiff's allegations of ownership are put in issue by the answer, and title alleged in the defendants, the burden of proving ownership at the trial is with the plaintiff, and a failure to introduce evidence tending to show plaintiff's ownership is fatal to the plaintiff's case.

Striking Out Evidence—Directed Verdict.

Accordingly, *held*, in such case, where, at the close of the case, it appeared that the defendants were the owners of the property in controversy, and plaintiff had offered no testimony tending to establish ownership in himself, that it was not error in the District Court, on motion of the defendants, to strike out of the record all evidence offered by plaintiff to support his claim of ownership; nor, after striking out such evidence, was it error to direct the jury to return a verdict to the effect that the defendants were the owners of the property, and entitled to a return thereof.

Question of Value for Jury.

Held, further, in such case, that it was not error, the value of the property being in dispute, to submit the question of value upon the evidence for the consideration of the jury.

Motion to Strike Out Evidence.

Certain evidence examined, and *held*, that a motion to strike out such evidence was properly denied.

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

Action in claim and delivery by Thomas Haveron against H. T. Anderson and another. There was judgment for defendants, and plaintiff appeals.

Affirmed.

Phelps & Phelps, for appellant.

Sauter & Fraine, for respondents.

WALLIN, J. This is a claim and delivery action brought to recover the possession of a quantity of grain,—wheat, oats, and barley,—which grain, it is admitted, originally belonged to the defendants, and was in their possession when the plaintiff caused it to be taken out of defendants' possession and removed to Minto, where it was sold and disposed of by the plaintiff. It is conceded that plaintiff threshed a large quantity of grain for defendants in the year 1891, and that, upon settlement had upon December 21st of that year, it was found that defendants were indebted to plaintiff on account of said threshing in the sum of $670, for which amount the plaintiff, on December 22, 1891, filed a claim for a thresher's lien. The lien covered all the grain in controversy in this action. In his original complaint, plaintiff bases his right to recover the possession of the grain in question upon a claim of special property therein arising upon such thresher's lien. For reason which do not appear of record, the trial court, on motion of plaintiffs counsel, struck from the complaint all allegations therein relating to the thresher's lien. As amended, the complaint was in the ordinary form, and alleged that plaintiff was the general owner of the grain, and that defendants had unlawfully taken, and were then unlawfully detaining,

the same from the plaintiff, and demanded a return of the grain or its value, *i. e.* $670. Defendants' answer, as amended, alleged title in defendants, and contained a denial of the plaintiff's ownership, and of the unlawful taking and detention, and demanded judgment for the return of the grain or its value, laid at $1,005. It will be convenient to state here that the original answer of the defendants was responsive to the original complaint, and joined issue upon the averments as to the alleged thresher's lien of the plaintiff, and also set out, as a counterclaim, that the plaintiff unlawfully took from the possession of the defendants, and converted to his own use, certain quantities of wheat, oats, and barley. On plaintiff's motion, this alleged counterclaim was stricken from the answer, but at the trial the defendant H. T. Anderson, against plaintiff's objection, was allowed to testify as to the quantity and kind and value of the grain removed by plaintiff from the possession of the defendants. A motion to strike out such testimony was denied. At the close of the testimony, on motion of defendants' counsel, the trial court struck from the record all evidence relating to plaintiff's ownership of the grain in suit, and directed the jury to find a verdict for the defendants, and find the value of the grain at the time it was taken out of defendants' possession by plaintiff. The only question submitted to the jury was as to the value of the grain when taken. The following is the verdict: "We, the jury in the above entitled action, find for the defendants that they are the owners of the wheat, oats, and barley described in the complaint, and are entitled to a return thereof." The verdict then found the value of each kind of grain separately, and the total value at $587.67 Judgment was entered on the verdict, and, after a bill of exceptions was filed, plaintiff appealed from the judgment. There is no claim in this court that the verdict as to the kind, quantity, or value of the grain is not justified by the evidence. No error of this character is assigned.

Appellant assigns three errors predicated upon the rulings of the trial court. Briefly stated, such errors are as follows: *First*,

That it was error to strike from the record all evidence relating to the plaintiff's alleged ownership of the grain; *second*, that it was error to overrule plaintiff's motion to strike from the record all evidence given by H. T. Anderson touching any grain taken out of defendants' possession by plaintiff, which motion was made upon the ground that such evidence had reference only to the grain described in defendants' counterclaim, which counterclaim had been stricken out; *third*, that it was error to instruct the jury to find a verdict for defendants. We are of the opinion that these assignments of error cannot be sustained. The principal issue in the case, arising upon the amended pleadings, was that of general ownership of the grain, which was alleged in behalf of both parties. Plaintiff had the burden of showing that he had title and ownership of the grain in suit when the action commenced. Failing in that, his taking possession and disposing of the grain was, for the purposes of this action a trespass *ab initio*. We think his evidence signally failed, and did not tend in the least, to show that the original title to the grain had been transferred to him by the defendants, who raised the grain. We do not feel justified in reciting the evidence in detail. It has been carefully read and considered by each member of the court, and we are all of the opinion that no evidence was offered tending to show a sale of the grain to the plaintiff. It appears that, at different times in the summer of 1892, negotiations were had between the plaintiff and his agents and attorney on one side, and the defendants on the other. Several interviews took place. Plaintiff and those representing him were urging defendants to pay said threshing bill to plaintiff, and defendants were informed that, unless payment was made promptly, legal proceedings under the lien would be instituted, and that plaintiff would replevin the grain in question, and that a sale under legal proceedings must then follow. It seemed to be taken for granted that legal proceedings to foreclose the lien would be expensive, and that such proceedings should be avoided if possible. It appears that defendants' teams were busy at that time, and hence defendants could

not haul the grain from their farm to town; but the parties agreed that it was fairly worth four cents per bushel to transport the grain from defendant's farm to market, and that plaintiff should procure teams, and transport the grain to market for that sum per bushel. The arrangement was that plaintiff should take the defendants' wheat, and apply it, at an agreed price per bushel, to discharge plaintiff's claim for threshing; and, as the amount of the defendants' wheat was then not definitely known, it was further agreed that the shortage in wheat, if any, should be made good out of defendants' barley and oats, then in defendants' possession. The barley and oats necessary to pay the bill were to be taken to market, and disposed of by plaintiff to the best advantage, and the proceeds applied upon the balance not paid by the wheat. But no agreement was made between the parties as to the price of the oats or barley; on the contrary, the price was left uncertain as well as the quantity. Under this arrangement, plaintiff's attorneys sent one Lawrence Herie with wagons to defendants' premises, with instructions to haul away the grain. Herie went to defendants' granary, and loaded on his wagons a part of two loads of wheat,—some 50 or 60 bushels,—when both defendants appeared, and forbade him from taking or removing the grain. Why this was done does not appear. The wheat on the wagons was taken away, and put in an elevator. The balance of the grain in suit was taken in this action by the sheriff, and by him removed, and sold to satisfy the lien. Herie was a witness for plaintiff; and, after describing the loading of the wheat on his wagons, as before stated, he was asked: "Q. And you took possession for whom? A. Took posssession of the wheat under your instructions as plaintiff's attorney to foreclose the lien; took possession under the agreement that I had with Mr. Anderson." The sheriff testified for the plaintiff, and, among other things, said: "I took this wheat, oats, and barley, in this action under the claim and delivery proceedings." Also: "I did the best I could, and this wheat and grain was sold under a foreclosure of the thresher's lien. The barley would only bring 20 cents, and

the oats were worth what I sold them for,—20½ cents per bushel." Comment upon this evidence would be superfluous. We do not see, in the whole testimony, a *scintilla* of evidence looking to a transfer of title from the defendants to plaintiff. We fail to discover in the evidence as much as a proposition to buy the grain outright. All of the negotiations looked to a sale in the market to avoid foreclosure proceedings. Even this arrangement was receded from by the defendants and the grain was then taken and sold to foreclose the alleged lien. The original complaint also indicates that, when the action commenced, the plaintiff's counsel was of the opinion that the grain was taken to foreclose a lien; but that theory was abandoned at the trial, and no attempt was made to justify under the lien. In this state of the evidence, it was not error to strike from the record all evidence, or pretended evidence, of a sale of the grain by the defendants to plaintiff; nor was it error to instruct the jury to find a verdict for defendants that they were the owners of the grain, and entitled to a return thereof. There being some conflict in the evidence as to the quantity and value of the grain taken, it was proper and necessary to submit the question of kind and value to the jury; and this was done, and their verdict upon this feature is in no wise assailed in this court.

One of the defendants testified as to the quantity and value of the grain taken by plaintiff from defendants' premises, and the court allowed this testimony to remain in the record, and refuse to strike it out, upon the ground that it was not competent or relevant, after the court had stricken the counterclaim from the answer. This is assigned as error, but we cannot sustain the assignment. The complaint charged that plaintiff was the owner of certain grain described, and that it was of a certain value; also, that defendants unlawfully took, and unlawfully detained, said grain from the plaintiff, to plaintiff's damage in the sum of $700. The amended answer denied all of these averments, and alleged "that plaintiff wrongfully disposed of said property, and converted the proceeds thereof to his own use." Defendants prayed

for a return of the property or its value, alleging its value at $1,005. The fact that plaintiff caused the grain to be removed from defendants' possession and sold was shown by plaintiff, and was conceded. This being true, it was important to ascertain the kind and value of the grain removed; and, until this was shown by testimony, no intelligent verdict would be possible. Under the pleadings, it was therefore competent for defendants, as well as plaintiff, to put in evidence upon these vital features of the case.

The judgment must be affirmed. All concur.

(58 N. W. Rep. 340.)

ROESLER & WHITE *vs.* F. W. TAYLOR.

Opinion filed March 3rd, 1894.

Personal Property Exemptions—Statute Not Repealed by Constitution.

Section 208 of the constitution of North Dakota, which provides that "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,"—does not, in the absence of legislation thereunder, repeal or annul the pre-existing exemption laws, under which a partnership firm was entitled to claim one exemption of $1,500 out of the partnership assets.

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

Action by Emil R. Roesler and Ralf E. White, partners, against F. W. Taylor, sheriff, for an injunction. Plaintiffs had judgment, and defendant appeals.

Affirmed.

Ed. Pierce, for appellant.

Robert J. Mitchell, for respondents.

BARTHOLOMEW, C. J. The respondents Roesler & White, were partners in business. A judgment was obtained against them, as such partners, upon a partnership debt, and execution was issued

thereon, and levied upon all of their partnership property; whereupon, they made a verified schedule of all their partnership property, which amounted in value to less than $1,500; and served the same upon the officer having the execution, and who is appellant herein, with notice that they claimed the property upon which he had levied, as their exemptions, and demanding its release. The officer refused to release, and respondents commenced an action against him, and procured an injunction restraining the sale of the property. From the order granting the injunction the officer appeals to this court, and it is agreed that the only question involved is whether or not a partnership as such, is entitled to any exemption, under the constitution and laws of this state. Sections 5126 to 5140, inclusive, of the Comp. Laws, which were in force in the late Territory of Dakota, allowed the debtor, whether the head of a family or not, to hold personal property to the amount of $1,500 exempt from sale on execution, upon complying with the requirements of the statutes, and also provided that a partnership firm could claim one exemption of $1,500 out of the partnership property. Such was the law at the time of the adoption of our constitution, which provided, in § 208 thereof as follows: "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. This section shall not be construed to prevent liens against the homestead for labor done and materials furnished in the improvement thereof, in such manner as may be prescribed by law." No subsequent legislation has been had, fixing or in any manner providing for, exemptions of personal property. Section 2 of the schedule of the constitution continued in force all existing laws of the Territory of Dakota not repugnant to the provisions of the constitution. Did the adoption of the constitution repeal, in effect, in whole or in part, the then existing exemption laws? This must be answered in the negative.

In *State* v. *Swan*, 1 N. D. 5; 44 N. W. 492, we had occasion to examine at length a similar question, and that case and the authorities there cited must control this. It it very clear that said § 208 of the constitution is not, of itself, an exemption law. Under it, alone no exemption could be enforced by any process known to the law, because it fixed no specific exemption, and exemptions, being unknown to the common law, can exist only by virtue of specific constitutional or statutory provision. If, then, that constitutional provision repealed the pre-existing exemption laws, the citizens of this state were left, from the time of the adoption of the constitution until such indefinite time in the future as some legislature might see proper to fulfill the moral obligation imposed by the constitution, without any exemption laws whatever. Our constitution makers never intended such results. Without passing upon the constitutional provision in any other particular whatever, it is clear to us that one of its purposes was to guarantee to every resident head of a family in this state an exemption of a homestead and certain personal property. Appellant's contention is that, by the terms of the guaranty, it deprives the citizen of the very benefit which it sought to confer upon him. The conclusion is entirely unwarranted. It may be true that the constitutional provision empowers or requires the legislature to enact a law repugnant to existing exemption laws. But the provision itself is not repugnant. Nor need we decide whether or not it would be competent for the legislature now to enact a law extending exemptions to others than heads of families. It is enough to know that the legislature, acting under the constitution, has not attempted so to do; and the constitutional provision itself is powerless to repeal the pre-existing laws, because it is without force or effect until supplemented by the legislative action, which it, in terms, requires. *Williams* v. *Mayor*, 2 Mich. 560, and *Goldman* v. *Clark*, 1 Nev. 610, cited in the Swan case, are particularly pertinent to this case. The order appealed from is affirmed. All concur.

(58 N. W. Rep. 342.)

L. B. MINER *vs.* FRANCIS & SOUTHARD.

Opinion filed March 3rd, 1894.

Justice Summons—Return Day Must be Named.

A summons issued by a justice of the peace, returnable, not on any particular day, but on the seventh day after service thereof, does not contain a direction for the defendant to appear and answer before the justice at a time specified in the summons, and service of such a summons will not give the court jurisdiction of the person of the defendant.

Special Appearance—Not Voluntary.

After defendants had appeared specially, and objected to the jurisdiction of the court on the ground that the summons was not sufficient to confer jurisdiction, and after the court had overruled this objection, they appeared generally, and answered. *Held*, that such appearance was not a voluntary appearance, and did not waive the defendants' objection to the jurisdiction of the court.

Objection Not Waived by Appeal.

Nor was such objection waived, or any jurisdiction over the defendants conferred, by their appeal to the District Court, and subsequently to this court, for the sole purpose of reviewing the question of the sufficiency of such summons.

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

Action by L. B. Miner against O. W. Francis and H. C. Southard. There was judgment for plaintiff, and defendants appeal. Reversed.

H. C. Southard, for appellants.

A defendant has a right to appear for the purpose of moving to dismiss a defective summons and it is error in the court to refuse him that privilege. Nor does the fact that he afterwards appears and answers, waive his right or cure the error. *Lyman* v. *Milton*, 44 Cal. 631; *Deidesheimer* v. *Brown*, 8 Cal. 340; *Bell* v. *Good*, 19 N. Y. Sup. 693; *Morris* v. *Graham*, 51 Fed. Rep. 53. This doctrine is not opposed to *Lyon* v. *Miller*, 2 N. D. 1.

Edgar W. Camp, for respondent.

By answering on the merits the defendant waived objection to jurisdiction. *Walker* v. *Turner*, 42 N. W. Rep. 918; *N. P. Ry. Co.* v. *DeBush*, 20 Pac. Rep. 752; *Kaw Valley Life Ass'n* v. *Lemke*, 19

Pac. Rep. 337; *Daily* v. *Kennedy*, 31 N. W. Rep. 125; *Yorke* v. *Yorke*, 55 N. W. Rep. 1095; *Allen* v. *Coates*, 11 N. W. Rep. 132; *White* v. *Merriam*, 19 N. W. Rep. 703; *Freeman* v. *Burks*, 20 N. W. Rep. 207; *Elliott* v. *Lawhead*, 1 N. E. Rep. 577; *N. Y. & B. M. Co.* v. *Gill*, 2 Pac. Rep. 5; *Stephens* v. *Bradley*, 8 So. Rep. 415; *Ry. Co.* v. *Caldwell*, 19 Pac. Rep. 542; *Sealy* v. *Cal. L. Co.*, 24 Pac. Rep. 197; *Upper Miss. T. Co.* v. *Whittaker*, 16 Wis. 220; *St. Louis Car Co.* v. *Stillwater St. Ry.* 54 N. W. Rep. 1064. By appealing to the District Court appellants waived all objection to jurisdiction. *Col. Cen. Ry. Co.* v. *Caldwell*, 19 Pac. Rep. 542; *Dunn* v. *Haines*, 23 N. W. Rep. 501; *Pearson* v. *Kan. Mfg. Co.*, 15 N. W. Rep. 346; *Shawaug* v. *Love*, 17 N. W. Rep. 264; *Adams Exp. Co.* v. *St. John*, 17 Ohio St. 641; *Hurford* v. *Baker*, 23 N. W. Rep. 339; *Dikeman* v. *Mrotek*, 45 N. W. Rep. 118; *Barnum* v. *Fitzpatrick*, 11 Wis. 81; *Ruthe* v. *G. B. & M. Ry. Co.*, 37 Wis. 344; *Blackwood* v. *Jones*, 27 Wis. 498.

CORLISS, J. This action was originally commenced before a justice of the peace. The defendants first appeared specially before the justice, and moved to set aside the summons in the action for the reason that no time was therein specified for the appearance of the defendants. This motion was overruled. Defendants excepted. Thereafter, they answered the complaint in the action; reserving, however, their objection to the jurisdiction of the court because of the alleged insufficiency of the summons. Judgment having been rendered against them, they appealed to the District Court on questions of law only. No new trial was demanded or had. Being defeated in that court, the defendants have brought the case here for review on the single question of jurisdiction.

We think that the justice should have sustained defendants' motion to dismiss because of the defect in the summons heretofore mentioned. The summons did not, on its face, specify any definite return day. It required the defendants to appear before the justice on the seventh day after the service of the summons upon them, exclusive of the day of service. The summons must

contain "a direction that the defendant appear and answer before the justice at his office at the time specified in the summons." Comp. Laws, § 6053. The time was not specified in the summons. It was only by reference to an extrinsic fact that the return day could be ascertained. The statute provides that the summons itself shall specify the return day. That day must be fixed by the summons, and appear upon its face, without reference to a future, uncertain event. The day for the appearance of the defendants in this case could not be determined by an inspection of the process. It was fixed, not by the summons alone, but by the volition of the officer having the process to serve. Until it should please him to serve it, it could have no fixed return day. Should he serve it on such a day that the return day would fall on Sunday or a legal holiday, the summons, which it is claimed is valid when issued, would become illegal by the act of a ministerial officer. This would not result from the fact that it was served on a day on which process could not be legally served, but because the ministerial officer had fixed the return day on Sunday or a legal holiday. Counsel for respondent urges that the summons is as valid as it would be if it contained a statement that it was returnable in seven days after date. But the analogy fails in a vital particular. Such a summons, unlike the one in the case at bar, would, upon its face, and by reference to its language alone, fix the return day without the necessity of a resort to extrinsic evidence. What would be the return day of a summons like that issued in this case, where it was served on two defendants on different days? As to the two defendants, it would be returnable on different days. One must appear on one day, and one on another day.

