REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

NOVEMBER, 1902, TO MARCH, 1904

F. W. AMES,
REPORTER

VOLUME 12

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OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

HON. ALFRED WALLIN, Chief Justice.[1]
HON. N. C. YOUNG, Chief Justice.
HON. D. E. MORGAN, Judge.
HON. JOHN M. COCHRANE, Judge.[2]

R. D. HOSKINS, Clerk.
R. M. CAROTHERS, Reporter.[3]
F. W. AMES, Reporter.[4]

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[1] Term expired December 31, 1902.
[2] Qualified January 1, 1902; died July 20, 1904.
[3] After January 1, 1903.
[4] After July 1, 1903.

SEC. 101. Where a judgment or decree is reversed or confirmed by the Supreme Court, every point fairly arising upon the record of the case shall be considered and decided, and the 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 for his dissent in writing over his signature.

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

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IN MEMORIAM

JOHN F. COCHRANE

Upon the convening of the Grand Forks session of the September, A. D. 1904, term of court, on the forenoon of September 20th, after the opening of said term in due form, the following proceedings were had:

By Mr. Justice Young:

Since our last term, this court and this state has sustained a great loss in the death of our associate, Judge Cochrane. His great service to the state as a citizen, and his long and distinguished career at the bar, as well as his relation to this court at the time of his death, make it altogether fitting that his memory should be cherished and honored. We have, therefore, set apart this, the opening day of this term, for that purpose, and an opportunity will now be given to his associates at the bar, and others, to offer their tributes of respect and to present resolutions.

GUY C. H. CORLISS.

Judge Guy C. H. Corliss said:

May it please your Honors: Compared with many of the courts of the nation this tribunal is only in its infancy. A decade and a half constitute the term of its existence, and yet within that period two of its judges have gone the way of all mortal flesh; one of them, Judge Bartholomew, scarcely declined into the vale of years; and the other, our more recent loss, standing upon the very summit of human life. As we consider these things, and remember, too, that death swept them both into the Infinite Mystery as a tornado bursts out of the calm of noonday without warning, or an avalanche leaps from the stillness of the mountain side without premonitory sign, we are constrained to echo the thought of Burke when, pros-

trated by grief at the death of that son of such promise, he cried out in the agony of his soul: "What shadows we are, and what shadows we pursue."

In less than twelve hours from the time he entered his home, his mind full of plans for the future, which he unfolded to her who was nearest to him, the great heart was cold, the large brain was still, the eloquent lips were silent, and that personality which loomed up in the public mind as no other personality in this state, had passed forever from human view.

Judge Cochrane, whom we all expected to greet here today upon this bench, has laid aside the burden of this life and gone away into that far off country visible only to the eye of faith. And so instead of greeting him here and addressing our arguments to him as a member of the court, we are assembled to express our love for him, our deep sense of loss at his death, and to place upon record our estimate of him as a man, as a lawyer and as a jurist. It is altogether fitting that we, the members of that profession which he embraced and followed with such distinction, should do this; fitting that we should do it at this time, a session of the court, and in this place, the Temple of Justice, and in the presence of the Supreme Tribunal of the state he so recently adorned and honored.

It is also, if your honors please, appropriate that there should be a pause in the activities of this bench while a merited tribute is paid to his memory. With us all this will be no perfunctory task, but only a labor of love; for he obtained and kept to the very last hour of his life a firm hold upon the affections of every member of the bar. No other lawyer in this state was more universally or more deeply beloved. But how inadequate is aught we may say, aught we can say, to present to the minds of those who knew him not the man as he was. We may eulogize him; we may take the full measure of his remarkable intellect and of his great heart; and yet how paltry it will all seem when we turn from the words we utter to our remembrance of the living man. An hour or two of speech for forty-five years of existence marked by notable achievements, by a brilliant display of the intellect and by the exhibition of extraordinary generosity of heart. It seems almost like mockery. Words cannot repaint the hues of sunset after the cold gray of night has settled upon the horizon; and after the beauty and splendor of a complex and brilliant life such as his has died away in the West, who, though prompted by the deepest love, dare essay to restore the rich coloring

of that life? Though he should exhaust the resources of human speech, he must nevertheless wholly fail. And, therefore, were it not for those who are to come after us, the generations that can know him only through our speech and the traditions of the people, his most appropriate eulogy would be simply to name him. In the palace of Caesar, Enobarbus exclaims to Agrippa, "Would you praise Caesar, say Caesar: go no further." And so might we condense and best express his encomium by the single word "Cochrane," were it not for the generations that are to follow. That name would instantly suggest to all who knew him the whole man—heart, intellect, character, learning, temperament, achievements, and that indescribable something which distinguished him from all other men.

But to speak his eulogy by simply naming him is possible only with those who came into relation with him in life. When they are gone naught but tradition will remain, save as speech has left a permanent memorial; and we who loved him are unwilling to leave his fame to mere tradition, sure to be obliterated by the flood tide of future years. We would build to his memory in granite that the monument may endure to be seen across the coming decades by those who shall hereafter constitute an integral part of this great commonwealth.