But it is insisted that defendants, by their general appearance after their objection to the summons had been overruled, and by pleading to the merits, made a voluntary appearance; that such an appearance conferred jurisdiction; and that, as the only objection here made relates to the jurisdiction of the court, it is immaterial whether the court erred in deciding that it had jurisdiction,

for, even assuming all its proceedings to have been illegal before the voluntary appearance, from that time it was vested by the defendants' voluntary action with full jurisdiction over their persons. If the subsequent general appearance can be regarded as voluntary, the respondent's position cannot be successfully assailed. But we do not think it was voluntary. It was not like an appearance under threat of a justice to take jurisdiction without color of authority. In such a case, the defendant, being in no danger of prejudice from refusing to appear, could hardly be said to have been forced to make an appearance to protect himself. Such an appearance would be voluntary. But here there was a summons, although it was defective, and here there was a legal service of this summons. The court having overruled defendants' motion, the defendants were compelled by the joint action of the justice and the plaintiff—by the action of the justice in overruling the motion, and the action of plaintiff in persisting in his suit after he had been apprised of the defect in the summons—to defend, or take the risk of being defeated on the question of jurisdiction after it was too late to be heard on the merits. Some of the courts which hold an appearance under such circumstances to be voluntary deem it unfair that the defendant should have the chance of defeating a judgment on the merits by sustaining the jurisdictional point on appeal, while he enjoys the certainty of sustaining the judgment, if favorable to himself. But it often happens that, upon the trial of an action, reversible error is committed by the court while plaintiff is proving his case. Must the defendant then be regarded as waiving such error because he proceeds, with the chance of reversal if defeated? It is well to put the responsibility for this condition where it belongs. That the defendant enjoys this advantage is owing to the action of the plaintiff, in persisting in his prosecution of the case after he has been fairly warned by the defendant that he will, at all stages of the action, insist upon his contention that the court had no right to take jurisdiction of his person. Let the plaintiff dismiss, and start anew, if he is unwilling that defendant should enjoy this

advantage. We are aware that there are a number of cases in which the contrary view is adopted; but we feel that the rule which we establish in this case is more in accord with principle, and more equitable in its spirit, having in view the interests and rights of both plaintiff and defendant in the action. We hold that a general appearance after an objection to jurisdiction has been overruled, does not constitute a voluntary appearance, unless the contrary is shown, provided the defendant seeks a review of his objection to the jurisdiction of the court in the very action in which it is made. Of course, it is clear that a defendant may make a voluntary appearance after such an objection is overruled. That it was his purpose to make such an appearance would be conclusively established by his abandoning the point after judgment, by not seeking to review it on appeal. Hence, such a judgment would never be vulnerable to collateral attack on the ground that the appearance was not voluntary. There is an intimation to the contrary in *Jones* v. *Jones*, (N. Y. App.) 15 N. E. 707-709, but what was said was only obiter. As sustaining our ruling that the subsequent general appearance was not voluntary, and that, therefore, the judgments of the District Court and of the justice of the peace should be reversed, and the case dismissed, on the ground that the justice never acquired jurisdiction over the persons of the defendants, because there was neither service of legal process nor a voluntary appearance, we cite the following cases: *Harkness* v. *Hyde*, 98 U. S. 476; *Warren* v. *Crane*, 50 Mich. 301, 15 N. W. 465; *Dewey* v. *Greene*, 4 Denio, 94; *Walling* v. *Beers*, 120 Mass. 548; *Jones* v. *Jones*, (N. Y. App.) 15 N. E. 707; *Benedict* v. *Johnson*, (S. D.) 57 N. W. 66; *Avery* v. *Slack*, 17 Wend. 85; *Deidesheimer* v. *Brown*, 8 Cal. 339; *Kent* v. *West*, 50 Cal. 185; *Lyman* v. *Milton*, 44 Cal. 635; *Lazzarone* v. *Oishei*, (Super. Bluff.) 22 N. Y. Supp. 267.

It is further contended that defendants, by appealing to the District Court, have waived all objections to the jurisdiction of the justice of the peace. We are at a loss to discover how the act of invoking the jurisdiction of an appellate court to correct an

error in the proceedings can be construed as a waiver of such error. No case can be found to support such a doctrine. Authorities opposed to it can be cited: *Craighead* v. *Marton*, 25 Minn. 41; *Shaw* v. *Moser*, 3 Mich. 71. See, also, *Freer* v. *White*, (Mich.) 51 N. W. 807. The cases cited by respondent are some of them like the case of *Lyons* v. *Miller*, 2 N. D. 1, 48 N. W. 514, where the appellant did not merely ask for a review of the case upon the record made below, but invoked the jurisdiction of the appellate court to have the action tried anew upon the merits. None of the cases cited by respondent to sustain his position on this point support this contention under statutes similar to ours. The appellants in this case appealed solely upon questions of law. They invoked the jurisdiction of the District Court for no other purpose than to have reviewed the ruling of the justice that the summons was sufficient. The statute declares that either party may have on the appeal the benefit of all legal objections made in the Justice Court. Comp. Laws, § 6132. The judgments of the District Court and of the justice of the peace are reversed, and the action dismissed. All concur.

(58 N. W. Rep. 343.)

FRED H. SMITH *vs.* NORTHERN PACIFIC RY. CO.

Opinion filed February 24th, 1894.

Opinion of Witness—But Not His Belief Competent.

Upon a question of identity, where a witness is unable to speak positively, he may state his opinion based upon his own observations, but will not be permitted to give his belief resulting from certain extrinsic facts and circumstances, where such facts and circumstances are of a character which can be intelligently considered by the jury. In such cases the witness should state the facts and circumstances which furnish the grounds of his belief, and leave the inference to be drawn by the jury.

Unresponsive Answers Stricken Out.

Where a witness gives unresponsive answers to questions, and thereby thrusts improper testimony before the jury, such answers should be stricken out, and, if such answers are prejudicial to a suitor, it is reversible error to refuse to strike them out if a timely motion is made for that purpose.

Fires—Identity of Engine—Belief of Witness.

Where the identity of an engine drawing a certain train of cars was a material question for the jury, a witness (who was about a half mile distant from the train when it passed) was asked, "State if you know, the number of the engine drawing the train," and answered, I believe it was number 44." On cross-examination he was asked, "What was the number of the engine?" and answered, "I believe it was number 44." He was then asked. "Do you know that this was engine number 44?" and answered, "It is my honest belief that it was engine 44. It was her day to run. Her engineer was on it, and the railroad dispatcher would not deny it." A motion was promptly interposed to strike out said answers of the witness. The answers were not responsive, as they gave only the belief of the witness resulting from a course of reasoning deduced from facts and circumstances as to which the jury was as well qualified to judge as the witness.

Appeal from District Court, La Moure County; *Rose*, J.

Action by Fred H. Smith against the Northern Pacific Railroad Company to recover damages from fire set by defendant's locomotive. There was judgment for plaintiff, and defendant appeals.

Reversed.

Ball & Watson, for appellant.

S. L. Glaspell, for respondent.

WALLIN J. This action is brought to recover damages done to plaintiff's property by a fire alleged to have been negligently

started by the defendants. The complaint alleges, and the undisputed testimony shows, that the damaging fire occurred on the 6th day of April, 1889. It is undisputed that the fire started in dry grass at a point outside the defendant's right of way, and about 118 feet distant from the railroad tracks, and that from the point of ignition the fire spread to plaintiff's premises, and there destroyed the property of the plaintiff. The fact is clearly shown and not disputed, that the fire in question sprang up immediately, or within a few moments after one of the defendant's passenger trains going west had passed a point adjacent to where the fire originated, and that such train passed that point about 12 o'clock noon on the 6th day of April, 1889. It is conceded that, if defendant's train started the fire at all, it did so by throwing out fire or sparks from the passenger train in question. When the plaintiff rested his case, the train which set out the fire had been clearly identified, but at that time no testimony had been offered tending to establish the identity of the engine which drew the train, by its number or otherwise, unless the evidence of one Reese, who testified in plaintiff's behalf, tended to identify such engine as engine No. 44. As we have determined that the evidence of Reese furnishes the data upon which our decision must turn, we will reproduce its material features, as given at the trial. Reese lived in the vicinity, and, after testifying that he saw the fire about 15 minutes after it started, and that he saw the train pass the point about noon, he was asked as follows: "Q. State, if you know, the number of the engine drawing the train which you say went through a few minutes before the fire started. A. I believe it was number 44. Q. State, if you know, the name of the engineer on the train. A. Knowles. Q. Do you know whether or not this engine 44, run by this engineer, Knowles, started other fires on or about the 6th of April, 1889? A. I know positively. Q. State all you know of this. A. About the 9th or 10th of March, 1889, it started a fire near my place, within two rods of culvert 131. It started another one on what we call 'McNay's Crossing.' That was a few rods east of where it started

this fire of Fred H. Smith. That fire was on the north side of the track, and this fire of culvert 131 was on the north side. There was a fire about every week. Q. State fully about these other fires that were caused by engine 44." The witness stated that he was present at all the other fires testified to, and that he stayed right at home, because he was afraid to go away on account of the destructive work of engine 44. "Q. In the case of each of these fires, had engine 44 gone through just before the fire started? A. Yes; in each case. I saw the fires start as the engine went by." Cross-examination: "Q. How far were you from the fire when you first saw it. A. About half a mile. Q. What was the number of this engine? A. I believe it was number 44. Q. Do you know that this was engine 44? A. It was my honest belief that it was engine 44. It was her day to run. Her engineer was on it, and the railroad dispatcher would not deny it. Q. You know it was engine number 44 that started these other fires you testified to? A. Yes." The evidence of Reese, above quoted, was admitted against the repeated objections of defendant's counsel, made upon the grounds that it was incompetent, irrelevant, and immaterial; and counsel also moved promptly to strike out the answers made by Reese upon the same grounds. The court allowed the testimony to stand, and, to the several rulings, the defendant saved an exception. These several rulings, are assigned as error in this court, and the question is presented whether the testimony was admissable or inadmissable at the time it was offered, and, if not admissible, whether it was prejudicial.

Upon the defense it was shown by clear, undisputed evidence that the engine which drew the train that set out the fire, if it was set out by any train, was engine No. 60. It further clearly appeared from the undisputed testimony that engine No. 60 was fully equipped with the best modern appliances for arresting sparks and preventing the escape of sparks and fire from the engine; and it also appeared, by evidence not controverted, that the fireman and engineer who were running the engine at the time were men of skill and experience, and that the engine was

handled with due care when it passed the locality of the fire. As to the number of the engine which drew the train in question: George W. Knowles, the engineer upon the train testified: "I have had my attention called to the location of the fire, and it is about two miles west from Verona. On April 6th I left Verona, going west, about noon. I had engine number 60. I know engine number 44. Engine 44 on that day was in the shop. I was running 44 when she was not in the shop, on my regular run. She was my regular engine. There were two engines on that run. I was running one of them, and George Truman was running the other. Engine number 60 was the the regular engine of George Truman. There were two engineers on that run, myself and George Truman, and there were two regular engines, 44 and 60. Mine was engine 44, and Truman's was engine 60. Engine 44 was in the shop at this time for the purpose of having her flues fixed." Richard Beggs testified that he was then an engineer, but was a fireman at the time in question. He testified: "I was with engineer Knowles on April 6th, 1889, firing his engine. The engine we had that day was No. 60. George Truman was my engineer. Engine number 60 was my regular engine." Beggs was called at a later stage of the trial, and testified as follows: "Q. You have testified to going over the road of the Fargo & Southwestern on the 6th of April, 1889, on engine 60, with Mr. Knowles. Did you ever make more than one trip on that engine with Mr. Knowles in that month? A. No, sir." Knowles was recalled, and testified: "Q. You have testified as to having gone over the Fargo & Southwestern road on engine 60 on the 6th day of April, 1889, with fireman Beggs. I will ask you if that was the only trip you ever made with engine 60 with firemen Beggs. A. To my knowledge, it was. Q. Are you sure it was the only one you ever made with him, or that engine, in the month of April, 1889. A. Yes, sir." J. M. Quinlan testified: "I reside at Fargo. My business is foreman boilermaker of the Northern Pacific shops at Fargo. I made the boiler repairs on engine 44. They were made in the latter part of March or the beginning of April. I

think she came out of the shop during the month of April, but what time I could not tell you without looking at the books. It could not have been as early as the 6th of April that she came out. She was still undergoing repairs on that day." S. L. Bean testified: "I am the division master mechanic for the defendant. Have held that position since June 15, 1887. My duties as master mechanic are to supervise engineers of the machinery department, and occasionally make inspection to know that there duties are being attended to. Engine 44 had an old style stack until the latter part of March, 1889, when she went into the shops, and stayed there until the latter part of April, being there from three weeks to a month. She was certainly there until after the middle of April. She was being changed and made into an extension front and straight stack. There had been complaints, prior to this, of engine 44 starting fires, and we took her in the shops, and put on the extension front. No. 60 had not been, prior to April 6th, engineer Knowles' engine. He may have run her now and then a trip. The Smith fire was reported to me as having been set in the neighborhood of Verona station. As soon as this was done, I had the record looked up, and special inspection made, to make sure there had been nothing overlooked in previous inspections,—I mean as to engine number 60. Our records show that engine number 60 made the run drawing the passenger train from Fargo to Edgerly and return on April 6, 1889. The different records which are kept are the engineer's time book, the mileage book, roundhouse register, and this stack inspection register. It is impossible to keep track of the coming and going in such quantity and numbers as the defendant has without keeping a record under this system which I have described. With these four records, there is no possibility of a mistake being made, and engine number 60 being reported as going over the road on a given day, when some other engine went. And, besides these records, we have the original trip slip, and they are filed. That makes five records which we have on the point. The trip slips and the books have to correspond. It would be engineer Knowles who

would file it if he had made the run that day, and he would receive pay for that day's work on the mileage basis. I examined all these records personally after my attention had been called to the fire. I looked over the records. All of these records showed that it was engine number 60 which ran over the road." At the close of the case, defendant moved in the trial court to strike out the evidence of Reese, as above set out, upon the grounds stated, when defendant's counsel moved to strike it out originally. This motion was denied, and the evidence was permitted to be considered by the jury. Defendant excepted to this ruling, and it is assigned as error here.

We think the original ruling was prejudicial error. By refusing to strike out the testimony of Reese, the court in effect, submitted his testimony to the jury, and allowed the jury to consider it with the other evidence offered by the plaintiff in support of the allegations of the complaint. Reese testified that he believed that engine 44 drew the offending train, and also gave testimony tending strongly to show that engine No. 44 had on other days, and about the time in question, scattered fire frequently, and had repeatedly, on other occasions about that time, and in the same neighborhood, started fires which had spread in various directions, and done damage to other parties. From this evidence the jury were permitted to consider whether No. 44 drew the offending train. Reese testified that he honestly believed that it did; and, if it did, they were then permitted to consider what Reese had stated in his testimony as to the habits of 44 with reference to throwing out fire in the neighborhood. When the testimony of Reese was offered, it was objected to, and the attention of the trial court was called specifically to the different features of his testimony by the following motions seasonably made by defendant's counsel to strike it out: "Thereupon the defendant moved the court to strike out the answers to every question and cross question propounded to the witness Reese, and which was objected to, and heretofore ruled upon by the court." "The defendant then moved to strike out all the testimony of the

witness Reese, so far as the same relates to engine 44, and the alleged destructive work done by her, and the alleged setting out of the fire by her." Reese does not state that when the offending train passed, going west, he then and there recognized the engine by her number or otherwise; on the contrary, his testimony excludes the hypothesis that he did recognize the train by anything he saw or heard at the time. When asked on cross-examination, "Do you know that this was engine No. 44?" He answered: "It is my honest belief that it was engine 44. Her engineer was on it, and the railroad dispatcher would not deny it." The answer discloses clearly that the witness rested his belief upon the facts and circumstances alluded to, and that his belief was a conclusion deduced by a course of reasoning from the facts which he stated. But in this an elementary rule of evidence was violated. It was the province of the jury to draw conclusions from the facts stated by the witness. Whether the engine which drew the train was numbered 44 was a question of fact for the jury, and they were as competent to draw a conclusion from the facts stated by the witness as he was. It is true that a nonexpert witness may, on questions of identity, give his opinion or impressions, if based upon his own observations; but no nonexpert witness is allowed to state his opinion, or the deductions of his own mind, based upon facts which the jury can consider and determine as well as the witness. Notes on pp. 234 and 235, 3 Abb. N. C., (*People* v. *New York Hospital*;) 1 Greenl. Ev. § 440; *Hathaway* v. *Brown*, 22 Minn. 214; *Williams* v. *Clark*, (Minn.) 49 N. W. 398. On his direct examination, Reese was asked, against objection, as follows: "State, if you know, the number of the engine drawing the train." His answer was: "I believe it was number 44." On cross-examination the witness was asked: "Do you know that this was engine number 44?" He answered: "It is my honest belief that it was engine 44," etc. The questions called for the knowledge of the witness, if he had knowledge. The answers were unresponsive, and were not suggested by the

question. The witness saw fit to give his belief, and did not respond as to his knowledge. His belief, not based upon his observations made at the time the train passed, was inadmissable. The questions were proper, but the answers were improper, because they were unresponsive to the question, and wholly incompetent as evidence. When a witness answers unresponsively, and gives testimony not suggested by a proper question, and the testimony is inadmissable, the proper course is to move the court to strike out the unresponsive answers. This motion was made, and the court refused to strike out the testimony. This ruling was error, and, for reasons already stated, was highly prejudicial to the defendant. For this error, the judgment will be reversed, and a new trial granted. See 1 Thomp. Trials, § 718. The evidence sought to be striken out by the motion was, in its essential nature, incompetent. The grounds of objection to the testimony could not have been obviated if such grounds had been stated or reiterated in the motion to strike out. *Turner* v. *City of Newburgh*, (N. Y. App.) 16 N. E. 344; *Bergmann* v. *Jones*, 94 N. Y. 51; *People* v. *Beach*, 87 N. Y. 508. All concur.

BARTHOLOMEW, C. J., having been of counsel, took no part in the above decision; *Templeton*, J., of the First Judicial District, sitting in his place by request.

(58 N. W. Rep. 345.)

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ACQUITTAL OF GREATER OFFENSE.

A verdict of "guilty" of any lesser offense included within the offense charged in the information is an acquittal of the graver charge. *State* v. *Johnson*, 150.

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AFFIDAVIT OF MERITS.

Necessary on motion to vacate judgment taken by default. *Gauthier* v. *Rusicka*, 1. Form of Affidavit of Merits. See Rule xii p. xxvii.

AGENCY. See PRINCIPAL AND AGENT.