Coming to this territory in 1881, about twenty-three years ago, he was for years before his death the acknowledged leader of the bar of this state. It is true that one of his brother lawyers might excel him in some one department, another might be spoken of as possessing a little more skill or strength in a particular direction, some faculty of the mind being more active or developed; but when it came to the totality of intellectual powers, the mass and force of his brain and the manifold phases of its strength, there is little doubt as to the rank he occupied. In my mind there was no doubt at all. It was and is my deliberate judgment that he had not his equal in the profession within the borders of this state. If he did not possess the sharpest legal discrimination, he could yet count it an advantage that he was not forever splitting hairs and running after refinements too subtle for practical use. His brain was so big that his intellectual vision, from the very nature of the case, could not be microscopic. Like all large masses, his mind moved slowly until he was thoroughly aroused, and then its action was rapid, but it was the speed of the cannon ball and not the swiftness of a dart. Its momentum then, obeying the well known law of physics, was tremendous, for

there was velocity multiplied by the weight of his ponderous brain. And yet, if your honors please, he never seemed to touch the top of his power. One always felt, so easy and congenial to him were great intellectual feats, that he had an ample reserve upon which he could draw at will as occasion should demand it. He always seemed to be saying to a part of his mental powers: "Rest, keep holiday, the exigency does not require your employment now."

His powers of speech were exceptional; I think I may truthfully say extraordinary. Not remarkably fluent until his mind had become heated by excitement, the words poured from his lips like a torrent when he was in the full swing of his eloquence. A redundant imagination, a heart whose fountains of deep feeling were easily stirred, sweeping the whole man along with a mighty tide and an exuberant diction,—these, under the impulse of his powerful brain, made him easily a great orator, unequalled in that respect by any of his professional brethren in the state. His last masterly argument was in this very court room, before a jury, in the defense of a famous homicide case, and what an argument it was! He was then a sick man, too sick for the burden of such a trial; and yet the mind asserted its supremacy and he rose to the demands of the occasion, displaying no trace of mental weakness, arraying his facts, marshalling his argument, hurling terrific invective, making wide incursions into fields of sacred and profane literature for illustrations and evoking the emotions of the heart with all his old time power, asserting anew his leadership in the contests of the forum. All who heard him then, and it was a great throng, for this building was packed to its utmost capacity—all who heard him then felt and acknowledged the spell of an unaccustomed enchantment. Strong and fluent in presenting an argument to the bench, there were others who might contest his supremacy there, but before a jury he distanced all competitors. His nature was so large that he was never entirely at home when the reason was the only faculty to be employed. He was most truly himself when heart as well as brain inspired and shaped his speech. Then it was he flew an eagle's flight above all others. He was cool and resourceful in the court room. He was never discomfited by an unexpected turn in the case he was trying. Every emergency found him in full possession of all his faculties. Like Napoleon, he became greater as the difficulties thickened; and, like him, too, his judgment on the spur of the moment as to what was best to be done at a crisis in the trial was well nigh in-

fallible. He could, therefore, try a case well with little or no preparation, when compelled to do so. And yet he made most careful preparation for trial when this could be done. His policy was that of Macbeth "to make assurance doubly sure, and take a bond of fate." His trial briefs (and I saw many of them) were remarkable papers. Everything that could be anticipated was carefully studied out and set down, so that as little as possible should be left to the confusion of the battle. This was especially true in cases involving questions of medical jurisprudence. I doubt whether he had his superior in the nation in handling cases of that character. Against his exhaustive preparation, supplemented by his wide erudition along such lines, no doctor could stand on cross-examination who had not made equally careful preparation on his part. I have in mind a case of that character, his preparation in which is a type of the preparation he made in all such causes. It was a suit against a surgeon for malpractice in setting a comminuted fracture of both bones of the forearm. He prepared it for trial, and had intended to manage the defense in person in the court room. It so happened that the duty devolved upon me at the last moment. I turned to his brief, and there I found everything—the facts, the law and the medical aspects of the case all set down in their due order, and nothing whatever left to chance, except, of course, the unforeseen exigencies of the trial itself.

Back of this careful planning of the battle lay a wonderful mastery of men, so that, when his personal generalship supplemented the preparation he had made, he was practically invincible,—absolutely so in a cause possessing real merit. He knew men through and through; their weaknesses, their foibles, their vanities, and also their great and noble qualities; and he could play with a master touch upon the delicate and complex mechanism of their souls, sounding them from their lowest note to the top of their compass. In a stormy convention he could rouse enthusiasm to the highest pitch, eliciting the admiration and applause of even his political opponents in the contest. His whole being, mind, body, will and moral nature seemed to dilate when he was riding upon the turbulent waves of a stormy popular assembly.

With his great physique, his powerful voice, his torrent of speech, his wonderful control of large masses of men, and that courage which became more magnificent as the dangers and difficulties thickened, he reminded me of Danton; and like him, too, his heart was

constructed on a colossal scale. I hardly dare state the full measure of his generosity lest I appear to do the greatest of injuries to his memory by exaggeration of speech. Many were the beneficiaries of it. It reached all classes; it assumed every conceivable form. The grand total in money alone was a large sum, very large for a man of his means; but it was not with money alone that he was lavish. He gave in the same spirit, and with the same free hand, of his time, his talents, his learning, his energy, his sympathy; nay, more, he put aside his own ambitions to further the interests, the reputation and the success of his friends. How many men can point to such a record? He was always fighting the battle of others, never his own. Generally regarded as the fittest man in the state for the senate, he never sought that position, although I know from his own lips that the honor would have been pleasing to him and that the life of a statesman would have been congenial to his tastes. He was always helping some one else to the senate; and when his own name was suggested in connection with that high office and a movement was started in his behalf, it had only his half-hearted support, or, rather, it did not have his support at all. It was not in his nature to be a self-seeker, and I am glad, and I thank God that he did not run after that exalted office by political methods; but that he kept proudly on his way in the calm assurance that he lost no honor by not being chosen to represent this state in the highest branch of the national legislature. All who hear me know that his selection to that exalted position would have reflected as much honor upon the office and the state as upon himself.