1. The declarations of an agent are inadmissable in evidence to prove either the agency or its scope. *Plano Mfg., Co.* v. *Root*, 165.
2. An agent authorized to sell binders for another, has power to warrant that the binders will do as good work as any other machine in the market. *Canham* v. *Plano Mfg., Co.*, 229.
3. The general authority of an agent to warrant cannot be restricted by secret instructions as to third persons who have no knowledge of such restrictions. *Canham* v. *Plano Mfg., Co.*, 229.
4. Where the purchaser of a binder was induced to keep the machine by repeated promises and attempts to fix the same, made by the agent who sold the same, a return of the binder immediately after discovering that it would not work as warranted, after the last attempt to fix it, is in time to entitle purchaser to claim that he has rescinded the contract for breach of warranty promptly. *Canham* v. *Plano Mfg., Co.*, 229.
5. So long as the principal acts for himself in a matter in the presence of his agent, the agent as to such matter does not represent the principal, his power is suspended for the time being. *Hutchinson* v. *Cleary*, 270.
6. Where the written order for a straw stacker signed by defendants contained the clause "The stacker is hereby purchased and sold subject to the following warranty and agreement and no one has authority to add to or abridge or change it in any manner." *Held*, that the defendants having signed the order embracing such stipulation are presumed to be aware of this feature of the order and are bound to know it and observe its requirements. The defendants while this writing was in force could not lawfully enter into an oral agreement with plaintiffs agents, the terms of which are inconsistent with those stipulated in the writing. *Reeves & Co.* v. *Corrigan*, 415.

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The amount demanded in the complaint controls in actions for damages by negligence, on application for removal to Federal Court. *Smith* v. *N. P. R. R. CO.*, 17.

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APPEAL. See BILL OF EXCEPTIONS—RULES.

1. The appellant must make an assignment of errors as required by Court Rule No. 15, or his appeal will be dismissed. *Globe Inv. Co.* v. *Boyum*, 538.
2. On appeal upon questions of law alone urging objections to jurisdiction of court below, which were there urged under a special appearance and overruled; is not a waiver of the point or submission to the jurisdiction. *Miner* v. *Francis & Southard*, 549.
3. An affidavit used upon a motion for a new trial, which states that certain evidence could and would be offered if a new trial should be granted, is entirely insufficient unless it also states that such evidence is newly discovered, or furnishes some excuse for not introducing it on the former trial. *Goose River Bank* v. *Gilmore*, 188.
4. When an appeal is taken from an order denying a new trial, and the motion for such new trial was heard in part upon certain papers and documents, which, on appeal to this court have been properly indentified by the Judge and certified by the Clerk of the District Court, a motion to purge the record of such papers and documents for the reason that the same are not authenticated by any bill or statement cannot be sustained. Under § 5, Ch. 120, Laws 1891, no bill or statement is required to bring such papers and documents before the court. *Goose River Bank* v. *Gilmore*, 188.

APPEARANCE.

1. A special appearance in Justice Court to object to jurisdiction is not a voluntary appearance. *Miner* v. *Francis & Southard*, 549.
2. A general appearance will not validate a decree otherwise invalid by reason of fraud and deceit practiced in its procurement. *Yorke* v. *Yorke*, 343.
3. When a party who has not been properly served with process appears in a case, and asks to have a decree against him set aside for the reason that the court had no jurisdiction of his person, and for the further reason that such decree was procured by fraud and deceit, and was without evidence to support it, such appearance is general, and is a waiver of all defects in the service of process. *Yorke* v. *Yorke*, 343.

ASSAULT AND BATTERY. See CRIMINAL LAW AND PRACTICE.

ASSAULT WITH DANGEROUS WEAPON. See CRIMINAL LAW AND PRACTICE.

ASSESSMENT AND TAXATION.

1. Where adjoining lots in a town plat were assessed together as an entirety, and valued at one lump sum, a subsequent sale of such lots for the taxes based upon such assessment must follow the description in the assessment. The lots cannot legally be sold separately, each for moiety of the tax arising from the lump valuation. *O'Neil* v. *Tyler*, 47.

ASSESSMENT AND TAXATION—Continued.

2. A description of real estate as it appeared in the assessment roll examined, and *held* to be sufficient. *O'Neil* v. *Tyler*, 47.
3. Where a board of county commissioners meets as a board of equalization on the day appointed by law, and, after organization, adjourns until the next day, subsequent adjournments from day to day by less than a quorum of such board will preserve the duration of such session. *O'Neil* v. *Tyler*, 47.
4. The assessor failed to deliver the assessment roll to the auditor on the day required by law, but the board of equalization was in session upon that day, and, by adjournments from day to day, entered in the minutes, continued in session until such roll was filed, and thereafter a majority of said board remained in session for two days, engaged in equalizing the taxes for that year. *Held*, that the taxpayers, had sufficient notice of the time of meeting of the board of equalization, and sufficient opportunity to be heard upon their assessments, notwithstanding the irregularity in filing the assessment roll. *O'Neil* v. *Tyler*, 47.
5. The statute requires parcels of land listed in an assessment roll, which consists of parts of sections, to be particularly described. Sections 1544, 1582, Comp. Laws. Accordingly, *held*, that tracts of land in an assessment roll, consisting of parts of sections, described as follows, viz: Name of owner, ———; section ———; town ———; range ———, —followed by a statement of the number of acres, is insufficient, because the part of the section is not particularly described. The fact that such description may not mislead the owner is not alone enough to validate it. *Power* v. *Bowdle*, 107.
6. Following the rule laid down in *Powers* v. *Larabee*, 49 N. W. Rep. 726, 2 N. D. 141, and *Keith* v. *Hayden*, 2 N. W. Rep. 495, 26 Minn. 212, *held*, that the combination of letters and figures given below, and all others of similar character, in the assessment rolls in question, are insufficient and invalid as descriptions of parts of sections of land, viz: NW_4; NW_4; of NE_4; NE SW; W_2 SW. Such symbol writing is not English as it is ordinarily used, and is without the sanction of any general usage among the masses of the people. Hence the symbol writing descriptions cannot be upheld as a basis of taxation, or as a means of building up and perpetuating title to real estate under the revenue laws. *Power* v. *Bowdle*, 107.

ASSESSOR. See ASSESSMENT AND TAXATION, PLEADING AND PRACTICE.

The assessor is responsible for sufficiency of description of all real estate returned by him. *Power* v. *Bowdle*, 107.

ASSIGNMENT OF ERRORS. See APPEAL—RULES 538.

ASSIGNEE OF JUDGMENT. See JUDGMENT, 280.

ATTORNEYS. See LIENS, 280.

1. When a decree of court has been obtained, and an application to set the same aside is subsequently made in the same case, service of the citation to show cause why the decree should not be set aside is properly made upon the attorney of record who procured the decree. *Yorke* v. *Yorke*, 343.
2. The lien of an attorney for money due his client, in the hands of the adverse

ATTORNEYS—Continued.

party, under § 470, Comp. Laws, when secured by compliance with the requirements of that section, gives the attorney an interest in such moneys, similar to that of an equitable assignee thereof. *Clark* v. *Sullivan*, 280.

3. His interest extends to and embraces the judgment rendered in the action to recover such moneys, and also the undertaking to pay such judgment, given by the defendant in such action on appeal, and also the cause of action on such undertaking against the surety thereon. The attorney has the same equitable interest in such judgment, undertaking, and cause of action upon the undertaking that he has in the money due his client from the adverse party. *Clark* v. *Sullivan*, 280.

ATTACHMENT. See CHATTEL MORTGAGES, 193.

1. Under the federal statutes, the rights of a transferee of national bank stock, under an unrecorded transfer, good at common law, are superior to the rights of a subsequent attaching creditor of the transferrer without notice. *Doty* v. *First Nat. Bank*, 9.
2. Chattel mortgage is superior to attachment lien. *Bank* v. *Oium*, 193.
3. While § 5130, Comp. Laws, requires a debtor who desires to receive the benefit of the exemptions mentioned in § 5128, *Id.*, to serve upon the officer who has seized his property under execution or attachment a verified schedule containing all his personal property, yet the failure of the debtor to include in such schedule all of such property, when done with no fraudulent intent, and when the officer is in no manner misled thereby as to the amount of the debtor's property, will not deprive the debtor of such exemptions, but only debars the debtor from selecting any property as exempt which does not appear in the schedule. *Wagner* v. *Olson*, 69.

BANKS. See NATIONAL BANKS, CORPORATIONS.

BILL OF EXCEPTIONS.

1. The stenographer's transcript of the proceedings had at the trial, and used on a motion for new trial for the purpose of showing errors of law occurring at the trial, does not constitute an authenticated record, and before this court can review errors occurring at the trial the proceeding must be brought upon the record by a bill of exceptions or statement of the case. *Bank* v. *Gilmore*, 188.
2. It is not the duty of the court to engross the bill in accordance with his decision as to what it shall contain. *Edwards & McC., Lumber Co.* v. *Baker*, 170.

BOARD OF EQUALIZATION.

1. May adjourn from day to day. *O'Neil* v. *Tyler*, 47.
2. May receive assessment roll from the assessor and act upon it, when the board is legally in session, but after the day the assessor is required by law to file the same. *O'Neil* v. *Tyler*, 47.

BONDS.

1. The school township board may issue and negotiate the bonds of the corporation. *Prairie School Tp.* v. *Haseleu*, 328.
2. The school township treasurer has no power to issue, negotiate or sell bonds under Ch. 44, 45, Laws 1883. *Prairie School Tp.* v. *Haseleu*, 328.
3. Where a statute authorized the issue of municipal bonds payable in not less than 10

BONDS—Continued.

years from date, bonds issued thereunder, payable in 11 days less than 10 years from date, are void, even in the hands of a *bona fide* purchaser. *People's Bank* v. *School District*, 496.

4. The invalidity of such bonds does not affect the liability, if any, of the municipality, independently of the bonds. *People's Bank* v. *School District*, 496.
5. It is elementary that even *bona fide* purchasers of negotiable municipal securities are charged with knowledge of all the requirements of the statute under which the securities were issued. *People's Bank* v. *School District*, 496.

BURDEN OF PROOF. See EVIDENCE, PLEADING AND PRACTICE.

CHATTEL MORTGAGES.

1. Where a creditor attaches personal property covered by a mortgage, between the execution and delivery of the mortgage and the filing thereof, his lien is not superior to that of the mortgagee, under the statute (§ 4379) declaring such mortgage void as to creditors unless filed, where the debt for which he attaches existed before the giving of the mortgage, and the creditor has not altered his position to his detriment since the mortgage was given, and before the filing thereof. *Bank* v. *Oium*, 193.
2. It is unnecessary, to preserve the lien of a chattel mortgage, to renew the same by refiling a copy thereof, with a statement, etc., as required by Ch. 41, of the Laws of 1890, where the mortgagee has taken possession of the property before the period arrives at which the statute requires the mortgage to be so renewed. *Bank* v. *Oium*, 193.
3. The description in a chattel mortgage stated that the property was situated on a certain section in a certain township and range, but did not name the county or state within which such section and property were located. The mortgage was filed by the mortgagee in Ransom County, in the then Territory of Dakota, and it was shown that the section named in the mortgage was located in that county, and that property corresponding with that described in the mortgage was situated thereon, owned by the mortgagor. *Held*, a sufficient description as against an attaching creditor as to such property, but not as to property not situated on such section. *Bank* v. *Oium*, 193.
4. A. executed to B. a chattel mortgage upon the crop to be grown during three specified years on certain described real estate, partly owned, and partly leased, by the mortgagor. The granting clause was of "all that personal property described as follows," etc. Following the description was the following covenant: "It is especially covenanted and agreed that this mortgage is a lien upon said land and the use thereof during said time." The *habendum* covered only the "personal property aforesaid," and all the provisions relating to the power of sale and the sale were confined to personal property. *Held*, that the instrument did not constitute a mortgage on real estate. *Mortgage Bk. & Inv. Co.* v. *Hanson*, 465.

CHARGING THE JURY. See INSTRUCTIONS, CRIMINAL LAW AND PRACTICE, ERROR, EVIDENCE.

CLAIM AND DELIVERY.

1. Where each party claims right to possession by virtue of absolute ownership, a

CLAIM AND DELIVERY—Continued.

verdict which finds plaintiff entitled to possession and fixes the value of the property, will sustain a judgment. *Branstetter* v. *Morgan*, 290.

2. Where each party claims ownership the burden of proof is on plaintiff. *Haveron* v. *Anderson*, 540.

3. Where value is in dispute, the question of value should be submitted to the jury. *Haveron* v. *Anderson*, 540.

4 When, in such a case, the owner brings the action of claim and delivery against the officer holding such property, on the ground that the same was exempt from such seizure, the burden is upon the officer to show what specific property so held by him was liable to seizure for the purchase price thereof under the process in his hands. *Wagner* v. *Olson*, 69.

5. The action of claim and delivery will lie at the suit of the defendant in attachment to recover property seized under a writ of attachment, when it is stated in the affidavit that such property was exempt from such seizure. *Wagner* v. *Olson*, 69.

COMPLAINT. See PLEADING AND PRACTICE.

The amount claimed in the complaint controls in actions for negligence on application for removal to the Federal Court. *Smith* v. *Northern Pac., R. Co.*, 17.

CONFUSION OF GOODS.

1. Where the property of one is received by another, this of itself does not entitle the owner to priority of payment out of the general assets of the one receiving the property. To recover his property, the owner must be able to trace and identify it in some form. *Northern Dak. Elev. Co.* v. *Clark & Smart*, 26.

2. Where a merchant purchases goods of the same class and quality from different parties, and in the ordinary course of business so mingles the goods upon his shelves that it becomes impossible to designate the goods purchased from any one party, yet such fact will not render the entire stock liable to seizure at the suit of one of such parties to recover the purchase price of goods sold to such merchant, notwithstanding § 5137, Comp. Laws, provides that no exemption shall be allowed against an execution issued for the purchase money of property that has been seized under the execution. *Wagner* v. *Olson*, 69.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE, RAILROAD COMPANIES.

1. The track on which the coupling was made was a curved one, and plaintiff was standing on the footboard of the engine, on the inside of the curve, at the time he was injured. There was no evidence as to the degree of the curve. *Held*, that he was not negligent, as a matter of law, in remaining there to help in making the coupling *Bennett* v. *N. P. R. Co.*, 91.

2. Nor was he guilty of contributory negligence, as a matter of law, in standing in that place, notwithstanding the unusual shortness of the drawbar of the engine and of the drawbar of the car, the former projecting 6 inches beyond a rim on the rear of the engine, and the latter being, according to some of the evidence, 12 inches long, the evidence showing that the usual play to a drawbar is from 1 to 4 inches; there being no play to the drawbar on the engine, and it being undisputed that the engine approached the car slowly to make the coupling, so that the amount of slack taken up would be but little, if everything was in proper order. *Bennett* v. *N. P. R. Co.*, 91.

CONTRIBUTORY NEGLIGENCE—Continued.

3. Neither was it contributory negligence, as a matter of law, for him to remain on the footboard, instead of going ahead, and setting the pin, and then stepping outside the track before the engine and car came together. *Bennett* v. *N. P. R. Co.*, 91.

CONDEMNATION PROCEEDINGS.

1 Where condemnation proceedings were commenced under the statute in force prior to the adoption of § 14 of our state constitution, specifying the manner of taking private property for public use, and the land owner participated in such proceedings, and, after the report of the commissioners was filed, demanded a jury trial, as in the statute provided, he thereby waived the benefit of the constitutional provision, and cannot at the trial in the District Court before the jury be heard to allege the unconstitutionality of the statute. *Ry. Co.* v. *Nester*, 480.

2. By failing to file exceptions to such report, and demandiug a jury trial, he waived all irregularities and informalities in the prbceedings upon which the commissioners' appraisement was based. *Ry. Co.* v. *Nester*, 480.

CONVERSION. See TROVER AND CONVERSION.

CONSTITUTIONAL LAW.

1. Article 20 of the state constitution received a majority of all the votes cast upon the question of the adoption of the same and upon the question of the adoption of the constitution; but did not receive a majority of the votes cast for governor. *Held*, that said article 20 was legally adopted. *State* v. *Barnes*, 319.

2. The "Prohibition Statute" Ch. 110, Laws of 1890 is not vulnerable to the constitutional objections that its object is not fully expressed in the title, or that it contains more than one subject, or that it is not uniform in its operation, or that it inflicts cruel and unusual punishments. *State* v. *Barnes*, 319.

3. Under § 78, constitution, the appointing power of the governor is confined to filling vacancies in office, in cases where no other mode is provided by the constitution or laws for filling the same. *State* v. *Boucher*, 389.

4. Chapter 48, Laws of 1893, is unconstitutional because the subject of the act is not expressed in its title. *State* v. *Nomland*, 427.

CONTEMPT OF COURT.

A guardian *ad litem* for an infant plaintiff under § 5200 Comp. Laws is liable for costs, but payment cannot be enforced by a court order, and contempt proceedings for its violation. *Granholm* v. *Sweigle*, 476.

CONTRACTS. See DEEDS, HOMESTEAD, WARRANTY, RECISSION OF CONTRACT, PRINCIPAL AND SURETY, NEGOTIABLE, INSTRUMENTS.

1. An order embodied the following stipulation: "The stacker is hereby purchased and sold subject to the following warranty and agreement, and no one has authority to add to or abridge or change it in any manner." *Held*, that defendants, having signed the order embracing such stipulation, are presumed to be aware of this feature of the order, and are bound to know it and observe its requirements. The stipulation was lawful, and one which the parties had a right to make, and, being made, the defendants, while it was in force, could not lawfully enter into an oral arrangement with plaintiff's agents, the terms of

CONTRACTS—Continued.

which are wholly inconsistant with those stipulated in the writing. *Reeves & Co.* v. *Corrigan*, 415.

2. Parties who have contracted with a foreign corporation as a corporation, and received and retained the benefits of such contract, cannot, in an action by such corporation, based thereon, raise the question of noncompliance with the terms of statute. *Washburn Mill Co.* v. *Bartlett*, 138.

COUNTERCLAIM. See PLEADING AND PRACTICE.

1. In actions to quiet title to real estate, defendant may allege facts which show title in himself and ask that such title be quieted and confirmed by the court. Such new matter when properly pleaded constitutes a counterclaim within the meaning of Subd. 1, § 4915, Comp. Laws. *Power* v. *Bowdle*, 107.
2. Defendant cannot counterclaim a cause of action for tort—where the cause of action for tort does not arise out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim. *Braithwait* v. *Akin*, 365.

COUNTY COMMISSIONERS.

The county commissioners cannot authorize the expenditure of money when the amount is greater than can be paid out of the annual revenue of the county of the current year, and where the question of such expenditure has not been submitted to the voters of the county. *State* v. *Getchell*, 243.

COVENANTS. See DEED, HOMESTEAD.

1. Covenants are construed most strongly against the covenantor. *Dun* v. *Dietrich*, 3.
2. The implied covenant against incumbrances raised under § 3249, Comp. Laws, by the use of the word "grant" in a conveyance in fee, is restrained, as against the grantor, by an express covenant against incumbrances limited by its terms to the heirs, executors, and administrators of the grantor. *Dun* v. *Dietrich*, 3.
3. A wife who joins her husband in a deed of conveyance for no other purpose than to release her homestead right in the property is not bound by the implied covenant arising from the use of the word "grant." *Dun* v. *Dietrich*, 3.

COSTS.

1. On appeal from a judgment embracing costs, the Supreme Court will presume, unless the contrary affirmatively appears in the record that the costs were duly taxed and inserted in the judgment. *Gould* v. *Duluth & Dak. Elev. Co.*, 96.
2. A guardian *ad litem*, for infant plaintiff under § 5200, Comp. Laws is liable for costs, but payment cannot be enforced by a court order and contempt proceedings for its violation. *Granholm* v. *Sweigle*, 476.

CORPORATIONS. See NATIONAL BANKS, 9.

1. Sections 3190, 3192, Comp. Laws, which prescribe the terms upon which foreign corporations may do business in this state, do not render contracts entered into with such corporations, before compliance with the terms of said sections, unenforceable and void. *Washburn Mill Co.* v. *Bartlett*, 138.
2. Parties who have contracted with such foreign corporation as a corporation, and received and retained the benefits of such contract, cannot, in an action by such corporation, based thereon, raise the question of noncompliance with the terms of said sections. *Washburn Mill Co.* v. *Bartlett*, 138.

CRIMINAL LAW AND PRACTICE. See VERDICT, INSTRUCTIONS, WITNESSES, EVIDENCE, ERROR.

1. Where an information was adjudged defective by the Supreme Court because it did not state that the prosecution was in the name and under the authority of the state, and the case was reversed, *held*, it was not error for the trial court to make an order allowing the state's attorney to file a new information curing the defect, without a new preliminary examination of the accused. *State* v. *Hasledahl*, 36.
2. The making of such an order is no part of the trial, within the meaning of § 7321, Comp. Laws, providing that the defendant must be personally present at the trial when the offense is felony, and it is therefore not necessary that defendant should be personally present when such order is made. *State* v. *Hasledahl*, 36.
3. If notice to defendant or his counsel of application for such order was necessary, the error, if any, in failing to give such notice, was error without prejudice. For such an error there can be no reversal. Section 7588, Comp. Laws. *State* v. *Hasledahl*, 36.
4. Comp. Laws, § § 6479, 6480, 6491, 6492, 6510, 7429, construed. *Held*, on a trial for the crime of assault and battery committed with a deadly weapon, "with intent to kill," the accused, under § 6510, Comp. Laws, may be convicted of an assault and battery, armed with a dangerous weapon, "with intent to do bodily harm." The commission of the latter is necessarily included in the commission of the former, within the meaning of § 7429, *supra*. *State* v. *Johnson*, 150.
5. Where the accused was charged with an assault and battery when armed with a deadly weapon, "with intent to kill," and the verdict was for "assault and battery with intent to do bodily harm, as charged in the information," *held*, the verdict will warrant a conviction for assault and battery only. The weapon with which an assault is committed is an essential feature of the crime defined by § 6510, *supra*. The jury failed to find the weapon, and the ommission is fatal to a conviction for felony. *State* v. *Johnson*, 150.
6. The following words found in the verdict, "as charged in the information," are ambiguous, and cannot be resorted to for the purpose of showing that the assault and battery was committed with a dangerous weapon, in view of the fact that the effect of the verdict is to acquit the accused of the offense "charged in the information." *State* v *Johnson*, 150.
7. It is proper upon the redirect examination of a witness in a criminal case to permit him to state facts and circumstances that tend to correct or repel any wrong impressions or inferences that arise from the matters drawn out on cross-examination, and this rule is not changed because such facts and circumstances may be of such a character as to prejudice the defendant in the minds of the jury. *State* v. *McGahey*, 293.
8. An error of the court in ruling upon the admission of evidence that conclusively appears to have been innoxious, and could have worked no prejudice to the party objecting, is no ground for reversal. *State* v. *McGahey*, 293.
9. Where, in answer to proper questions, a witness volunteers incompetent and irresponsive matter in his answers, and which matter has but an indirect bearing upon the issue upon trial, and is promptly stricken out by the court, in the presence and hearing of the jury, on motion of opposing counsel, such action

CRIMINAL LAW AND PRACTICE—Continued.

amounts to a withdrawal of such matter from the jury, and no duty rests upon the court, in the absence of any request thereunto, to further caution the jury, either at that time or in the general charge, to disregard such matter. *State* v. *McGahey*, 293.

10. No duty rests upon the prosecution in a criminal case to produce and swear as witnesses for the state all the eyewitnesses to the transaction, where the testimony of the witnesses called, or some of them, is direct and positive, and apparently covers the entire transaction. *State* v. *McGahey*, 293.
11. The control of the remarks of counsel for the state during a criminal trial is a matter largely in the discretion of the trial court; and where the objectionable remarks are of a general character, and such as would not be likely, under the attending circumstances, to prejudice the cause of the accused in the minds of honest men of fair intelligence, the failure of the court to strike out such remarks, or caution the jury against them, is not such an abuse of discretion as will constitute error. *State* v. *McGahey*, 293.
12. While a party to an action cannot object to questions asked a witness upon cross-examination, tending to elicit proof that the witness had been guilty of practices that would affect his credit before the jury, yet, where such matters are purely collateral to the issue, the answer of the witness is final, and it is not proper to introduce contradicting evidence. *State* v. *McGahey*, 293.
13. The state has the right, on cross-examination, to show the nature of the relations existing between the witness and the accused, as far so their relations are such as would create a bias on the part of the witness that might reasonably be supposed to affect his testimony, and this rule cannot be changed by the fact that these relations may be such as to prejudice the accused in the minds of the jury. *State* v. *McGahey*, 293.
14. It is not error to refuse an instruction requested that correctly states the law, and is applicable to the case, when the court, in its general charge, has fully and and specifically covered the same points. *State* v. *McGahey*, 293.
15. "The "Prohibition Law" Ch. 110, Laws 1890 was legally adopted, its object is fully expressed in the title. It does not contain more than one subject, is uniform in its operation and does not inflict cruel or unusual punishments. *State* v. *Barnes*, 319.
16. Section 5200 reads: "Where costs are adjudged against an infant plaintiff the guardian by whom he appeared in the action must be responsible therefor and payment thereof may be enforced by attachment." Construing said section, *held: First*, that the obligation of the guardian to pay such costs arises upon the law, and does not in any degree depend upon an order of court directing the guardian to pay such costs; and hence, where such an order is made, it cannot be enforced by a proceeding as for a contempt of court against the guardian. Disobedience of such an order does not constitute a contempt of court. *Sscond*, No *ca. sa.* attachment proceedings—such as exist in the State of New York—have been authorized by any statute in this state whereby a guardian can be taken into custody and imprisoned for the nonpayment of such costs. *Third*, The nonpayment of such costs does not constititute a tort or a fraud, within the meaning of § 15 of the state constitution, and hence the omission to pay (not being a contempt of court) would not authorize a court to

arrest and incarcerate the guardian for nonpayment upon any civil process whatsoever. Accordingly, *held*, further, where in such case, after entry of judgment for costs against an infant plaintiff, the District Court, after hearing the guardian upon an order to show cause, ordered that the guardian be imprisoned in the county jail until the said costs were paid, that such order was without warrant of law, and null and void. *Granholm* v. *Sweigle*, 476.

17. The offense of an aggravated assault with a dangerous weapon, committed with intent to do bodily harm, as defined by § 6510, Comp. Laws, necessarily includes in its commission a simple assault, but the offense does not necessarily include in its commission the offense of assault and battery. *State* v. *Marcks*, 532.

18. Accordingly; *held*, construing § 7244, Comp. Laws, where defendants were charged in the information with the aggravated assault defined in § 6510, and with such charge there was blended in the same count a sufficient charge of assault and battery, that it was error to overrule a demurrer to the information interposed upon the ground that it stated more than one offense. *State* v. *Marcks*, 532.

19. Upon the trial the jury were instructed, in effect, that if the evidence failed to show beyond a reasonable doubt that the defendants were guilty of the aggravated assault charged, but did show them to be guilty of assault and battery, they could find defendants guilty of the latter offense. The jury returned a verdict of guilty of assault and battery. A motion in arrest of judgment was overruled. *Held* error, construing § 7429, Comp. Laws. *State* v. *Marcks*, 532.

20. Where an indictment is properly entitled "*State of North Dakota* v. *A. B.*" and shows on its face that it was properly presented by "the grand jury of the State of North Dakota in and for the County of Griggs," it sufficiently appears therefrom that the prosecution is carried on in the name, and by the authority of the State of North Dakota. *State* v. *Kerr*, 523.

21. An indictment that charges "that at said time and place the said A. B., did sell and give to one C. D., as a beverage, certain intoxicating liquors, to-wit, one-half pint of whisky," is not bad for duplicity. It is a general rule that where a statute mentions several things disjunctively as constituting one and the same offense, all punishable alike, the whole may be charged conjunctively in a single count, as constituting a single offense. *State* v. *Kerr*, 523.

22. When the evidence showed more than one sale of whisky by the defendant to the person named in the indictment within one year prior to the finding of the indictment, and when the witness could not fix the date of any particular sale, it was not error in the trial court to refuse to require the prosecution to elect upon which specific sale it relied for conviction. *State* v. *Kerr*, 523.

23. Section 8, Ch. 71, Laws 1890, which provides that, with certain specified exceptions, "no information shall be filed against any person for any crime or offense until such person shall have had a preliminary examination therefor, as provided by law, before a committing magistrate or other officer having authority to make preliminary examinations, unless such person shall waive his right to such examination," etc." construed. *Held*, where a criminal complaint filed against the accused with an examining magistrate, after alleging time and place, designates the offense in general language, giving its name, and, in addition thereto, sets out such of the facts and circumstances constituting the offense as will fairly apprise a person of average intelligence of the

CRIMINAL LAW AND PRACTICE—Continued.

nature of the accusation against him, it will be sufficient, within the meaning of the statute, to authorize the State's Attorney to file an information against the accused for the same offense if he has had or waived an examination on such complaint. It will make no difference with this rule if certain averments of fact which are essential in an information are omitted from the complaint. Such complaints need not be framed with the same degree of care and technical accuracy as is required in framing informations and indictments. Tested by this rule, the complaint against the petitioner is examined, and found sufficient. *State* v. *Barnes*, 131.

24. Rulings of the District Court made upon the trial of criminal actions are reviewable by writ of error, but the writ of *habeas corpus* cannot be invoked for that purpose. *State* v. *Barnes*, 131.

25. Where the petitioner pleaded in abatement to an information filed in the District Court, against him that he had neither had nor waived a preliminary examination for the offense charged in such information, and the plea was overruled. *Held*, that such ruling was made by a court having jurisdiction of the person and the subject matter, and therefore the ruling cannot be reviewed by *habeas corpus*. *State* v. *Barnes*, 131.

CUSTOM. See JUDICIAL NOTICE.

DAMAGES.

1. In an action to recover for personal injuries, where there is no claim in the complaint or in the evidence that plaintiff's mental powers were in any manner impaired by the injury, it is error for the trial court to instruct the jury that in estimating the damages they may take into account the effect of the injury upon plaintiff's mental powers. *Comasky* v. *Northern Pac. R. Co.*, 276.

2. The court instructed the jury, that they might, at their option, allow or not allow interest on the annual value of the use of the land while it was wrongfully occupied by the defendant. *Held*, that such instruction was proper. *Hegar* v. *DeGroat*, 354.

3. The action is to recover possession of the land, and for damages for its wrongful occupation. At the trial, against objection, plaintiffs were allowed to introduce testimony showing their expenditures for attorney's fees in prosecuting this action. The verdict was for the plaintiffs, and the jury allowed, as a separate item, the sum of $500 as and for plaintiff's attorneys' fees in this action. *Held*, that the court erred in admitting the testimony, and that the judgment must be modified by striking therefrom the amount allowed as attorneys' fees. *Held*, further that § 4601, which allows a recovery, as a part of the damages, of "the costs, if any, of recovering the possession," has reference only to the costs incurred in a previous action, if any had been brought for the sole purpose of recovering possession and that even in such cases expenditures incurred in the previous action could not embrace attorneys' fees as an element to swell the damages in the later action. *Hegar* v. *DeGroat*, 354.

DEED. See COVENANTS, 3.

DEFAULT.

1. A judgment by default will only be vacated upon affidavit of merits. *Gauthier* v. *Rusicka*, 1.

DEFAULT—Continued.

2. A decree obtained through fraud and deceit will be vacated. The power to vacate is inherent in the court and independent of statute. *Yorke* v. *Yorke*, 343.
3. A judgment of a Justice of the Peace entered by default in action of unlawful detainer is void for want of jurisdiction where it appears that each party claimed title to the land. *Hegar* v. *DeGroat*, 354.

DEFINITIONS.

1. "Estates and Interest." *Power* v. *Bowdle*, 107.
2. "Lien." *Power* v. *Bowdle*, 107.

DESCRIPTION. See ASSESSMENT AND TAXATION, CHATTEL MORTGAGES.

1. The statute requires parcels of land listed in an assessment roll, which consists of parts of sections, to be particularly described. Sections 1544, 1582, Comp. Laws. Accordingly *held*, that tracts of land in an assessment roll, consisting of parts of sections, described as follows, viz: Name of owner, ———; section ———; town———; range———, —followed by a statement of the number of acres, is insufficient, because the part of the section is not particularly described. The fact that such description may not mislead the owner is not alone enough to validate it. *Power* v. *Bowdle*, 107.
2. Following the rule laid down in *Powers* v. *Larabee*, 49 N. W. Rep. 726, 2 N. D. 141, and *Keith* v. *Hayden*, 2 N. W. Rep. 495, 26 Minn. 212, *held*, that the combination of letters and figures given below, and all others of similar character, in the assessment rolls in question, are insufficient and invalid as descriptions of parts of sections of land, viz: NW¼; NW¼ of NE¼; NE SW; W½ SW. Such symbol writing is not English as it is ordinarily used, and is without the sanction of any general usage among the masses of the people. Hence the symbol writing descriptions cannot be upheld as a basis of taxation, or as a means of building up and perpetuating title to real estate under the revenue laws. *Power* v. *Bowdle*, 107.
3. The description in a chattel mortgage stated that the property was situated on a certain section in a certain township and range, but did not name the county or state within which such section and property were located. The mortgage was filed by the mortgagee in Ransom County, in the then Territory of Dakota, and it was shown that the section named in the mortgage was located in that county, and that property corresponding with that described in the mortgage was situated thereon, owned by the mortgagor. *Held*, a sufficient description as against an attaching creditor as to such property, but not as to property not situated on such section. *Union Nat. Bank* v. *Oium*, 193.
4. Following the description of certain crops in a chattel mortgage and the land upon which the crops were to be grown was the following clause: "It is especially covenanted and agreed that this mortgage is a lien upon said land and the use thereof during said time." The *habendum* covered only the "personal property aforesaid." *Held*, that the instrument did not constitute a mortgage of real estate. *Mortgage Bk. & Inv. Co.* v. *Hanson*, 465.

DIVORCE.

In divorce proceedings it is competent for the court to assign the homestead to the innocent party. *Rosholt* v. *Mehus*, 513.

DOMESTIC RELATIONS. See MARRIED WOMEN, HUSBAND AND WIFE, HOMESTEAD, DIVORCE.

ERROR. See EVIDENCE, INSTRUCTIONS.

1. Errors in procedure are without prejudice. *Prairie School Tp.* v. *Haselen*, 328.
2. Errors of the court in admitting testimony when clearly nor prejudicial is no ground for reversal. *State* v. *McGahey*, 293; *Hegar* v. *DeGroat*, 354.
3. It is not error requiring reversal for the court to refuse correct requests for instructions, where the same point has been covered by the court in his general charge. *State* v. *McGahey*, 293.
4. The admission of testimony that has no bearing upon the issues as made by the pleadings, but which from its nature would tend to prejudice the jury against the party objecting, constitutes reversible error. *McMillen* v. *Aitchinson*, 183.
5. Illustrative cases of prejudicial error. *Comasky* v. *Northern Pac. R. Co.*, 276; *Hutchinson* v. *Cleary*, 270; *Smith* v. *Northern Pac. R. Co.* 555.

ESTOPPEL.

1. A county is not liable for illegal and excessive expenditures by the county commissioners and is not estopped to show illegality of expenditure by acts of its commissioners, in accepting the benefits of their *ultra vires* acts. *State* v. *Getchell*, 243.
2. Municipal corporations are estopped, as against bona fide holders of municipal bonds, from setting up as a defense to an action thereon that all the preliminary steps necessary to authorize the issue of the bonds were not taken, when the officers who have charge of the issue of such bonds are especially or impliedly authorized to determine whether all the conditions precedent to the issue of valid bonds have been complied with, and recite in the bonds so issued that they have been complied with. It is not necessary to estop the corporation that this statement should set forth in detail that all the preliminary steps have been taken. It is sufficient that it declare that the bonds are issued in pursuance of a certain statute, specifying it. Neither is it essential that the officers issuing the bonds should be expressly authorized to determine such questions. It is sufficient if they are given full control in the matter. *Coler* v. *Dwight School Tp.* 248.
3. A defendant estopped from claiming a recission of contract for purchase price of a machine, by continued use of the machine after knowledge of defects. *Minnesota Thresher Mfg. Co.* v. *Hanson*, 81.
4. Persons dealing with a foreign corporation are estopped from pleading against it, noncompliance with the statute. *Washburn Mill Co.* v. *Bartlett*, 138.

EVIDENCE.