But he served the state. Indeed he served it in the very highest walks of public service by aiding in the administration of justice in various capacities. Webster, in his ornate and classic eulogy on Story before the Suffolk bar, said:

"Justice is the great interest of man on earth. It is the ligament which binds civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness and the improvement and progress of the race. And whoever labors on this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures and contributes to raise its august dome still higher in the skies, connects himself in name and fame and character with that which is and must be as durable as the fame of human society."

Judge Cochrane labored upon the temple of justice with usefulness and distinction. He labored there in four different ways. First, by the practice of his profession largely as an advocate in the courts. Second, by fighting without rest and without regard to personal consequences to maintain a high standard upon the bench throughout the state and to create a sound public sentiment in that behalf. Next, by what he did in and for the North Dakota law school, to which he was deeply attached, a work practically unremunerated; and, finally, by himself discharging the functions of a judge of our court of last resort, dying in the harness, the desk in his library at his home having upon it when he was so suddenly called away the manuscript of an opinion he was then preparing.

He was young in years, but he was old in what he had accomplished. I have already spoken of his professional career and standing. I only wish to say that he tried more important criminal cases than any other lawyer in the state. Indeed, few lawyers anywhere in the northwest could point to such a list or to such a record of success. Any tribute to his worth would be incomplete which omitted to mention what he did in the interests of a capable and upright bench; how he labored in season and out of season to take our judiciary out of politics. I know from his own lips that it was this part of his life's work that gave him the greatest satisfaction. And well it might. No man can serve the state in a way more vital to the public good than this. It brought him no personal advantage. It cost him time and money and made for him political enemies. But he persevered, and practically alone and single handed he did in this direction what no other citizen of the state could have done. What the fruit of this work has been and is in this judicial district is well known to all. It is republican in its politics, and yet its judges have been democratic since statehood, chosen as they should be with sole reference to their fitness and without any regard to party affiliations. What other man could have induced two republican conventions to nominate for the district bench two democratic lawyers against the determined opposition of republican aspirants?

Next, I would refer to his work in the law school. That work was characteristic of the man. He prepared most carefully for the hour's lecture; he often ran over the allotted time, and even after that he would remain talking to a knot of students who gathered around him. In many other ways he did effective service for the school aside from what he did as an instructor, and the state will

honor and remember him for it. The details cannot be elaborated here. The boys all knew they had in him a staunch friend; yes, that they had in him an approachable friend. At any time they could go to him for any kind of aid or service. And they all admired and loved him. How could they help it? What a tower of strength he would have been to that school and to the cause of legal education in this state if he could only have been spared with all his old time health and vigor to labor in and for it.

Having taken his seat upon the bench less than two years before his death, he had not seen that length of judicial service through which alone can come the reputation of a jurist. But the opinions he wrote, his legal learning, and the known strength of his intellect, made it only a question of time when, if life and health had been vouchsafed to him, he would have taken high rank as a judge. I regard this as quite exceptional, for it seldom happens that a great trial lawyer becomes an eminent judge when removed from the atmosphere of strife to the calm of judicial work. I have in mind two or three noted instances in British judicial history where the very reverse was the case; where men who were eminent advocates did not rise even to the level of the average judge when placed upon the bench. Curran is acknowledged to be the first of Irish advocates, and no one thinks of disputing Erskine's title to that proud claim in England, and yet the former made a signal failure as master of the rolls and the latter as lord chancellor of England. Scarlett won more verdicts than any lawyer of his day, and yet did not shine as a baron of the exchequer. So that, when it can be said of Judge Cochrane that not only was he the most brilliant advocate of the state, but that he also gave undoubted signs that he would make an able judge, we have, indeed, paid a high tribute to his intellect.

I cannot refrain from referring to a few personal traits. He was a man of great simplicity. He never posed, he never did anything for effect; no one ever thought that he was acting a part, nor was he at all solicitous about the impression he was making. At all times and under all circumstances he was just himself, a man unspoiled by success. So far from over-estimating his strength the exact reverse was the case. He was rigorously critical of himself and of the work he did. While, of course, conscious that he was a man of power, he really failed to measure his true greatness. He loved children and they loved him. The most natural and characteristic picture he ever had taken was standing bending forward, one

of his little nieces upon his back, her arms about his neck and her head nestled close to his, and upon his face that broad, genial, matchless and inimitable smile, a smile unlike any other that I ever saw

His friendships were deep and lasting. The friends he had and their adoption tried he grappled to his heart with hooks of steel.

No man ever had a more faithful, more loyal and a more unselfish friend than he was to me. I could stand here an hour and narrate the instances in which he thought of me first and of himself only second, or, rather, not at all.

He was a prodigious reader. His magnificent library, miscellaneous and legal, was in constant service. The result was that he was well informed on many subjects. His lectures and public addresses showed wide learning and sound judgment in applying his knowledge. The largeness of his nature was shown by the breadth of his sympathy. All classes and conditions of life were alike attracted to him. Not that he did not have his enemies. He was too positive and aggressive to agree with every one. But his enemies admired and respected him. They acknowledged his genius and the greatness of his heart. He was utterly incapable of a mean or cowardly act. His faults were all the offshoots of his virtues carried to excess.

All know of his beautiful home life, and he loved his home. There was his great library; there was the devotion of his wife, and there, too, was the devotion of one who a stranger in blood, loved him with a depth and intensity seldom felt by a sister for a brother.

His nature was so complex and rich that I find it eludes and defies all attempts at analysis. It was at bottom a religious nature, for his feelings were deep, strong and tender. I do not know what his theological views were. He never talked with me on that subject. He was very reticent about it. But judged by the supreme test, the parable of the Good Samaritan, Judge Cochrane was religious through and through. Perhaps he saw the folly of trying to solve problems that lie beyond human ken, and he therefore never dogmatized. I fancy that in the sanctities of his soul he could say "Amen" to the grand rebuke of the Quaker Poet to theological pride:

"Who fathoms the Eternal thought,
Who talks of scheme and plan.
The Lord is God: He needeth not
The poor device of man."

On Sunday last I visited his grave in Lakewood cemetery, where he lies by the side of his mother, whom he loved with an unspeakable

love. It was sunset, but to me his sun had not set. I could not bring myself to feel that he had gone. To me he was not there, and I cannot yet, quite yet, bring myself to realize that he is no longer with us. I seem to be with him just as of yore; in the office where we worked together, in the country where he loved to drive, in the court room where he won his fame, in the library at his home where he labored so long and where I have spent so many pleasant hours with him; nor shall I ever be willing to lay in the grave this great and noble man and friend.

CHARLES F. AMIDON.

Judge Amidon said:

May it please the Court: After this full, fitting and scholarly tribute to the memory of the man whom we have convened here to commemorate, delivered by one who knew him best and was most intimately connected with him, nothing new can be said. No one may hope to speak to the subject that has been covered by Judge Corliss' address and add to it in substance or in adequacy of expression. But we have come here, not so much to adequately express our thoughts or our feelings in regard to this good man, as to pay our individual tribute to his memory. For those who knew him, we can add nothing by what we say here. We cannot hope to convey a larger or stronger impress surely than he conveyed by his simple, strong, kindly life. It is for us and those who come after us, rather than for him, that we are here assembled.

The best tribute to his memory is the plain and simple truth. Nothing would have more quickly moved his fine scorn than unmeasured eulogy or fulsome praise. He was simple and true, and wished to stand before men, and I believe would wish to front the future as he was; not smoothed down and polished out until the distinctive features of his character were effaced. That was not the quality of the man. He lived simply. He thought strongly. He did not wish to pass for that which he was not. He was willing to stand with the strong, simple, kindly features of his character conspicuous in his memory as they were in his life.

Mr. Cochrane belonged to an order of lawyers that is rapidly passing. The momentous changes that are taking place in our industrial life are working a transformation in the legal profession. A

generation ago a great lawyer drew his clientage from every walk of life. He represented no special interest and no class of interests. He was the servant of all, but he was dependent upon none. His thought was as large as the community in which he lived. His sympathy rested upon the common sympathies of man. Today all that is passing. We are living in a period of special interests. The stupendous concentration of industrial life is building single enterprises that overshadow in importance the state and almost the nation. These special interests require and demand for their service the very best legal talent. They have the means to secure that talent. Our intense commercial life makes our profession responsive to such calls. What is the result? The young lawyer the moment he demonstrates that he possesses great talents receives an invitation to accept a general counselship for one or another of these special interests. In this way he is withdrawn from the common profession. His thought is narrowed to the special interest which he serves. His sympathies are confined to the single client whom he represents. He is no more seen in the common forum of the people. I am not speaking in criticism, be it understood. I am simply speaking history, speaking the facts as they exist. Now, the legal profession throughout our national history has been the recruiting body of our public service. It is so by virtue of the fact that it is its business to take the case of another, formulate and adequately express it. Whatever depletes that profession depletes the public service. I need not develop this thought to any greater length. It is one of the conspicuous features of our public life. Why I refer to it is to bring out one of the features of Mr. Cochrane's character. He was a lawyer of the old school. He drew his clientage from every walk and condition of life. He worked for all. He felt for all. His intellectual outlook was as large as the community and the state in which he lived. He never had to consult his legal register before advocating any cause or any candidate. He never had a client, the withdrawal of whose support would have materially affected his professional career. He seemed always to hold a retainer for the common good. In this state, he was general counsel for the public welfare throughout his entire career. I think I speak within the limits of perfect moderation when I say that no other lawyer in the state who was actively engaged in the practice of his profession took so prominent and influential a part in public affairs. The first time I ever saw Judge Cochrane to know him, was in the first Republican State Convention

at Fargo. It was a theatre where he showed his fine talents at their best. It was a gathering in which matters were settled upon the floor of the convention; a turbulent, spirited, vital, eager contest. He was its chairman, and I think nobody who was there took a greater part in shaping its deliberations. I shall not refer to political matters. I shall simply refer to that part of our public service which he took for his special and peculiar province; the maintenance and elevation of the judiciary. No man who was there; no man in the state had as active and controlling a part in selecting the members of our first supreme court as Judge Cochrane. We owe it to him that we had from the very first a supreme court which gave the state a name and a standing throughout the legal and judicial life of the west.

Throughout his entire life, as Judge Corliss has already said, he devoted his best energy to securing the independence and maintaining the character of the judiciary. He was the friend of this court: the friend of those who occupied it from time to time, the advocate of their cause, the defender of the court upon all occasions. He honored it in his professional career, he sustained it out in the larger walks of life. He was true to the same doctrine here in local contests. He knew, as every lover of justice knows, that party politics has no more proper place in the selection of a judge than it has in the trial of a law suit. If I were to select the occasion where I would take Judge Cochrane's measure at its best, where all his splendid talents towered forth in the fullness of the stature of his manhood, I would take it in the Republican State Convention held in this city when he stood before his party and pleaded that it would adopt that clause in England's second Magna Charta, the Bill of Rights of 1688, wherein it was written that a judge shall hold his commission during good behavior.