1. A tax deed set aside for irregularities, no longer possesses any evidential force. *O'Neil* v. *Tyler*, 47.
2. The court will take judicial notice of such facts and matters as are so notorious as to be generally known. *Power* v. *Bowdle*, 107.
3. The mere fact that fire was started 118 feet from the track is not sufficient in itself to warant submission of the question of negligence to the jury. *Smith* v. *Nor. Pac. R. Co.*, 17.
4. The presumption of negligence from the setting out of a single fire by an engine

EVIDENCE—Continued.

is one of law, and whether such presumption has been fully met and overthrown is in the first instance a question for the court. *Smith* v. *Northern Pac. R. Co.*, 17,

5. On appeal from a judgment embracing costs, the court will presume unless the contrary affirmatively appears in the record, that the costs were duly taxed and inserted in the judgment. Where presumptions prevail they will only be indulged in favor of the judgment. *Gould* v. *Duluth & Dak. Elev. Co.*, 96.
6. The burden of proof to show breach of warranty and performance of conditions precedent of the warranty is upon the purchaser. *Plano Mfg. Co.* v. *Root*, 165.
7. Agency cannot be proved by the declarations of the agent. *Plano Mfg. Co.* v. *Root*, 165.
8. Writing excludes oral proof of agents powers. *Plano Mfg. Co.* v. *Root*, 165.
9. Parole evidence is inadmissable to show prior or contemporaneous negotiations when the contract is in writing. *Plano Mfg. Co.* v. *Root*, 165.
10. When the evidence does not support the verdict, the verdict cannot stand. *McMillan* v. *Aitchinson*, 183.
11. The burden of proof is upon the officer holding property under attachment to show in a controversy with the owner, that the specific property by him seized was liable to attachment. *Wagner* v. *Olson*, 69.
12. The admission of testimony that has no bearing upon the issues but which from its nature would have a tendency to prejudice the jury against the party objecting, constitutes reversible error. *McMillan* v. *Aitchinson*, 183.
13. Newly discovered evidence, how made available on motion for new trial. *Goose River Bank* v. *Gilmore*, 188.
14. The evidence of one witness is sufficient to sustain a verdict, although contradicted by several. *Taylor* v. *Jones*, 235.
15. The defendant in an action is prohibited from testifying to conversations with plaintiffs intestate, notwithstanding an agent of decedent was present at the time the conversation took place. *Hutchinson* v. *Cleary*, 270.
16. Parole evidence is inadmissable to contradict a written instrument and its admission is prejudicial error. *Hutchinson* v. *Cleary*, 270.
17. Plaintiff may introduce evidence to refute an inference or presumption of fact that might arise from matters drawn from himself on cross-examination. *Branstetter* v. *Morgan*, 290.
18. Where in answer to proper questions the witness volunteers incompetent and irresponsive matter, and the answers are stricken out on motion of opposing counsel, such action is a withdrawal of the evidence from the jury and there is no duty upon the court in the absence of a request so to do, to caution the jury to disregard the evidence stricken out. *State* v. *McGahey*, 293.
19. In cross-examination it is permissable to show bias of witness in favor of the accused though the relation proved may be prejudicial to the accused in the minds of the jury. *State* v. *McGahey*, 293.
20. Parole evidence is inadmissable to vary or explain the terms of a written contract. *Prairie School Tp.* v. *Haseleu*, 328.
21. Parole evidence is admissable to very or explain the terms of a mere receipt. *Prairie School Tp.* v. *Haseleu*, 328.

EVIDENCE—Continued.

22. In an action to recover possession of real estate, a judgment of a Justice of the Peace entered by default in unlawful detainer suit, was properly excluded as void for want of jurisdiction. Title to land being in controversy as shown on the face of the docket. *Hegar* v. *DeGroat*, 354.

23. In an action against railroad company for negligent killing of a domestic animal, where plaintiff rests upon the *prima facie* showing that the animal was killed by defendant's train of cars, and proof of the value of the animal, and the defendant as against the statutory presumption of negligence thus raised, proves by uncontradicted evidence that the train in question was at the time of the accident in good repair and condition, and was equipped with the best modern appliances and improvements in use and was operated skillfully and with due care, then the statutory presumption of negligence arising from the killing is rebutted and entirely overcome. *Hodgins* v. *M. St. P. & S. Ste. M. R. Co.*, 382.

24. The evidence necessary to sustain a thresher's lien discussed. *Martin* v. *Hawthorn*, 412.

25. A person is presumed to know the contents of a written order or contract signed by himself on which another has acted and he is bound to observe its requirements. *Reeves & Co.* v. *Corrigan*, 415.

26. Where all the evidence offered is not sufficient to sustain the action or defense and where the other party has made sufficient proofs, a verdict should be directed on motion. *Martin* v. *Hawthorn*, 412.

27. A motion to strike out the entire evidence of a witness, will not be granted where there is any competent evidence in the testimony. *M. St. P. & S. Ste. M. R. Co.* v. *Nester*, 480.

28. Where in claim and delivery each party alleges ownership and at the close of the case it appeared that defendant was the owner of the property in controversy and plaintiff offered no testimony tending to establish ownership in himself. *Held*, that it was not error on motion of defendants to strike out all evidence offered by plaintiff to support his claim of ownership, and after striking it out to direct a verdict. *Haveron* v. *Anderson*, 540.

29. The burden of proof in claim and delivery actions, is upon the plaintiff to establish his ownership, or right of possession. *Haveron* v. *Anderson*, 540.

30. Unresponsive answers of a witness should be stricken out on motion and if the answers are prejudicial to a suitor it is reversible error to refuse to strike them out on timely motion. *Smith* v. *Nor. Pac. R. Co.*, 555.

31. The belief of a witness resulting from a course of reasoning deduced from facts and circumstances as to which the jury are as well qualified to judge as the witness is not proper evidence. *Smith* v. *Nor. Pac. R. Co.*, 555.

32. Upon a question of identity, where a witness is unable to speak positively, he may state his opinion based upon his own observations, but will not be permitted to give his belief resulting from certain extrinsic facts and circumstances, where such facts and circumstances are of a character which can be intelligently considered by the jury. In such cases the witness should state the facts and circumstances which furnish the grounds of his belief, and leave the inference to be drawn by the jury. *Smith* v. *Nor. Pac. R. Co.*, 555.

EXAMINATION OF WITNESSES. See EVIDENCE.

1. While a party to an action cannot object to questions asked a witness upon cross-examination, tending to elicit proof that the witness had been guilty of practices that would affect his credit before the jury, yet, where such matters are purely collateral to the issue, the answer of the witness is final, and it is not proper to introduce contradicting evidence. *State* v. *McGahey*, 293.
2. The state has the right, on cross-examination, to show the nature of the relations existing between the witness and the accused, so far as their relations are such as would create a bias on the part of the witness that might reasonably be supposed to affect his testimony, and this rule cannot be changed by the fact that these relations may be such as to prejudice the accused in the minds of the jury. *State* v. *McGahey*, 293.
3. It is proper upon the redirect examination of a witness in a criminal case to permit him to state facts and circumstances that tend to correct or repel any wrong impressions or inferences that arise from the matters drawn out on cross-examination, and this rule is not changed because such facts and circumstances may be of such a character as to prejudice the defendant in the minds of the jury. *State* v. *McGahey*, 293.
4. No duty rests upon the prosecution in a criminal case to produce and swear as witnesses for the state all the eyewitnesses to the transaction, where the testimony of the witnesses called, or some of them, is direct and positive, and apparently covers the entire transaction. *State* v. *McGahey*, 293.

EXCEPTIONS. See BILL OF EXCEPTIONS.

1. A failure to take exceptions to the report of commissioners in condemnation proceedings and demanding a jury trial is a waiver of all irregularities and informalities in the proceeding. *M. St. P. & S. St. M. R. Co.* v. *Nester*, 480.

EXECUTORS AND ADMINISTRATORS. See EVIDENCE, 270.

EXECUTION. See ATTACHMENT, 69; EXEMPTIONS.

1. Plaintiff in execution sold over 1,700 acres of defendant's land for $96. The land was worth at least $6,800. It was sold in a lump, although consisting of 11 distinct parcels. Defendant, however, attempted to redeem from the sale, and took from the sheriff, and had recorded, a certificate of redemption. In a suit brought by plaintiff in the execution, who had purchased at the sale, to have this certificate of redemption annulled, defendant asserted the validity of his redemption, setting forth facts in his answer to excuse his failure to redeem in time. Defendant paid the balance due on the judgment after receiving credit for the sum for which his property was so sold under execution, and claimed the benefit of such credit by receiving and filing a satisfaction of the entire judgment. He also waited until 16 months had elapsed since the sale, and 4 months since the time for redemption had expired, before questioning the sale. *Held*, that he had waived his right to have the sale set aside for inadequacy of price, and because of the irregularity in selling separate parcels in one mass. *Power* v. *Larabee*, 502.
2. Where defendant knows of the sale, and has a fair opportunity to redeem, he cannot have the sale set aside because of inadequacy of price, as the redemption right affords him ample protection against a sacrifice of his property. *Power* v. *Larabee*, 502.

EXECUTION—Continued.

3. Where defendant's right of redemption is injuriously intefered with by a sale of several parcels in a lump, the sale will be set aside on motion, if attacked in a reasonable time. *Power* v. *Larabee*, 502.
4. Ordinarily, the defendant must move to vacate the sale for irregularity at least before the redemption period has expired. *Power* v. *Larabee*, 502.
5. The sale of separate parcels in a lump does not render the sale void. It is only voidable. *Power* v. *Larabee*, 502.
6. Nor is a sale void or voidable merely because there is no one present at the sale but the sheriff and the plaintiff, who is the only bidder. Such a sale might, however, under certain circumstances, be set aside. *Power* v. *Larabee*, 502.

EXEMPTIONS.

1. A partnership firm are entitled to one exemption of $1,500. The constitution has not changed the pre-existing exemption laws. *Roesler & White* v. *Taylor*, 546.
2. While § 5130, Comp. Laws, requires a debtor who desires to receive the benefit of the exemptions mentioned in § 5128, *Id.*, to serve upon the officer who has seized his property under execution or attachment a verified schedule containing all his personal property, yet the failure of the debtor to include in such schedule all of such property, when done with no fraudulent intent, and when the officer is in no manner mislead thereby as to the amount of the debtor's property, will not deprive the debtor of such exemptions, but only debars the debtor from selecting any property as exempt which does not appear in the schedule. *Wagner* v. *Olson*, 69.
3. Where a merchant purchases goods of the same class and quality from different parties, and in the ordinary course of business so mingles the goods upon his shelves that it becomes impossible to designate the goods purchased from any one party, yet such fact will not render the entire stock liable to seizure at the suit of one of such parties to recover the purchase price of goods sold to such merchant, notwithstanding § 5137, Comp. Laws, provides that no exemption shall be allowed against an execution issued for the purchase money of property that has been seized under the execution. *Wagner* v. *Olson*, 69.
4. When, in such a case, the owner brings the action of claim and delivery against the officer holding such property, on the ground that the same was exempt from such seizure, the burden is upon the officer to show what specific property so held by him was liable to seizure for the purchase price thereof under the process in his hands. *Wagner* v. *Olson*, 69.
5. The action of claim and delivery will lie at the suit of the defendant in attachment to recover property seized under a writ of attachment, when it is stated in the affidavit that such property was exempt from such seizure. *Wagner* v. *Olson*, 69.

EXEMPT PROPERTY. See EXEMPTIONS.

EXEMPTIONS FROM TAXATION. See GROSS EARNINGS LAW.

FORECLOSURE OF MORTGAGES.

1. The powers embraced in the proviso of § 5411, Comp. Laws, regulating foreclosures of mortgages by advertisement, construed. *Held*, that the several orders made by the Judge of the District Court in this case, directing the discontinuance of foreclosure proceedings by advertisement, and requiring

FORECLOSURE OF MORTGAGES—Continued.

that the further foreclosure proceedings of said mortgages be had in court, are valid orders; the same being based in each case upon an affidavit which was satisfactory to the judge who made the order, and which also set out such facts as are required by said proviso to be embodied in such affidavits. *McCann* v. *Mtg. Bk. & Inv. Co.*,172.

2. *Held*, further, that the proceeding in which the above entitled matters originated is, considered as a remedy, merely cumulative, and the same is not to be classed with, or regulated by, the principles of law and rules of practice which obtain in civil actions in which equitable relief by injunction is sought. *McCann* v. *Mtg. Bk. & Inv. Co.*, 172.

3. *Held*, further, that the proviso contained in § 5411, *supra*, is intended to confer upon Judges of the District Courts certain authority, to be exercised at their discretion, and such descretion is nonreviewable, except in cases of abuse, and that the several records herein fail to present a case of abuse of discretion. *McCann* v. *Mtg. Bk. & Inv. Co.*, 172.

4. Where a party in possession, and with full knowledge of all the facts, pays to the proper officer the money necessary to redeem certain real estate from a foreclosure sale by advertisement, which sale was made after the lien of the mortgage had been fully satisfied and destroyed, and where such payment is made for the sole purpose of preventing the execution of a deed to the purchaser at the foreclosure sale, which would create an apparent cloud upon the title, such payment is voluntary, and cannot be recovered. *Wessel* v. *D. S. B. Johnson Land & Mtg. Co.*, 160.

5. That a payment was made under protest is of no avail, unless there was duress or coercion of some character, and then its only office is to show that such payment was made by reason of such duress or coercion. Protest can never make that involuntary which in its absence would be voluntary. *Wessel* v. *D. S. B. Johnson L. & M. Co.*, 160.

6. An allegation that a mortgage has been assigned to plaintiff, coupled with an averment that plaintiff is the holder and owner of the notes secured by the mortgage, sufficiently shows title to the notes, as well as mortgage, in the plaintiff, although the notes and mortgage appear to be payable to another person. *Fisher* v. *Bouisson*, 493.

7. A complaint, upon its face, must show whether any proceedings have been had at law, or otherwise, for the recovery of the debt secured by the mortgage. Such complaint must show that no other proceedings than those referred to therein have been had for such purpose. Therefore, *held*, that an averment that no other foreclosure proceedings had been instituted than proceedings to foreclose by advertisement which had been enjoined, is not a compliance with the statute, (§ 5434, Comp. Laws,) and the complaint is therefore vulnerable to demurrer. *Fisher* v. *Bouisson*, 493.

FOREIGN CORPORATIONS.

Right to do business within the state, to sue before appointing resident agent or filing articles of corporation. *Washburn Mill Co.* v. *Bartlett*, 138.

FORFEITURE.

The usury statute embraced in Ch. 70, Laws 1889, was, without a saving clause, repealed by § 12, Ch. 184, Laws 1890; but such repeal does not operate to

FORFEITURE—Continued.

extinguish any penalty, forfeiture, or liability incurred under the act of 1889. Section 4767, Comp. Laws. *McCann* v. *Mtg. Bk. & Inv. Co.*, 172.

FRAUD AND DECEIT. See PRACTICE.

A decree obtained by fraud and deceit will be vacated on motion of injured party. *Yorke* v. *Yorke*, 343.

FRAUDULENT CONVEYANCES. See SALES, 76.

GOVERNOR.

1. The governor has no power to remove the trustees of the agricultural college and experimental station from office. *State* v. *Miller*, 433.
2. Section 1, Ch. 93, Laws 1889, which provides for the appointment of trustees of the state institutions, including the penitentiary, examined and construed. The section contemplates that such trustees shall (except in cases of vacancy) be appointed by the concurrent action of the governor and senate, and, when so appointed, that such trustees shall continue in office, not only until the expiration of the prescribed term for which they are appointed, but beyond that period, and until their successors are chosen by the action of both the governor and senate. It is accordingly *held*, that trustees who were appointed by the governor, and confirmed by the senate at its session in 1891, for a term of two years, are lawfully entitled to hold over after the expiration of the term of two years for which they were appointed, notwithstanding the fact that the governor in due time nominated their successors, and the senate which assembled in 1893 adjourned without confirming them, or confirming any successors of the trustees appointed in 1891. *State* v. *Boucher*, 389.
3. The expiration of the prescribed term, when coupled with the fact that the senate adjourned without confirming successors of trustees in office under a former appointment, will not operate to create a vacancy in the office, which, under the statute, can be temporarily filled by the governor. The vacancies contemplated by the statutes are actual vacancies, and such as arise from death, resignation and like causes. *State* v. *Boucher*, 389.
4. Under § 78 of the state constitution, the appointing power of the governor is confined to filling vacancies in office in cases where no other mode is provided by the constitution or laws for filling the same. *State* v. *Boucher*, 389.

GUARDIAN AD LITEM.

Under § 5200, Comp. Laws, making a guardian *ad litem* responsible for costs. The obligation to pay the costs arises upon the law, and does not depend upon a court order, and a court cannot punish for contempt a disobedience to its order for payment of such costs. *Granholm* v. *Sweigle*, 476.

GRANT. See DEED, COVENANT.

GROSS EARNINGS LAW. See ASSESSMENT AND TAXATION.

The gross earnings law did not exempt from taxation property of a railroad company not embraced in any land grant, and not used for railroad purposes. *Fargo & S. W. R. Co.* v. *Brewer*. 34.

HABEAS CORPUS.

1. Rulings of the District Court made upon the trial of a criminal case cannot be reviewed by *habeas corpus*. *State* v. *Barnes*, 131.
2. This is a proper remedy where a person is imprisoned by order of court who had no jurisdiction of the person or subject matter. *State* v. *Barnes*, 131.

HOMESTEAD.

1. A wife who joins her husband in a deed of conveyance for no other purpose than to release her homestead right in the property is not bound by the implied covenant arising from the use of the word "grant." *Dun* v. *Dietrich*, 3.
2. Where a married woman leaves the home of herself and husband, the title to which was in the husband, and remains away nearly three years before claiming any homestead interest in the property, but the husband remains in constant occupancy of the land, keeping his home thereon, such absence alone will not constitute abandonment by the wife of her homestead rights. Whether or not, in such case, a wife could, under any circumstances, forfeit her homestead rights under our statute, not decided. *Rasholt* v. *Mehus*, 513.
3. In divorce proceedings, it is competent for the court to assign the homestead to the innocent party, either absolutely or for a limited period; but where the decree in the divorce proceedings is silent upon the question, the homestead will, upon the dissolution of the marriage, remain in the possession of the party holding the legal title thereto, discharged from all homestead rights or claims of the other party. *Rosholt* v. *Mehus*, 513.

HUSBAND AND WIFE. See HOMESTEAD SURETY, MARRIED WOMEN.

A married woman is liable on a note signed by her as surety for her husband, although she does not charge her separate estate with the payment thereof. *Col. & U. S. Mtg. Co.* v. *Stevens*, 265.

INDICTMENT. See CRIMINAL LAW AND PRACTICE, 523.

INFORMATION. See CRIMINAL LAW AND PRACTICE, 36.

INTOXICATING LIQUORS. See CRIMINAL LAW AND PRACTICE, 523, 319.

INSTRUCTIONS.

1. The giving of erroneous instructions raises an immediate presumption of prejudice, but where the complaining party could not be prejudiced thereby a new trial denied. *Bank* v. *Lemke*, 154.
2. When the instructions are disregarded by the jury, this is good ground for reversal. *McMillan* v. *Aitchinson*, 183.
3. An instruction that in estimating damages the jury may take into account the effect of the injury upon plaintiff's mental powers, when there is no evidence that plaintiff's mental powers were in any way impaired, is erroneous. *Comasky* v. *Nor. Pac. R. Co.*, 276.
4. Where the court on motion and in the hearing of the jury strikes out incompetent evidence volunteered by the witness in answer to proper questions. No duty rests upon the court in the absence of a request so to do, to further caution the jury to disregard the testimony so stricken out. *State* v. *McGahey*, 293.

INSTRUCTIONS—Continued.

5. Failure of the court to strike out remarks of the prosecuting attorney made in the hearing of the jury, where the remarks are of a general character and not such as to prejudice the cause of the accused in the minds of honest men of fair intelligence is not abuse of discretion. *State* v. *McGahey*, 293.
6. It is not error to refuse requests for instructions, though the requests are applicable to the case and correct in law, if the same points are covered in the general charge. *State* v. *McGahey*. 293.
7. Instruction that the jury may allow interest on the annual value of the use of land, while it was wrongfully occupied by the defendant, *held* proper. *Hegar* v. *DeGroat*, 354.
8. In action for possession of land defendant justified under a tax deed, and when the tax deed was offered in evidence the same being void on its face, was excluded for that reason. An instruction that such deed furnished no justification to the defendant for entering upon the land, *held* proper. *Hegar* v. *DeGroat*, 354.
9. An instruction concerning rights of defendant under a written order for straw stacker, held erroneous as ignoring and violating the positive language of the writing. *Reeves & Co.* v. *Corrigan* 415.
10. "The general rule is that in the case of a highway, a municipal corporation is answerable in damages for the lack of ordinary and reasonable care and is held to the same rule of negligence which is expected of private persons in the conduct of their business involving a like danger to others." *Ludlow* v. *Fargo*, 485.