All students of English institutions believe that the writing of that little clause in the Bill of Rights of 1688 marks the most important element in the unfolding of England's national life. On the two hundredth anniversary of its promulgation the greatest judge upon the English bench stood before the assembled bench and bar of his nation and said: "There is no human being whose smile or frown, there is no government, tory or liberal, whose favor or disfavor can start the pulse of an English judge upon the bench, or move by one hair's breadth the even equipoise of the scales of justice." Every fibre in the being of Judge Cochrane would have throbbed

and thrilled to that sentiment. To the permanency of judicial tenure he gave the best endeavor of his life, and until it is accomplished there will remain some part of his work for us all to do.

Mr. Cochrane was a big man before he was a great lawyer. He was fond of books, as the splendid library which he collected testifies. But he did not draw his nourishment from books; his strength came from men and affairs. That is the only source from which any great character can draw its strength. He never got his life bound in law calf. Who ever saw him in the trial of a case was impressed far more by the native strength of his manhood than by what he had learned. As has already been said, it was the emergency which called forth his powers, whether it was in a public convention or in the trial of a case. It was by his personality rather than study that he acquired success.

If I were to mention an attribute of his character which impressed me as much as any, it was his splendid liberality of life. He gave himself prodigally, bountifully, to others and for others. If we were to call the roll here today of the men who have entered our public service and who have honored that service, there would not be one of them who would not step forward and bear testimony to some act of personal helpfulness rendered to him by Mr. Cochrane. He did not seek his own. He gave to others. I believe he never sought an office, but there were few who have aspired to office who have not received strong and helpful aid at his hands. He was of very broad sympathies. He could not see a fellow man in trouble without wanting to help him. Most of us when a man is in trouble, first begin to ask how much he is to blame for being in the position which he occupies, and we mete out our helpfulness according to our estimate of his blameworthiness. It was not so with Mr. Cochrane. For him it was enough that a fellow man was in trouble. He would look after the blameworthiness after he got him out. He resembled Lincoln in that particular. He could always see the situation from the standpoint of the man who was in trouble.

Judge Cochrane, as I said, was a big man before he was a great lawyer. His manhood has made as large an impression upon those who knew him, I believe, as his legal standing made upon the profession. He was true to his duties to the state, true to his duties to the profession to which he belonged, true to the solemn and high trust which he assumed as a member of this court. I rejoice that his life was crowned by a position upon this bench which published

his merits to the world in a way which the simple practice of his profession could not have done. I am glad to be here to add my tribute along with the others of the profession to his memory. He was a man whse career ought to be held in perpetual remembrance. We know how transitory the memory of the lawyer is, but we can at least write our esteem of him upon the records of this court that those who come after us, either in the judicial or legal life, may know of his worth and his character in the estimation of those who knew him best.

REV. E. J. CONATY.

Rev. E. J. Conaty said:

May it please your honors: We meet today to honor the memory of Judge Cochrane, and it is in every way fitting that these exercises should take place on the scene of his most splendid activities and in the presence of the court of which he was a distinguished member.

The bench, the bar and the public await the unveiling of their hearts, but silence, deep and sacred, is the sole measure of our irreparable loss. The most that human lips can do, however eloquent, is to hold up his life as an example and an incentive.

I esteem it most fortunate that my experience at the bar and acquaintance with Judge Cochrane permit me to speak my gratitude for a friendship which continued from its inception to the hour of his death, and to testify to those great abilities which early gave evidence of richest fruition. He died before life reached its meridian, but not before he had impressed his thought and character upon the mind and the jurisprudence of this commonwealth. When we seek the secret of his success and the reason for the esteem in which he was held by his fellow men, we find it in the incessant, the unflinching, the resolute industry—the labor which left nothing to chance or accident, nothing to intuition or even to inspiration, and which gave to his arguments and his decisions a logical force which compelled conviction and compelled assent. Labor consecrated his life as it consecrates all lives. It is labor that strengthens the intellect, that fosters virtue, that strengthens character, that preserves morality, and since heaven itself is taken only by violence, gives to man the crown of his eternal destiny, and Judge Cochrane was noted for his laborious life. A short time before his death, the last con-

versation I had with him after the honor conferred upon Mr. Winship, the twenty-fifth anniversary of the Herald's existence, I said to him, noting his apparent feebleness, "Why can't we go down to the lakes for a few weeks and put aside our troubles?" He said, "I can't. I have too much work, and I can't bring my library with me." When I consider his success I recall to mind the words of the illustrious John Adams, once himself president of the United States, when he heard that his son, John Quincy, had been elevated to that exalted office. He said, "He was always laborious, man and boy, from infancy." And as we read our country's history we find those that have been elevated to highest offices have exhibited this splendid virtue. Presidents have come from the tow path and the tannery, have come from the cobbler's bench and the farm, because their industry had marked them as men worthy of the public confidence. Men who are laborious are honorable and honest men. When we seek for wrong-doing we go not to those whose lives are devoted incessantly to good works. On the contrary we seek for it among those who, living in idleness, perhaps revelling in the results of ill-gotten wealth, exhibit humanity in its most repulsive form.

When Judge Cochrane's fame began to spread he was called to every part of the state, and wherever he went his talents won instant recognition and marked him for promotion. "Seest thou a man," says Solomon, "diligent in his business, he shall stand before kings. He shall not stand before mean men." And the hour came when Judge Cochrane was borne, amid the applause and approval of his fellow citizens, to the highest office in the gift of this commonwealth. I say it deliberately—the highest office that man can hold. Not because upon the judicial office depends the title to the executive; not because the court determines the constitutionality of laws, or even the right of their own membership to that position, but because the judge is the one who is to readjust the conditions which have been disrupted and brought disorder in the world. Law, we know all of us, is a rule of action, and if sin had never entered the world order would have continued forever and earth would have been a heaven. But with sin came disorder, and it required even the son of God to rescue man from its consequences, and the judiciary is uplifted to produce in civil society that peace and harmony which is interrupted by the commission of crime or the violation of the rights of property, and hence the judge, after his elevation to office, which comes by a divine act through the people, is the representa-

tive of justice, of a divine power, and exercises an authority which defines the rights of men between themselves and even determines the awful question of human life. Under the influence of the great thoughts which permeated his mind our illustrious friend began to take deeper and stronger views of the great question of human existence. And at the midnight hour I remember his asking me, after a long conversation, "Do you believe those things that you have told me, those doctrines that you preach?" I told him they were the result of conviction and not of inheritance. As he turned to go away he said, "There is great strength—you must have great comfort and satisfaction in holding those views in regard to human conduct, and in regard to eternal justice." It was the last interview I had with him. I remember it with a deep, pathetic feeling. It was the last time I spoke to him. He and I stood alone down here in the south end of town, when almost all others had gone to rest, but so deeply were we interested we were loath to part, as if there were some premonition that we should never meet again on earth.

I do not point to any great physical work done by Judge Cochrane —and in this presence, in this intellectual atmosphere it would be sacrilege to consider his wealth or what his wealth had done. Mean men measure their fellow men by what money has accomplished. I do not depreciate the use and worth of money. The lawyer is entitled to his fee for his services, but he would rather win his case, if he be a true lawer, and lose the fee, than to secure the fee and lose the case. The healer, the physician, wishes a reward for his services, but he would rather save his patient and lose his fee than lose his patient and get his fee. The minister of the Gospel has little use for money save when others need it more than he, but if he is true to his divine calling he will prefer to save souls rather than to save money. And when we seek to form an estimate of character we have only to consider the full sweep of the world's history and ask, "What have we now that has not come of intellectual wealth?" The historic cities of the world furnish evidence of this truth. Pigmies wander through the realms of Pericles, amid the ruins of the greatest physical works that human art could construct, but the thought of Demosthenes and Herodotus, the philosophy of Plato and Aristotle are felt now and will be so long as human intellect survives upon this earth. Rome, the great law-giving nation of the world, has passed away so far as its physical power is concerned, and yet the Code Justinian and the spirit that animated that great people

in their great days still survives, and one of the greatest of modern men expressed the same thought when he said, "I shall go down to posterity with the Code Napoleon in my hand." And it is because Judge Cochrane has lived in the eternal realms of thought that he has carried our souls—that we have come here today to pay him our soul's memorial—our tribute of affection and respect.

To me it is difficult to say all that I feel. I have seen him in his early days, in the vigor of that splendid manhood which challenged admiration not less than the great intellectual powers which he exhibited. I have seen him struggling in the throes of the Grim Reaper, and my soul and heart went out to him not once, but twice, and he seemed always to think in some mysterious way that I held him back from the grave, and I feel it deeply because he had asked me more than once if I would be with him when he was dying, that his taking off was so sudden that I could not have shown again the depth of the friendship that I had ever felt for him. His last public appearance in this city was on an occasion when some of my friends did me some honor. I remember that night the kind words he spoke, and I shall cherish them all my life, and if it be that Divine Providence permits us to meet again, their memory will be with me beyond the grave, and I bear this testimony to him now and to his friendship, and bear it with a full heart, and I thank God that I am permitted, though he is not here to hear what I say, to repay, even in the smallest way, the many acts in word and deed that he has done to me during all the years that we have lived together. As his last days came he seemed to think more and more of the higher things. It is the logic of his profession and of the judiciary to lift men up towards truth, and all truth is the reflection of the divine mind, and I sincerely hope and pray that though he did not on earth pursue the processes that others have in the search of light, that the almighty and merciful God has given to him to see, not through a glass darkly, but face to face, the full revelation of divine love.

CHARLES F. TEMPLETON.

Judge Templeton said:

May it please the Court: I arise for a twofold purpose. First, to drop a sprig of evergreen upon the bier of a departed friend. Second, to pay a brief tribute to the memory of an able and distinguished member of our profession.

Sixteen years have passed since I first met Judge Cochrane. During the first half of that period he was engaged in active practice in the courts over which I had the honor to preside. The next six years (after my retirement from the district bench) and just preceding the date that he took his seat as a member of this Court, we frequently met at the bar in the trial of cases—occasionally as associates, but usually as opponents. Though my social relations with him were not intimate, they were most friendly. I therefore had the best of opportunity for studying the man, for becoming acquainted with his personal characteristics and for estimating his abilities as a lawyer. It is no exaggeration to say that Judge Cochrane was large of heart and large of mind as he was large of stature. Of a kind and sympathetic disposition, ever ready to aid the weak and the oppressed, generous beyond description; his affection for children was remarkable. He was loyal to his friends; he was as true as steel. He would not speak words of praise in your presence and wag the vile tongue of slander behind your back. His faults (the few he had), and who that is born of woman has none?—all sprung from the kindness of his disposition and the geniality of his nature. He was a broad, a many sided man; he had a cultured mind. His search for knowledge was not limited to the study of the law. He traveled extensively in the fields of science and explored many a path in the realm of general literature. As a lawyer he stood in the front rank of the profession. I say it not in disparagement of those who are eminent, but in simple justice to him whose memory we today commemorate, I express it as my firm conviction that before disease had fastened its unrelenting grip upon him, John M. Cochrane was, all things considered, the leading figure at the North Dakota bar. In the art of cross examination, where so many fail, he stood above the average. He was exceptionally strong in the trial of jury cases; there his fine physique and impassioned eloquence weighed mightily and rendered him a most dangerous antagonist. He marshalled evidence with rare skill. At times his