JUDICIAL NOTICE.

Courts and judges rest under an official obligation to notice and recognize, without proof, such facts and matters as are so notorious as to be generally known. Among other things, courts must judicially notice the vernacular language, and such abbreviations and symbols of ideas as have, from immemorial use, been adopted by the people generally, and thereby have become a part of the common usage of the language. When this occurs, *i. e.* when a given usage of language ceases to be a mere special usage, limited in its sphere, and emerges into general use among the masses of the people, the state, either by its courts or its legislature, will adopt and legalize such usage, and thereby add the same to the body of the common or of the statute law, as the case may be. Thereafter the existence of such general usage of language is not to be left to the hazards of *nusi prius* trials, to be proved or disproved, as testimony may preponderate one way or the other. Its existence is evidenced by the statute or by judicial precedents, as the case may be. *Power* v. *Bowdle*, 107.

JUDGMENT.

1. A judgment by default will not be vacated excepting upon affidavit of merits. *Gauthier* v. *Rusicka*, 1.
2. Judge may direct entry of judgment when outside his district. *Gould* v. *Elev. Co.*, 96.
3. Where, on account of irregularities connected with the tax sale, a tax deed is set aside by the court, such deed no longer possesses any evidential force, and, in order to show that the tax for which the sale was made, or any subsequent tax, was a lawful tax, the party alleging the fact must show, by common-law proof, that the steps essential to a valid tax have been taken by the officials. A

JUDGMENT—Continued.

regular assessment and levy must be alleged and proved in order to recover judgment, under § 1643, Comp. Laws. *O'Neil* v. *Tyler*, 47.

4. In a case where the sole issue is plaintiff's right to recover anything of defendant, and where the amount due, if anything, is admitted by the pleadings, and where the jury returns a general verdict in favor of plaintiff, and against defendant, without fixing the amount of the recovery, it is not error prejudicial to the defendant for the court to order judgment for plaintiff for the amount admitted by the pleadings. *English* v. *Goodman*, 129.
5. An application to the District Court, or to a judge thereof, for an order directing the entry of a judgment, may be made *ex parte*. Notice of such application is not necessary, unless a stay exists, or the court or judge, for some special reason, directs that such notice be given. *Gould* v. *Duluth & Dak. Elev. Co.*, 96.
6. Defendant moved in the District Court to vacate certain judgments entered in plaintiff's favor, and pending defendant's motion plaintiff made a counter motion, asking, in the alternative, either that the judgments be confirmed, or, if vacated on defendant's motion, that a new judgment be entered on the verdict. Both motions were denied, by one and the same order. *Held*, that while the order, in terms, denied plaintiff's motion, as well as that of the defendant, its practical operation and legal effect were wholly favorable to the plaintiff and wholly unfavorable to the defendant. *Gould* v. *Duluth & Dak. Elev. Co.*, 96.
7. The judgment of a justice of the peace entered by default in unlawful detainer action is void for want of jurisdiction, where it appears that both parties claim title to the land. *Hegar* v. *DeGroat*, 354.
8. One who buys a setoff to a claim against him without notice of a prior assignment of such claim, may use the setoff as a defense the same as though the claim against him had not been assigned. *Clark* v. *Sullivan*, 280.

JURISDICTION. See JUSTICE OF THE PEACE, 354.

1. District Judge has jurisdiction to direct entry of judgment when outside of his district. *Gould* v. *Duluth & Dak. Elev. Co.*, 96.
2. District Judge has no jurisdiction to order guardian *ad litem* of infant plaintiff to pay costs, and imprison or punish for contempt on refusal of guardian to obey his order. *Granholm* v. *Sweigle*, 476.
3. State courts are without jurisdiction to declare rights of adverse claimants to public lands. *Grandin* v. *LaBar*, 446.
4. A justice of the peace has no jurisdiction of unlawful detainer case where the title to land is involved. *Hegar* v. *DeGroat*, 354,

JUSTICE OF THE PEACE.

1. A justice of the peace has no jurisdiction to enter judgment by default in an unlawful detainer suit where the title to land is in dispute. *Hegar* v. *DeGroat*, 354.
2. A special appearance before a justice of the peace to object to jurisdiction on the ground that the summons was not sufficient to confer jurisdiction, is not a voluntary appearance. *Miner* v. *Francis & Southard*, 549.
3. A summons issued by a justice of the peace, returnable, not on any particular day, but on the seventh day after the service thereof, does not contain a direction for the defendant to appear and answer before the justice at a time specified in the summons, and service of such a summons will not give the court jurisdiction of the person of the defendant. *Miner* v. *Francis & Southard*, 549.

JURY TRIAL. See CONDEMNATION PROCEEDINGS, 480.

LIEN.

1. The lien of an attorney for money due his client, in the hands of the adverse party, under § 470, Comp. Laws, when secured by compliance with the requirements of that section, gives the attorney an interest in such moneys, similar to that of an equitable assignee thereof. *Clark* v. *Sullivan & Voss*, 280.
2. His interest extends to and embraces the judgment rendered in the action to recover such moneys, and also the undertaking to pay such judgment, given by the defendant in such action on appeal, and also the cause of action on such undertaking against the surety thereon. The attorney has the same equitable interest in such judgment, undertaking, and cause of action upon the undertaking that he has in the money due his client from the adverse party. *Clark* v. *Sullivan & Voss*, 280.
3. The entry of notice of lien under Subd. 4 of § 470 is not notice to any except the judgment debtor. *Clark* v. *Sullivan & Voss*, 280.
4. "Lien" is not synonymous with "Estates and Interest." *Power* v. *Bowdle*, 107.
5. In order to preserve a lien for threshing grain, under Ch. 88, Laws Dakota Territory, 1889, the statement which that statute directs shall be filed, must contain a description of the land whereon the grain upon which the lien is claimed was grown. *Parker* v. *First Nat. Bank*, 87.
6. No party is entitled to a lien, under the provisions of that chapter, unless he owns and operates the machine with which the threshing was done. *Parker* v. *First Nat. Bank*, 87.
7. When a party claiming to have a thresher's lien under Ch. 88, Laws 1889, takes possession of the grain, and sells the same, and an action is brought against him by the owner of the grain for converting the same, it is incumbent upon the lien claimant to show at the trial not only that he filed a verified account in writing embodying, among other things, a description of the land upon which the grain was grown, but he must further prove that, as a matter of fact, the grain upon which the lien is claimed was grown upon the land described in the writing on file. Accordingly, *held*, where in such action the defendant (lien claimant) rested his defense without offering any testimony tending to show where the grain in question was grown, and the plaintiff testified that no grain was grown in the year in question upon the land described in the statement filed with the register of deeds, it was error in the trial court to deny plaintiff's motion to strike out all evidence in the case relating to the lien. *Martin* v. *Hawthorn*, 412.
8. The clause in chattel mortgage after description of the land upon which the crops are to be grown, "It is expressly covenanted and agreed that this mortgage is a lien upon said land and the use thereof during said time" does not create a lien upon the real estate. *Mortgage Bk. & Inv. Co.* v. *Hanson*, 465.
9. The priority of lien on a building given to one who furnishes material, as against an existing incumbrance on the land, by the provisions of § 5480, Comp. Laws, does not exist, unless the building or improvement on which such priority of lien is claimed was wholly erected subsequently to the attaching of the lien of the incumbrance, and the lien claimed to be prior thereto is for work done or material furnished in such erection. Such priority of lien exists only when the holder of such lien can have the building or improvement sold, and removed

LIEN—Continued.

from the land, without unlawfully invading the rights of the earlier incumbrancer. *James River Lumber Co.* v. *Danner*, 470.

LIMITATION OF ACTIONS.

A tax deed void on its face cannot operate to set the statute of limitations in motion. *Hegar* v. *DeGroat*, 354.

LOCOMOTIVE. See NEGLIGENCE, 17.

MANDAMUS.

1. Alternative writ of *mandamus* quashed, because it appeared that the motion for a new trial, which it directed the District Judge to decide, was not pending before him for decision. *State* v. *Judge of District Court*, 43.
2. *Mandamus* will not lie to aid in the collection of an illegal claim. *State* v. *Getchell*, 243; *State* v. *Currie*, 310.

MARRIED WOMEN. See HUSBAND AND WIFE, 265.

MECHANIC'S LIEN. See LIEN, 470.

MINGLING OF GOODS.

1. Where a merchant purchases goods of the same class and quality from different parties and in the ordinary course of business so mingles the goods upon his shelves that it becomes impossible to designate the goods purchased from any one party, yet such fact will not render the entire stock liable to seizure at the suit of one of such parties to recover the purchase price of goods sold to such merchant. *Wagner* v. *Olson*, 69.
2. Where the property of one is received by another, this, of itself, does not entitle the owner to priority of payment out of the general assets of the one receiving the property. To recover his property, the owner must be able to trace and identify it in some form. When it is mingled indistinguishably with the mass of property of the one receiving it, or when, as in the case of money, it is paid out by him, the right to pursue it is lost, because identification is impossible. *Northern Dak. Elev. Co.* v. *Clark & Smart*, 26.

MORTGAGE. See FORECLOSURE OF MORTGAGES, CHATTEL MORTGAGE, LIEN.

MOTION FOR NEW TRIAL.

1. When an appeal is taken from an order denying a new trial, and the motion for such new trial was heard in part upon certain papers and documents, which, on appeal to this court, have been properly indentified by the judge and certified by the Clerk of the District Court, a motion to purge the record of such papers and documents for the reason that the same are not authenticated by any bill or statement cannot be sustained. Under § 5, Ch. 120, Laws 1891, no bill or statement is required to bring such papers and documents before the court. *Goose River Bank* v. *Gilmore*, 188.
2. The stenographer's transcript of the proceedings had at the trial, and used on a motion for new trial for the purpose of showing errors of law occurring at the trial, does not constitute an authenticated record, and before this court can review errors occurring at the trial the proceeding must be brought upon the

MOTION FOR NEW TRIAL—Continued.

record by a bill of exceptions or statement of the case. *Goose River Bank* v. *Gilmore*, 188.

3. An affidavit used upon a motion for a new trial, which states that certain evidence could and would be offered if a new trial should be granted, is entirely insufficient unless it also states that such evidence is newly discovered, or furnishes some excuse for not introducing it on the former trial. *Goose River Bank* v. *Gilmore*, 188.
4. When not submitted by the parties for determination and no continuance of the motion made, the same is not pending, and the court cannot be compelled by *mandamus* to decide it. *State* v. *Judge of District Court*, 43.

MUNICIPAL CORPORATIONS.

1. The charter of the City of Fargo, as amended in 1881, gave the mayor a veto power as to ordinances and resolutions passed by the council, and also conferred upon the "mayor and council" the power to "levy and collect taxes." An ordinance also provided that the "mayor and council" should "levy" the annual city taxes. The validity of a tax levy being in issue, the record of the proceedings of the city council showed that the council by resolution levied a tax, but no evidence was offered to show that the mayor approved of such resolution, or that he in any manner participated in or knew of the action of the council. *Held*, that the proof failed to show a valid levy. *Held*, further that no valid levy could be made by the independent action of the council. *O'Neil* v. *Tyler*, 47.
2. Section 13 of the charter of the City of Fargo, as amended in 1881, provides "that upon the passage of all ordinances the yeas and nays shall be entered upon the record of the city council." This provision is mandatory, and it appearing that an ordinance (Title 1, Ch. 6, of the ordinances of the City of Fargo,) was adopted in violation of said provision, and that upon its passage by the council the yeas and nays were not entered upon the record, *held*, that said ordinance was not legally adopted, and hence never became a valid ordinance. *Held*, further, that an ordinance subsequently adopted, purporting to amend a single section of such ordinance, and which could not be enforced when standing alone, is likewise null and void. *O'Neil* v. *Tyler*, 47.
3. The county superintendent of schools, under Ch. 14, Laws 1879, organized a school district, school district officers were elected, and exercised the functions of their respective offices; teachers were employed by the district, and school was taught therein, and a school meeting was held in the district to vote upon the question of issuing bonds to build a schoolhouse. Such bonds were thereafter issued. In an action upon some of the interest coupons of such bonds, *held*, that the district was a *de facto* municipal corporation, and that therefore the defense could not be interposed that the bonds were void on the ground that the district had no legal existence because of failure to comply with provisions of the statute regulating the organization of such districts in matters which went to the jurisdiction of the county superintendent to organize the district. *Coler* v. *Dwight School Tp.*, 249.
4. Cities which have been organized or reorganized under the general law of this state (Comp. Laws, § 844 *et seq.*) are charged with full power and responsibility in the matter of the streets, sidewalks, and crossings within their limits;

MUNICIPAL CORPORATIONS—Continued.

and the duty of establishing streets and removing obstructions therefrom is a duty expressly enjoined by the statute. In performing such duties, cities are liable in a civil action to persons who, in the exercise of due care, receive injuries caused by negligent acts done either by the city officials or others who are acting for the city and under its authority. The cities so organized and governed are impliedly liable for damages caused by their wrongful or negligent acts, and no express statute making them liable is necessary. Accordingly, *held*, that the following instruction, given by the trial court to the jury, is not error: "The general rule is that, in the case of a highway, a municipal corporation is answerable in damages for the lack of ordinary and reasonable care, and is *held* to the same rule of negligence which is expected of private persons in the conduct of their business involving a like danger to others." *Ludlow* v. *City of Fargo*, 485.

5. A ditch was dug across one of the public streets of the City of Fargo by workmen acting under the authority of the city. The workmen left the ditch ungarded, and without a light to warn the public of danger. After dark the plaintiff was driving along said street, and drove into the ditch, and was thrown from her carriage and injured. *Held*, that these facts show that the obstruction in the street which caused the injury complained of was the result of the direct act of the city, and in such a case the plaintiff was not obliged, in order to recover, to show either actual or constructive notice to the city of the existence of the obstruction. *Ludlow* v. *City of Fargo*, 485.
6. Where a statute authorized the issue of municipal bonds payable in not less than ten years from date, bonds issued thereunder payable in eleven days less than ten years from date, are void even in the hands of a *bona fide* purchaser. *Peoples' Bank* v. *School Dist.*, 496.
7. The invalidity of such bonds does not effect the liability of the municipality independently of the bonds. *Peoples' Bank* v. *School Dist.*, 496.

NATIONAL BANKS.

1. Section 5139, Rev. St. U. S., providing that the stock of a national bank shall be "transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association," was enacted for the benefit of the corporation, its shareholders and creditors, only. As to all other parties a transfer of such stock, good at common law, is good under the statute. *Doty* v. *Bank*, 9.
2. Under the federal statutes, the rights of a transferee of national bank stock, under an unrecorded transfer, good at common law, are superior to the rights of a subsequent attaching creditor of the transferrer without notice. *Doty* v. *Bank*, 9.
3. It is not competent for state legislation to limit or interfere with the transferable quality of national bank stock, as the same is left by the statutes of the United States. *Doty* v. *Bank*, 9.

NEGOTIABLE INSTRUMENTS.

1. Where a purchaser of property gives his note therefor, and afterwards rescinds the contract of sale on the ground of breach of warranty, he may recover the amount of the note and interest, without first paying the same, when the note was negotiated before maturity to an innocent purchaser for value. But the judgment should provide that upon the return of the note to the plaintiff, and

NEGOTIABLE—INSTRUMENTS—Continued.

his release from all liability thereon growing out of any judgment which has been recovered thereon, and on payment of costs within a specified time, the judgment should be satisfied. *Fahey* v. *Esterly Machine Co.*, 220.

2. Bona fide indorsee for value of a negotiable instrument takes it free from the defense that it was given as purchase price for a machine upon which there was a breach of warranty. *Fahey* v. *Esterly Machine Co.*, 220.
3. Bona fide purchasers of negotiable municipal securities are charged with knowledge of all the requirements of the statute under which the securities were issued. *People's Bank* v. *School District*, 496.

NEGLIGENCE. See CONTRIBUTORY NEGLIGENCE.

1. Where an action is brought against a railroad company for the negligent killing of a domestic animal, the plaintiff can, if he sees fit to do so, make out a *prima facie* case without showing actual negligence, by proving the value of the animal and the fact that it was killed by defendant's train of cars; but in such case, if the defendant, to overcome the statutory presumption of negligence arising from the killing, shows conclusively by undisputed evidence that the train in question was at the time of the accident in good repair and condition, and was equipped with the best modern appliances and improvements in use, and was operated skillfully and with due care, then, and in such case, the statutory presumption of negligence arising from the killing is rebutted and entirely overcome; and where in case, at the close of the testimony, defendant requested the trial court to direct a verdict for the defendant, and the court refused to do so, *held*, that such refusal was reversible error. *Hodgins* v. *R. R. Co.*, 382.
2. Plaintiff, a switchman, in the employ of defendant, was directed by the foreman of the switching crew to assist him in coupling an engine to a flat car. According to some of the evidence the drawhead of the car sank flush with the end of the car when the engine struck the car, and plaintiff was caught between the car and engine, and injured. The evidence showed that the play of a drawbar was from 1 to 4 inches, and that this drawbar was 10 to 12 inches long. *Held*, sufficient evidence of defendant's negligence to require the submission of that question to a jury. *Bennett* v. *N. P. R. Co.*, 91.
3. The presumption of negligence from the setting out of a single fire by an engine is one of law, and whether such presumption has been fully met and overthrown is in the first instance a question for the court. Evidence examined, and *held* sufficient to overthrow the presumption in this case. *Smith* v. *N. P. R. Co.*, 17.
4. The mere fact that the fire was started 118 feet from the track is not sufficient in itself to warrant submission of the question of negligence to the jury. *Smith* v. *N. P. R. Co.*, 17.
5. A city organized under the general law is bound to keep its streets free from obstructions and is liable to a person injured by neglect of this duty. *Ludlow* v. *City of Fargo*, 485.
6. Where an obstruction was caused by the direct act of the city, a person injured thereby need not show as condition precedent to recovery either actual or constructive notice of the obstruction to the city. *Ludlow* v. *City of Fargo*, 485.

NEW TRIAL. See MOTION FOR NEW TRIAL, 188; APPEAL.

NOTICE.

1. Notice of attorneys lien is only good as against the judgment debtor. *Clark* v. *Sullivan*, 280.
2. A purchaser of municipal bonds is chargeable with notice of the requirements of law under which they are issued. *People's Bank* v. *School District*, 496.

NOTICE OF TRIAL.

When the notice of trial contains an error in the date of the commencement of the term, the month and year being stated correctly, the notice is sufficient. *Smith* v. *N. P. R. Co.*, 17.

NOTICE OF MOTION.

A defendant is not entitled to notice of motion for leave to file a new or amended information against him, where one has been set aside as defective. *State* v. *Hasledahl*, 36.

OFFICAL BONDS.

Obligation of surety will not be enlarged by construction. *Prairie School Tp.* v. *Haseleu*, 328.

ORDINANCE. See MUNICIPAL CORPORATIONS, 47.

1. Where the charter of a city requires "that upon the passage of all ordinances the yeas and nays shall be entered upon the record of the city council" the provision is mandatory, and an ordinance passed in violation of this provision is not legally adopted, and the subsequent amendment of such void ordinance, by a section which could not be enforced standing alone, is also void. *O'Neil* v. *Tyler*, 47.
2. Where the charter so provides the mayor must approve all ordinances and resolutions and without his approval they are of no validity. *O'Neil* v. *Tyler*, 47.

ORDER.

An order by judge may be made outside of his district. *Gould* v. *Duluth & Dak. Elev. Co.*, 96.

PARTIES. See PLEADING AND PRACTICE, 354.

Sections 3303, 4870, Comp Laws, construed. The plaintiff Schmitz conveyed the land in question to the plaintiff Hegar while the defendant was in the actual possession of the land, claiming title adversely to Schmitz. *Held*, in an action brought by Hegar to recover the possession, and damages for wrongfully withholding the land, that Schmitz was properly joined as a formal party plaintiff. *Hegar* v. *DeGroat*, 354.

PAYMENT UNDER PROTEST.

A payment made under protest is of no avail unless their was duress or coercion of some character. *Wessel* v. *Mtg. Co.*, 160.

PERSONAL PROPERTY. See SALE, 76.

1. When, at or prior to the time of the execution of a bill of sale of personal property, the vendor, with intent to transfer the title and possession of the same, pointed it out to the agent of the vendee, where it was contained in boxes and crates, and stood in a warehouse, and subsequently locked the building, and delivered the key to such agent, who thereafter retained it, there was such an

PERSONAL PROPERTY—Continued.

immediate delivery and actual and continued change of possessson as fulfills the requirements of § 4657, Comp. Laws. *Morrison* v. *Oium*, 76.

2. Such delivery is not impaired by the fact that a third party may also have had property in the same warehouse, and held a key thereto; nor by the further fact that the vendor may have agreed with such third party that his possession should be exclusive. *Morrison* v. *Oium*, 76.

PERSONAL INJURIES. See NEGLIGENCE, DAMAGES, INSTRUCTIONS.

PLEADING AND PRACTICE.

1. Under Ch. 79, § 10, Laws 1891, the same business can be transacted at an additional term of court called by the judge as at the terms fixed by the statute. New cases can be noticed for such term and placed on the calendar thereof, and tried thereat. *Smith* v. *N. P. R. Co.*, 17.
2. Where in an action against a firm composed of two persons, the jury renders a general verdict only, in favor of plaintiff and against defendant, it is error for the court, while such verdict remains in the record, to render judgment against the plaintiff, dismissing the action as to one member of the firm, with costs. *Kellogg, Johnson & Co.* v. *Gilman*, 538.
3. A cause of action for tort cannot be sustained as an equitable set off, independant of statute, there being no averment that the interveners are insolvent. The mere fact that they are not residents of the state does not warrant the application of the doctrine of equitable set off. *Braithwaite* v. *Akin*, 365.
4. Even if the interveners were insolvent, equity would not allow the set off of a cause of action for an independeut tort against a claim arising on contract. *Braithwaite* v. *Akin*, 365.
5. One whose property has been converted may waive the tort and sue for the benefits received by the wrongdoer, although he has not disposed of the property converted; but the intent to waive the tort must appear on the face of the pleading. *Braitwaite* v. *Akin*, 365.
6. One who intervenes in an action subjects himself as fully to the jurisdiction of the court as if he had brought an original action against the person against whom his complaint in intervention is filed, and the defendant in intervention may recover an affirmative judgment against the intervener either because of matters growing out of the intervener's claim or by establishing a counterclaim the same as a defendant in an ordinary action. *Braithwaite* v. *Akin*, 365.
7. Plaintiff and interveners having recovered judgment against the defendants, the interveners claimed the money under a written contract with plaintiff. (See the contract referred to in the opinion.) Such contract provided that the interveners and the plaintiff (defendant in intervention) should contribute certain sums to a common fund with which to purchase the steamboat Eclipse, that the title should be taken in the names of plaintiff and another; that they should operate the boat, and pay over her earnings to the interveners, until their advances and certain claims of theirs against the boat were paid. After that the interveners' interest in the contract were to cease, and the boat to belong absolutely to plaintiff and the other purchaser. The boat was purchased by plaintiff and the other person under the agreement, and it is for the earnings

PLEADING AND PRACTICE—Continued.

while plaintiff was operating her under the agreement that the plaintiff recovered judgment. The interveners claimed the money due under this judgment as money to which they were entitled under the agreement. *Held*, that the plaintiff (defendant in intervention) cannot set up as a counterclaim a cause of action for the conversion of his interest in the steamboat referred to in such contract; that the cause of action for the tort did not arise out of the contract or transaction set forth in the intervention complaint as the foundation, of the interveners' claim and is not connected with the subject of the action. *Braithwaite* v. *Akin*, 365.

8. In an action under § 5449, Comp. Laws, to determine adverse "estates and interests" in real estate, the defendant may by answer, in addition to a denial of plaintiff's title, allege facts which show title in himself, and ask that such title be quieted and confirmed by the court. Such new matter, when property pleaded, constitutes a counterclaim, within the meaning of Subd. 1, § 4915, Comp. Laws. Such counterclaim constitutes a cause of action in favor of the defendant, and against the plaintiff, which is "connected with the subject of the action." *Power* v. *Bowdle*, 107.

9. To such counterclaim, if not demurred to, the plaintiff must respond by a reply, and, if none is served, the defendant may move for judgment. Comp. Laws, § § 4918, 4919. But where both parties at the trial treat the new matter as traversed and at issue, and evidence upon the same is put in without objection, and the court, without objection, proceeds to litigate and determine the subject matter of the counterclaim, it will be too late, after judgment, to raise the point that no reply was served. In such case the reply is waived by conduct. *Power* v. *Bowdle*, 107.

10. "Estates and interests" in lands are not synonymous in meaning with "liens." Mere "liens" are not primarily within the purview of the statute; but where a defendant sets out new matter as a counterclaim, which embraces a "lien" upon the land, and asks the court to pass upon the same, and such new matter is heard upon the merits, and is determined by the court, without objection, it will be too late, after judgment, for the defendant to raise the technical objection that "liens" cannot be litigated in such an action. *Power* v. *Bowdle*, 107.

11. In a case where the sole issue in plaintiff's right to recover anything of defendant, and where the amount due, if anything, is admitted by the pleadings, and where the jury returns a general verdict in favor of plaintiff, and against defendant, without fixing the amount of the recovery, it is not error prejudicial to the defendant for the court to order judgment for plaintiff for the amount admitted by the pleadings. *English* v. *Goodman*, 129.

12. The territorial statutes embraced in § § 1640, 1643, Comp. Laws, undertook to modify and regulate the practice in a variety of tax cases, including actions to "cancel" or "avoid" tax deeds. These statutes cannot be completely reconciled with each other, but the court is not at liberty to wholly ignore them, and render its decisions in such cases upon general principals only. With a view to giving the two sections some effect, § 1640 is limited to cases where the validity of the tax, in whole or in part, is conceded, and § 1643 is applied to other cases arising under the territorial tax laws. *O'Neil* v. *Tyler*, 47.

PLEADING AND PRACTICE—Continued.

13. The object of this action is to quiet plaintiff's title to real estate, and to annul defendant's adverse title, and it is brought under § § 5449, 5450, Comp. Laws. *Held*, that, within the meaning of § 1643, *supra*, it is an action to "cancel" a tax deed. The plaintiff invoked the equity powers of the District Court by praying for equitable relief, and that court gave such relief by its judgment annulling certain tax deeds as clouds on plaintiff's title. The action was therefore in equity, and none the less so because the plaintiff used a short form of complaint, and did not set out the nature of the cloud he was seeking to remove. *O'Neil* v. *Tyler*, 47; *Power* v. *Bowdle*, 107.

14. Defendant moved in the District Court to vacate certain judgments entered in plaintiff's favor, and pending defendant's motion, plaintiff made a counter motion, asking, in the alternative, either that the judgments be confirmed, or, if vacated on defendant's motion, that a new judgment be entered on the verdict. Both motions were denied, by one and the same order. *Held*, that while the order, in terms, denied plaintiff's motion, as well as that of the defendant, its practical operation and legal effect were wholly favorable to the plaintiff and wholly unfavorable to the defendant. *Gould* v. *Elevator Co.*, 96.

15. The practice of mingling distinct and independent matters in one hearing, and disposing of the batch by one order, condemned. *Gould* v. *Elevator Co.*, 96.

16. No appeal will lie from an order, in favor of a party. *Gould* v. *Elevator Co.*, 96.

17. An application to the District Court, or to a judge thereof, for an order directing the entry of a judgment, may be made *ex parte*. Notice of such application is not necessary, unless a stay exists, or the court or judge, for some special reason, directs that such notice be given. *Gould* v. *Elevator Co.*, 96.

18. Under the proviso contained in § 4828 Comp. Laws, a Judge of the District Court of the district in which the action is pending has authority, by an *ex parte* order, made while outside of such district, and within the state, to direct the entry of a judgment in such action; and, where an outside judge has been requested to act in the place of the judge of the district where the action is pending, under Ch. 61, Laws 1890, such outside judge is, with respect to such cases or matters as come within the request to act, empowered to "do and perform all such acts as might have been done and performed by the judge of such district." Accordingly, *held*, that the Judge of the Fifth Judicial District, who had been duly requested to act, had authority to sign an *ex parte* order for judgment in this case while within the fifth district; the action being pending in the third district. *Gould* v. *Elevator Co.*, 96.

19. On appeal from a judgment embracing costs, this court will presume, unless the contrary affirmatively appears in the record, that the costs were duly taxed and inserted in the judgment. Where presumptions control, they will only be indulged in support of the judgment. Elliott, App. Proc. § § 710, 717, 718, 725. *Gould* v. *Elevator Co.*, 96.

20. An action for the conversion of personal property cannot be maintained unless plaintiff was in possession or held a legal right to immediate possession of the property converted. *Parker* v. *First Nat. Bank*, 87.

21. An affidavit of merits required on motion to vacate judgment entered by default. *Gauthier* v. *Rusicka*, 1.

22. Removal of causes. Amount in controversy is the amount demanded in the complaint. *Smith* v. *N. P. R. Co.*, 17.

PLEADING AND PRACTICE—Continued.

23. A litigant is bound to know when terms of court are held, therefore when a notice of trial contains an error in the date of the commencement of the term, the month and year being stated correctly, the notice is sufficient. *Smith* v. *N. P. R. Co.*, 17.

24. The court will vacate decrees obtained by fraud and deceit practiced upon the prevailing party. *Yorke* v. *Yorke*, 343.

25. Where a decree is vacated for fraud in its procurement, it is not proper to dismiss the action, but defendant should be given a reasonable time within which to answer the complaint. *Yorke* v. *Yorke*, 343.

26. The admission of irrelevant testimony, where the same works no prejudice is not ground for reversal. *Hegar* v. *DeGroat*, 354.

27. In negligence cases where defendant by conclusive and undisputed evidence shows that the train at the time of accident was in good repair and condition and equipped with the best modern appliances and improvements in use and was operated skillfully and with due care, then the statutory presumption of negligence arising from the killing of a domestic animal is overcome, and a verdict should be directed on proper motion for the defendant. *Hodgins* v. *M. St. P. & S. St. M. R. Co.*, 382.

28. It is proper in certain cases to strike out all evidence upon motion and to direct a verdict. *Martin* v. *Hawthorne*, 412.

29. The court cannot punish a guardian *ad litem* of infant plaintiff as for contempt, because of his refusal to obey an order directing the payment of costs. *Granholm* v. *Sweigle*, 477.

30. Where there is any competent evidence in the testimony of a witness, a motion to strike out his entire testimony is properly overruled. *M. St. P. & S. St. M. R. Co.* v. *Nester*, 480.

31. A motion to vacate execution sale must be made within the redemption period. *Power* v. *Larabee*, 502.

32. The sale of several pieces of land upon execution *en masse*, renders the sale voidable, not void. *Power* v. *Larabee*, 502.

33. Redemption is adequate remedy for defendant against sacrifice of his property from inadequacy of price. *Power* v. *Larabee*, 502.

34. Waiting beyond the redemption period before moving to vacate a sale for inadequacy of price or because several pieces were sold in lump, is a waiver of the irregularity. *Power* v. *Larabee*, 502.

35. The presence of plaintiff and the sheriff only at sale, the plaintiff being the only bidder, does not render a sale on execution either void or voidable. *Power* v. *Larabee*, 502.

36. In divorce decree, the court can assign the homestead to the innocent party *Rosholt* v. *Mehus*, 513.

37. An allegation that a mortgage has been assigned to plaintiff, coupled with an averment that plaintiff is the holder and owner of the notes secured by the mortgage, sufficiently shows title to the notes and mortgage in the plaintiff, although the notes and mortgage appear to be payable to another person. *Fisher* v. *Bouisson*, 493.

38. A complaint upon its face must show whether any proceedings have been had at law or otherwise for the recovery of the debt secured by the mortgage. An averment that no other foreclosure proceedings had been instituted than

PLEADING AND PRACTICE—Continued.

proceedings to foreclose by advertisement which had been enjoined, is not a compliance with the statute. *Fisher* v. *Bouisson*, 493.

39. In claim and delivery where the question of value is in dispute it must be submitted to the jury. *Haveron* v. *Anderson*, 540.

40. In claim and delivery where each party alleges ownership in himself the burden of proof is on plaintiff to establish his ownership. *Haveron* v. *Anderson*, 540.

41. It is proper for the court on motion of defendant where plaintiff has failed to sustain by proof of his allegation of ownership in claim and delivery, to strike out all evidence offered to support his claim of ownership and direct a verdict for defendant that he is owner and entitled to a return of the property. *Haveron* v. *Anderson*, 540.

42. When a decree of court has been obtained, and an application to set the same aside is subsequently made in the same case, service of the citation to show cause why the decree should not be set aside is properly made upon the attorney of record who procured the decree. *Yorke* v. *Yorke*, 343.

43. An affidavit for publication of summons, which entirely fails to show that any diligence was used to find the defendant in this state, and fails to state positively the residence of such defendant, or that any diligence has been used to ascertain such residence, is fatally defective, and a publication of summons based upon such affidavit confers no jurisdiction of the person of defendant. *Yorke* v. *Yorke*, 343.

44. When a party who has not been properly served with process appears in a case, and asks to have a decree against him set aside for the reason that the court had no jurisdiction of his person, and for the further reason that such decree was procured by fraud and deceit, and was without evidence to support it, such appearance is general, and is a waiver of all defects in the service of process. *Yorke* v. *Yorke*, 343.

45. But such general appearance will not validate a decree otherwise invalid by reason of fraud and deceit practiced in its procurement. *Yorke* v. *Yorke*, 343.

PLEDGE.

A pledge cannot be created in the absence of contract. *Taylor* v. *Jones*, 235.

POSSESSION. See PERSONAL PROPERTY, 76.

PREFERRED CREDITOR. See CONFUSION OF GOODS.

Mere enrichment of the estate or extinguishment of debts by the property of another, will not make the owner thereof a preferred creditor. *N. D. Elev. Co.* v. *Clark & Smart*, 26.

PRESUMPTION OF NEGLIGENCE.

1. When overcome in fire cases. *Smith* v. *N. P. R. Co.*, 17.

2. When overcome in stock killing cases. *Hodgins* v. *M. St. P. & S. St. M. R. Co.*, 382.

PRESUMPTIONS. See PLEADING AND PRACTICE, EVIDENCE, NEGLIGENCE.

PRELIMINARY EXAMINATIONS. See CRIMINAL LAW AND PRACTICE, 131.

It is not necessary that a new preliminary examination be had before a new or amended information can be filed against a defendant, the first information having been adjudged defective in form. *State* v. *Haseldahl*, 36.

PURCHASE MONEY, EXECUTION. See EXECUTION, 69.

PRINCIPAL AND SURETY.

1. A married woman is liable upon a note signed by her as surety for her husband although she does not charge her separate estate with the payment thereof. *Col. Mtg. Co.* v. *Stevens*, 265.
2. The obligations of sureties upon official bonds are measured by the language of the bonds. The obligation cannot be expanded by construction beyond the fair import of the language used. *Prairie School Tp.* v. *Haseleu*, 328.

PUBLIC LANDS.

While the title to real estate remains in the United States, state courts are without jurisdiction to declare rights thereto of adverse claimants. *Grandin* v. *LaBar*, 446.

PUBLIC OFFICERS. See VACANCY.

1. Salary of the secretary of railroad commissioners determined. *State* v. *Currie*, 310.
2. Trustees of the state penitentiary are appointed by the concurrent action of the governor and senate, and they continue in office not only until the expiration of the prescribed term for which they are appointed, but beyond that period and until their successors are chosen by the action of both the governor and senate. *State* v. *Boucher*, 389.
3. The governor has no power under Ch. 95, Laws 1893, to remove the trustees of the agricultural college from office. *State* v. *Miller*, 433.

RAILROADS. See GROSS EARNINGS LAW, 34; NEGLIGENCE, 382; PRESUMPTIONS, EVIDENCE, PLEADING AND PRACTICE, CONDEMNATION PROCEEDINGS, 480.

RAILROAD LAND GRANTS. See PUBLIC LANDS, 446.

RAILROAD COMMISSIONERS. See PUBLIC OFFICERS, 310.

RECISSION OF CONTRACT.

1. Upon recission of contract for breach of warranty the buyer must show performance of all conditions precedent on his part to be performed, before a recovery can be had for purchase price. *Fahey* v. *Esterly Machine Co.*, 220.
2. Upon recission of the contract of purchase, for breach of warranty the buyer can recover the amount of his note, without first paying the same, when the note has been negotiated before maturity. *Fahey* v. *Esterly Machine Co.*, 220; *Canham* v. *Plano Mfg. Co.*, 229.
3. The right to rescind a contract of purchase for breach of warranty is not waived where the agent who sold the machine, induced the purchaser to hold the same under repeated promises to remedy the defects. *Canham* v. *Plano Mfg. Co.*, 229.

REDEMPTION.

1. Where a party in possession, and with full knowledge of all the facts, pays to the proper officer the money necessary to redeem certain real estate from a foreclosure sale by advertisement, which sale was made after the lien of the mortgage had been fully satisfied and destroyed, and where such payment is made for the sole purpose of preventing the execution of a deed to the purchaser at the foreclosure sale, which would create an apparent cloud upon

REDEMPTION—Continued.

the title, such payment is voluntary, and cannot be recovered. *Wessel* v. *D. S. B. Johnson L. Mtg. Co.*, 160.