eloquence was of the highest order. In the court room upon all occasions he was an antagonist worthy the steel of the ablest and the best. He could launch the arrows of irony and sarcasm with telling effect, but their points were never dipped in the poison of malice. Though at times his words may have seemed severe, they were not prompted by unkind motives; his object was to unmask the wrong. He was a generous adversary, yet ever loyal to his client's interests. He was diligent and painstaking in the preparation of his cases for trial. He never appeared in court unprepared. He was well grounded in the principles of the law, and he was also familiar with the decisions of the courts. In all matters pertaining to the profession his ideals were high. In the wisdom of God our brother has been taken from us. We will ever cherish his memory. The state has lost an exemplary citizen, the bar has lost one of its brightest ornaments, the bench has lost an able, just and upright judge. We mourn because our brother's pilgrimage here on earth is ended. It is fitting that we express our sorrow, for sincere sorrow is the highest compliment the living can pay the dead. But let us not forget that this cloud of sorrow has a silver lining too, for we believe that—

"Death is the crown of life,
Were death denied, poor man would live in vain;
Death wounds to cure, we fall, we rise, we reign."

TRACY R. BANGS.

Tracy R. Bangs said:

"Ships that pass in the night, and speak each other in passing;
Only a signal shown and a distant voice in the darkness;
So on the ocean of life we pass and speak one another—
Only a look and a voice, then darkness again and a silence."

Darkness and silence!

Darkness only to the eyes of those who remain, for to die is to learn to live, and until then one is but a "darkened guest in a darkened world."

Silence to those who harken only to audible sound. The rays of everlasting light, the duties and pleasures of citizenship in Heaven have come to him whose absence we mourn and whose memory we cherish.

While his life, his work, his words will live after him and speak to the minds of generations to come in even clearer notes than human voice could ere intone.

When the startling news was carried to the outer world that Judge Cochrane was no more, there came from the people of the state a moan of sorrow for the loss of one of its most distinguished public men, and from the people of the entire northwest, a wave of sympathy for the bereaved one at home.

He was always a public man, and his counsel highly considered and often sought in affairs of state. For more than twenty years, however, the courts of the territory and state furnished the main field in which he won renown—won not alone because of his forensic power, but because as well of his massive intellect, his broad mind and his unswerving fidelity to every trust in him reposed. Living in a state wherein conditions were yet unsettled, and where ability was not a necessary measure of political preferment—he steadfastly refused to join hands with mere politicians or even to be circumscribed by party lines when civic morals were involved. His friends at times looked for some small revenge to be undertaken, but their fears were groundless, for his very independence gave him strength, and by sheer force of character he compelled recognition of his abilities.

He was great, not because of political influence—he was greater than political influence.

Started at man's estate upon the serious journey of life with mental capabilities of the highest order, with disposition colored only by the sunbeams of geniality, tongue touched by the fire of eloquence, ambition limited only by the bounds of human achievement in the line of his chosen profession, combined with physical force and energy that knew no bounds, he, as a young man, stood th ideal clay from which to shape a mighty man.

Cultivating the talents so generously bestowed, by study, precept and practice—each grace of mind and heart nourished in the soil of good citizenship and watered with the dew of high ideals—we find him in early middle life with character moulded into harmonious completeness, a past to feel proud of, a future glowing bright with the promise of greater work yet to be accomplished—a mighty man.

Standing thus in his magnificent physical stature and towering mental strength, he was indeed a commanding figure. His life's

work is done; suddenly in the midst of a busy life, the mysterious voice was heard and he followed "Up the radiant peopled way, that opens into worlds unknown"—leaving life's struggle with its pains and sorrows, its fleeting joys, its promises and disappointments, to vest himself in the rich robes of eternal life.

When he reached the ferry to which we are all driven, I doubt not but that the silent boatman bowed his head in recognition of his precious charge, and, guiding his bark safely through the shoals and rapids that lie between this shore and that, placed the immortal soul of John M. Cochrane in the beautiful shade of the enchanted groves of paradise, where it awaits the coming of the sanctified spirit of that noble woman—his helpmeet on earth.

W. F. BALL.

W. F. Ball said:

May it please your honors: To one who knew him as well as I did, it is a pleasure, though one mingled with much of sorrow, to have the opportunity under circumstances such as these, to say a few words of tribute to the memory of our departed brother. Sorrow at our loss—of which the occasion gives us fresh reminder; but pleasure in the knowledge that we are today paying our tribute to the memory of one of whom no man may truthfully say aught, touching any of the things which fellow men have the custom-given right to criticize, which can redound to his discredit.

An acquaintance with John M. Cochrane extending almost from the days of his boyhood to the day of his death; an acquaintance which speedily ripened into a friendship far more intimate than the mere ordinary friendship, coupled with the social relations which existed between our respective families, brought he and I together for years upon terms that were intimate indeed. Watching him develop from the mere lad starting out on his professional career into the matured and well-grounded lawyer, and then on to the exalted position he held as a member of this honorable court at the time he was called from us; counselling with, and perhaps sometimes advising him in the earlier of his professional days; trying cases with him, sometimes on the same, and sometimes on opposite sides; occasionally sharing his outings with him—now upon the hunting fields of our own state, and again, in the winter season, in "the land of sunshine and flowers,"—all of these things, extending

unitedly over a period of many years, and during all of which there was never a cloud of even smallest proportions on the horizon of our friendship, gave me a knowledge of the man, and an insight into his character whereby I may speak knowingly of him; and I speak with only sincerity and candor when I say that during my whole life, including an active practice of the law of now nearly forty years' duration, I never knew the man, of high or low degree, to whom I gave more of honest and sincere respect and admiration than I gave to our deceased friend, John M. Cochrane.