2. Redemption from an execution sale is an adequate remedy against irregularities in the sale of several pieces of land *en massee* and for a grossly inadequate price. *Power* v. *Larabee*, 502.

REMOVAL FROM OFFICE. See TRUSTEES OF STATE INSTITUTIONS, 433; PUBLIC OFFICERS, VACANCY, GOVERNOR.

REMONAL OF CAUSES. See AMOUNT IN CONTROVERSY, 17.

REPLEVIN. See CLAIM AND DELIVERY, EVIDENCE, INSTRUCTIONS.

REPLY. See PLEADING AND PRACTICE.

REPEAL OF STATUTE.

1. The repeal of the usury statute did not extinguish the penalties incurred thereunder. *Nat'l Bank of N. D.* v. *Lemke*, 154; *McCann* v. *Mtg. Bank & Inv. Co.*, 172.
2. Repeals by implication are not favored. *State* v. *Currie*, 318.
3. When two acts are not in all respects repugnant, if the later act covers the whole subject of the earlier and embraces new provisions which show the last is intended as a substitute for the first, it will operate as a repeal. *State* v. *Currie*, 318.

RES JUDICATA.

When it is not certain that the same question was determined in favor of the party in another action, who relies upon the judgment therein as conclusive upon said question, the judgment is not final on the point. *Fahey* v. *Esterly Machine Co.*, 220.

REQUEST FOR INSTRUCTIONS. See EVIDENCE, ERROR, CRIMINAL LAW AND PRACTICE, INSTRUCTIONS, WITNESSES.

RULES OF COURT.

For failure to make assignment of errors as required by rule 15, appeal dismissed. *Globe Inv. Co.* v. *Boyum*, 538.

SALES. See EXECUTION SALES, PLEADING AND PRACTICE, FRADULENT CONVEYANCES, 76.

1. When, at or prior to the time of the execution of a bill of sale of personal property, the vendor, with intent to transfer the title and possession of the same, pointed it out to the agent of the vendee, where it was contained in boxes and crates, and stood in a warehouse, and subsequently locked the building, and delivered the key to such agent, who thereafter retained it, there was such an immediate delivery and actual and continued change of possession as fulfills the requirements of § 4657, Comp. Laws. *Morrison* v. *Oium*, 76.
2. Such delivery is not impaired by the fact that a third party may also have had property in the same warehouse, and held a key thereto; nor by the further fact that the vendor may have agreed with such third party that his possession should be exclusive. *Morrison* v. *Oium*, 76.

SALES—Continued.

3. Continued use of machinery purchased under a warranty, after knowledge of defects may destroy the buyer's right to rescind the contract, but will not destroy his right to plead a breach of warranty to defeat a recovery, in whole or in part, in an action brought by the seller to recover the purchase price. *Minn. T. Mfg. Co.* v. *Hanson*, 81.
4. Contract of warranty upon the sale of a steam threshing machine construed. This court will not limit such warranty to such defects only as are discovered when the machinery is first started, unless the wording clearly requires such restriction. *Minn. T. Mfg. Co.* v. *Hanson*, 81.

SCHOOL BOARD. See SCHOOL TOWNSHIP.

1. Board held responsible for loss of the proceeds from sale and delivery of certain school township bonds. *Prairie School Tp.* v. *Haseleu*, 328.
2. The school board have power to issue, negotiate and sell bonds of the school township, voted by the electors for the erection of a school house. *Prairie School Tp.* v. *Haseleu*, 328.

SCHOOL TOWNSHIPS.

1 A school township organized under Ch. 44, Laws 1883, becomes immediately upon such organization, liable for debts of a district, the school house and furniture of which become the property of the school township. This liability is complete, and does not depend upon the settlement of equities between several districts included in the new school township, under § § 136, 138, Ch. 44, Laws 1883. *Coler* v. *School Township*, 249.
2. School township board have full power to issue, negotiate and sell bonds of the school township when voted by the electors for the erection of a school house. *Prairie School Township* v. *Haseleu*, 328.
3. School township treasurer has no authority to issue or sell bonds. *Prairie School Tp.* v. *Haseleu*, 328.
4. Where a statute authorized the issue of municipal bonds payable in not less than ten years from date, bonds issued thereunder, payable in 11 days less than 10 years from date are void, even in the hands of a bona fide purchaser. *People's Bank of St. Paul* v. *School District*, 496.
5. The invalidity of such bonds does not affect the liability, if any, of the municipality, independently of the bonds. *People's Bank* v. *School District*, 496.
6. Bona fide purchasers of negotiable municipal bonds are charged with knowledge of all the requirements of the statute under which the securities were issued. *People's Bank* v. *School District*, 496.

SCHOOL TOWNSHIP TREASURER. See SCHOOL TOWNSHIPS, 328.

SCHOOL DISTRICTS. See SCHOOL TOWNSHIPS, 496.

SET OFF. See PLEADING AND PRACTICE.

1. A cause of action in tort cannot be set off against a cause or action upon contract. *Braithwaite* v. *Akin*, 365.
2. A cause of action for tort cannot be sustained as an equitable set off in the absence of an averment of insolvency. *Braithwaite* v. *Akin*, 365.

SET OFF—Continued.

3. When, the surety on an undertaking, after the attorney had secured his lien, but before the surety had notice thereof, purchased a judgment against the client, *held*, that in an action upon the undertaking, on appeal, the surety's right to set off such judgment was absolute, and was unaffected by the attorney's lien. *Clark* v. *Sullivan*, 280.
4. One who buys a set off to a claim against him, without notice of a prior assignment of such claim, may use the set off as a defense, the same as though the claim against him had not been assigned. *Clark* v. *Sullivan*, 280.

SPARKS FROM LOCOMOTIVE. See NEGLIGENCE, 17.

STATUTES.

1. The prohibition law was legally adopted and does not conflict with the state constitution. *State* v. *Barnes*, 318.
2. Repeal of statute does not extinguish forfeiture. *McCann* v. *Mtg. Bank & Inv. Co.*, 172.

STATUTES CITED AND CONSTRUED.

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STATUTES CITED AND CONSTRUED—Continued.

SESSION LAWS.

YEAR.	CHAP.	SEC.	PAGE.	YEAR.	CHAP.	SEC.	PAGE.
1879	14	--	249	1883	44	--	249
1883	99	--	34	1883	45	--	328
1889	93	1	389	1889	70	--	172
1889	110	27	310	1889	88	--	412
1890	122	--	310	1890	126	--	310
1890	125	--	310	1890	128	--	310
1890	187	--	310	1890	188	--	310
1890	61	--	96	1890	184	--	154
1890	71	8	131	1890	184	12	172
1890	9	--	310	1890	10	--	310
1891	79	10	17	----	---	--	---
1891	120	5	188	1891	9	--	310
1893	48	--	427	1893	95	--	433

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.

STENOGRAPHER'S TRANSCRIPT. See BILL OF EXCEPTIONS.

STREETS. See MUNICIPAL CORPORATIONS, NEGLIGENCE, INSTRUCTIONS.

SUMMONS.

1. An affidavit for publication of summons, which entirely fails to show that any diligence was used to find the defendant in this state, and fails to state positively the residence of such defendant, or that any diligence has been used to ascertain such residence, is fatally defective, and a publication of summons based upon such affidavit confers no jurisdiction of the person of defendant. *Yorke* v. *Yorke*, 343.
2. A summons issued by the justice of the peace, returnable, not on any particular day, but on the seventh day after service thereof, does not contain a direction for the defendant to appear and answer before the justice at a time specified in the summons, and service of such a summons will not give the court jurisdiction of the person of the defendant. *Miner* v. *Francis & Southard*, 549.
3. After defendants had appeared specially, and objected to the jurisdiction of the court on the ground that the summons was not sufficient to confer jurisdiction, and after the court had overruled this objection, they appeared generally, and answered. *Held*, that such appearance was not a voluntary appearance, and did not waive the defendants' objection to the jurisdiction of the court. *Miner* v. *Francis & Southard*, 549.
4. Nor was such objection waived, or any jurisdiction over the defendants conferred, by their appeal to the District Court, and subsequently to this court, for the sole purpose of reviewing the question of the sufficiency of such summons. *Miner* v. *Francis & Southard*, 549.

SURETY. See PRINCIPAL AND SURETY, MARRIED WOMEN.

TAXATION. See ASSESSMENT AND TAXATION.

TAX DEED. See DESCRIPTION, ASSESSMENT AND TAXATION.

1. A void tax deed will not set the statute of limitations in motion. *Hegar* v. *DeGroat*, 354.
2. A void tax deed is no justification in defendant in ejectment. *Hegar* v. *DeGroat*, 354.

TERM OF OFFICE. See GOVERNOR, PUBLIC OFFICERS, VACANCY.

TERMS OF COURT. See ADDITIONAL TERMS OF COURT, 17.

THRESHERS LIEN. See TROVER AND CONVERSION, 87, 412.

1. In order to preserve a lien for threshing grain, under Ch. 88, Laws Dakota Territory, 1889, the statement which that statute directs shall be filed, must contain a description of the land whereon the grain upon which the lien is claimed was grown. *Parker* v. *First Nat. Bank*, 87.
2. No party is entitled to a lien, under the provisions of that chapter, unless he owns and operates the machine with which the threshing was done. *Parker* v. *First Nat. Bank*, 87.
3. The lien claimant upon the trial must show that he filed a verified account in writing, embodying among other things a description of the land upon which the grain was grown, also as a matter of fact that the grain upon which the lien is claimed was grown upon the land described in the writing on file. *Martin* v. *Hawthorne*, 412.

TROVER AND CONVERSION.

1. An action for the conversion of personal property cannot be maintained unless plaintiff was in possession, or held a legal right to immediate possession of the property converted, at the time of the conversion. *Parker* v. *First Nat. Bk.* 87.
2. In action of conversion where the defendant took possession under claim of a threshers lien, and attempted to justify thereunder, but rested his case without offering proof to show where the grain in question was grown. A motion to strike out all evidence as to the lien should have been granted. *Martin* v. *Hawthorne*, 412.
3. Where one retained possession of the property of another, claiming to hold the same until a debt owing to him by the other is paid. Trover will lie for the conversion. *Taylor* v. *Jones*, 235.

TRUSTEES OF STATE INSTITUTIONS. See VACANCY, PUBLIC OFFICERS, GOVERNOR.

1. The trustees of the penitentiary are appointed by the concurrent action of the governor and senate. *State* v. *Boucher*, 389.

The governor cannot remove from office the trustees of the state agricultural college. *State* v. *Miller*, 433.

ULTRA VIRES. See SCHOOL TOWNSHIPS, 496.

1. Where the county commissioners of a county authorized expenditures beyond the revenue of the then current year, and without submitting the question to a vote of the people, their action was illegal and could not bind the county by the acceptance of the benefits of their illegal acts. *State* v. *Getchell*, 243.
2. The school township treasurer has no authority to issue or sell the bonds of the township. *Prairie School Tp.* v. *Haseleu*, 328.

USAGE AND CUSTOM.

The court will take judicial notice of a custom or usage so notorious as to be generally known. *Power* v. *Bowdle*, 107.

USURY.

1. The penalties prescribed by § 3723, Comp. Laws against usury were not extinguished by the repeal of that statute as to transactions completed prior to the repeal. *Bank* v. *Lemke*, 154.

2. The usury statute embraced in Ch. 70, Laws 1889, was without a saving clause, repealed by § 12, Ch. 84, Laws 1890, but such repeal does not operate to extinguish any penalty forfeiture or liability incurred under the act of 1889, § 4757, Comp. Laws. *McCann* v. *Mtg. Co.*, 172.

VACATION OF JUDGMENT. See DEFAULT, JUDGMENT, PLEADING AND PRACTICE.

VACANCY IN OFFICE.

1. The governor has no power to remove trustees of the state agricultural college. from office. *State* v. *Miller*, 433.

2. The expiration of the prescribed term when coupled with the fact that the senate adjourned without confirming successors of trustees in office under a former appointment, will not operate to create a vacancy in the office which can be filled by the governor. *State* v. *Boucher*, 389.

3. The appointing power of the governor is confined to filling vacancies in office where no other mode is provided by the constitution or laws for filling the same. *State* v. *Boucher*, 389.

VALUE.

In replevin where the question of value is in dispute it must be submitted to the jury. *Haveron* v. *Anderson*, 540.

VERDICT.

1. Evidence examined and held sufficient to sustain verdict. *Hegar* v. *DeGroat*, 354. *Reeves & Co.* v. *Corrigan*, 415.

2. It is error to refuse to direct a verdict where plaintiff has proved his cause of action and the facts proved by the defendant do not constitute a defense. *Martin* v. *Hawthorne*, 412.

3. Refusal to direct a verdict for the defendant railroad company upon its motion *held*, error, when under the facts proven, the statutory presumption of negligence raised alone by proof of the killing of a domestic animal by defendants train, was overcome by clear and undisputed proof. *Hodgins* v. *R. R. Co.*, 382.

4. A verdict contrary to the evidence or the instruction of the court cannot stand. *McMillan* v. *Aitchinson*, 183.

5. The claim that a verdict is without support in the evidence cannot be maintained when the explicit and consistent testimony of one witness sustains it, even though a number of witnesses may as explicitly testify to the contrary. *Taylor* v. *Jones*, 235.

6. In clam and delivery, where each party claims the right of possession by virtue of absolute ownership, and in no other manner, a verdict which finds the plaintiff entitled to the possession of the property, and fixes its value, will support a judgment for plaintiff for possession of the property, or its value as found by the jury. *Branstetter* v. *Morgan*, 290.

VERDICT—Continued.

7. A verdict of guilty of an offense included within the one charged in the information is an acquittal of the graver charge *State* v. *Johnson*, 150.
8. A verdict not responsive to the charge as contained in the information cannot be sustained. *State* v. *Johnson*, 150.
9. The judgment entered must correspond with the verdict. *Kellogg, Johnson & Co.* v. *Gilman*, 538.
10. Where the sole issue is plaintiffs right to recover anything, and where the amount due if anything is admitted by the pleadings, a general verdict for plaintiff without fixing the amount of the recovery is good and will stand. *English* v. *Goodman*, 129.

VOLUNTARY PAYMENT.

That a payment was made under protest is of no avail, unless there was duress or coercion of some character, and then its only office is to show that such payment was made by reason of such duress or coercion. Protest can never make that involuntary which in its absence would be voluntary. *Wessel* v. *Mtg. Co.*, 160.

VOTE.

Upon expenditure beyond the revenue for the current year, a vote is required before the county commissoners are authorized to act. *State* v. *Getchell*, 243.

WAIVER.

1. By going to trial without objection, defendant waives a reply to new matter constituting a counterclaim. *Power* v. *Bowdle*, 107.
2. By failure to file exceptions to condemnation proceedings all informalities and irregularities in the proceedings upon which commissioners appraisement was based are waived. *R. R. Co.* v. *Nester*, 480.
3. Irregularities in sale upon execution of several pieces of property *en massee* and for grossly inadequate price are waived by defendants failure to move for vacation of the sale within the redemption period. *Power* v. *Larabee*, 502.
4. Defendants appeared specially in Justice Court and objected to the jurisdiction on the ground that the summons was not sufficient to confer jurisdiction and after the objection was overruled they appeared and answered and afterwards appealed on this jurisdictional question, *held*, no waiver of the objection. *Miner* v. *Francis & Southard*, 549.

WARRANTY. See SALE.

1. Contract of warranty upon the sale of a steam threshing machine construed. This court will not limit such warranty to such defects only as are discovered when the machinery is first started, unless the wording clearly requires such restriction. *Minn. T. Mfg. Co.* v. *Hanson*, 81.
2. Continued use of machinery purchased under a warranty, after knowledge of defects may destroy the buyer's right to rescind the contract, but will not destroy his right to plead a breach of warranty to defeat a recovery, in whole or in part, in an action brought by the seller to recover the purchase price. *Minn. T. Mfg. Co.* v. *Hanson*, 81.
3. Written contract construed, and *held*, to constitute an agreement for sale and purchase of property, the title to pass on delivery and acceptance thereof. After such delivery and acceptance the purchaser cannot claim, in an action for the purchase price that the burden is on the vendor to show that the property

WARRANTY—Continued.

was as warranted. The warranty is collateral, and the purchaser must affirmatively show a breach thereof, and full performance of all conditions precedent of the warranty, to entitle him to rescind and defeat the action. *Plano Mfg. Co.* v. *Root*, 165.

3. Before the purchaser after sale can recover back the purchase price, on the theory of breach of warranty and rescission, he must fully perform all conditions precedent on his part to be performed according to the terms of the warranty. On sale of a harvester, the contract of warranty provided that the purchaser should give written notice of defects, not only to the agent from whom the machine was received, but also to the company at its headquarters. No notice to the company was given. *Held*, under the evidence, that there was no waiver of this requirement, and that therefore plaintiff could not recover back the purchase price on breach of warranty, although the machine was returned by him. *Fahey* v. *Esterly Machine Co.*, 220.

5. Where a purchaser of property gives his note therefor, and afterwards rescinds the contract of sale on the ground of breach of warranty, he may recover the amount of the note and interest, without first paying the same, when the note was negotiated before maturity to an innocent purchaser for value. But the judgment should provide that upon the return of the note to the plaintiff, and his release from all liability thereon growing out of any judgdment which has been recovered thereon, and on payment of costs within a specified time, the judgment should be satisfied. *Fahey* v. *Esterly Machine Co.*, 220.

6. Breach of warranty is not available as a defense against a negotiable note in the hands of a bona fide indorsee for value. *Fahey* v. *Esterly Machine Co.*, 220.

7. An agent authorized to sell binders for another has power to warrant that the binders will do as good work as any other machine in the market. *Canham* v. *Plano Mfg. Co.*, 229.

8. His general authority to so warrant cannot be restricted as to third persons who have no knowledge of such restriction. *Canham* v. *Plano Mfg. Co.*, 229.

9. Where the purchaser of a binder was induced to keep the machine by repeated promises and attempts to fix the same, made by the agent who sold the same, a return of the binder immediately after discovering that it would not work as warranted, after the last attempt to fix it, is in time to entitle purchaser to claim that he has rescinded the contract for breach of warranty promptly, within th provisions of § 3591, Comp. Laws. *Canham* v. *Plano Mfg. Co.*, 229.

10. *Fahey* v. *Harvesting Co.*, 55 N. W. Rep. 580, (decided at this term,) followed a to liability of vendor of property sold with warranty, when the contract of sale is rescinded by vendee for breach of warranty, for the amount of a negotiable note given for purchase price, negotiated to a bona fide indorsee before maturity, although such note has not been paid. *Canham* v. *Plano Mfg. Co.*, 229.

WITNESSES. See EVIDENCE, 293, 555.

WRIT OF ERROR.

What reviewed by. *State* v. *Barnes*, 131.