Broad of mind, great of heart, generous to a fault, practicing, not as a duty merely, but rather as a spontaneous result of a characteristic of his very nature, that virtue which is "the greatest of them all," he was yet quick of impulse, and not always slow to anger. But it was the mean things of life, acts of oppression, of injustice, of malice and of corruption which quickest aroused his ire; and his indignation more often found vent at the wrongs done to others than at such done to himself. And as for himself, while he was, as I have just said, quick of impulse and sometimes easily roused, it was not in him to do a mean thing. I believe John M. Cochrane could hardly have done a really mean thing if he had tried, for his impulses were all noble, his aims all high, his motives all to the right. His relations as a husband, and head of a family, were too well known to all his friends, and are of too sacred a character to either require or permit more than mere mention by me at this time. But his sorrowing widow, his grieving household, his mourning friends without number, attest only too eloquently the great, the irreparable loss that came upon them all that fateful day not long ago when our friend received that final summons which, severing all earthly ties, called him from our midst.

Of John M. Cochrane it may be truthfully said: That in his private life he was a kind, loving, considerate and true husband; a faithful, ever-remembering friend; a helper of the needy and distressed; a doer of unobtrusive good; a law-abiding, law-loving and duty-doing citizen—and that in his professional life he was the wise, clear-seeing counsellor, the conscientious advocate, opposed to all wrong, fearless in championing the right, and absolutely true to every trust confided to him. To possess some of these characteristics is common; to possess a majority of them marks a man for commendation by his fellows; to possess them all is rare indeed, and makes the man thus fortunate stand out as a beacon light on a high

hill, for the safe guidance of those striving to good and honorable place among their kind.

Cut down in what should ordinarily have been but the very beginning of the prime of his life; taken from loving wife and family, leaving hosts of sorrowing friends behind, there is yet something of solace left to mourning ones in the thought that his death, coming when and as it did, doubtless relieved him of much of suffering and pain which would almost inevitably have followed the course of the bodily ailment which had for long been sapping his life away. And while at first poor frail humanity may be disposed to wonder that the infinitely All-Wise should thus cut down, at the very threshold of its prime a life capable of so much usefulness, yet, when all is considered—when we fully realize our own utter blindness as to the future, and that an impenetrable veil hides, and must always hide from us that which might have come to pass had things been ordered differently, we can have the more heart to say: "Thy will, not mine, be done"—and can approach nearer to an abiding belief that, after all, our destinies are safest in the hands of "Him who doeth all things well."

M. A. HILDRETH.

Mr. Hildreth said:

May it please the Court: In the briefest possible manner I desire to pay tribute to a great advocate and friend. As the traveler wends his way through the great galleries in one of the famous capitols of the old world he finds himself entranced as amongst the masterpieces he gazes upon one called "The Unfinished Picture," and yet there is enough in the handiwork, and in the background, in the simplicity of outline, in the shadow of the cloud and bright light of the sunshine, to entitle the unfinished picture to a place in the hall of fame amongst the great handiwork of the masters' art. So, today, we are here to pay tribute to a great advocate and to one whose work was unfinished. We remember him as the genial, whole-hearted fellow who could reach down and stand for the lowest and poorest of mortals. His eloquence was for the right and just. And then we remember him in his work, brief and yet fairly well started, as a member of this great court. Unfinished as a jurist and yet sufficient in its background to clearly indicate that if length of days could have been in his right hand, unequalled riches in the realms

of jurisprudence would have been in his left hand. We remember him also that in this age of gold his knee never bowed to the power of money. And now that this great soul has passed beyond the purple hills, beyond the utmost reach of human help or word, it is meet and just that we should pay this tribute to his character.

SETH NEWMAN.

Mr. Newman said:

May it please the Court: Personally I can add nothing to the tributes which have been paid to the memory of Judge Cochrane at this time. I can only say that the great, noble, generous, sympathetic manliness of his nature—that element of character which made him the brother of all men, which tied him to the hearts of all who knew him, and which will render his memory enduring through this generation and the future, among those who came within the genial influence of his kindly impulses, towers far above all that has been said, all that may be said, all that can be said of him here today, and stamps him a great, true, noble man. I desire, if the Court please, at this time to present a slight testimonial of respect from the bar of Cass county and ask that it be spread upon the records of this court as a testimonial to the memory of Judge Cochrane:

CASS COUNTY BAR ASSOCIATION.

The Bar Association of Cass county unites with the brethren of the profession throughout the state in deploring the death of the Hon. J. M. Cochrane, late Justice of the Supreme Court. We view his departure from our midst with profound personal sorrow, and extend to his beloved and devoted widow our deepest sympathy in her bereavement. He was a man of such sterling and unusual qualities both of heart and of mind that to know him was to love him. His success at the bar was marked, and was attained by hard and unremitting work. It was never achieved at the expense of honor, or the loss of self respect. He loved to win, but not enough so to be willing to use unfair or unworthy means. He was a hard fighter, resourceful, strenuous, brilliant, but his methods were beyond dispassionate criticism. He was distinguished for his diligence, his love

of investigation, his pursuit of the growth of legal principles as he untiringly traced their development through multitudes of decided cases. He ascended the bench in the prime of his manhood, and we hoped that, relieved from the arduous and exciting labors inseparable from active practice, he might regain health in the performance of the high duties to which he was thus called. His judicial career, though brief, demonstrated the possession of an open mind, a strong, intellectual grasp of legal principles, ability to discriminate between the specious and the meritorious, patient research, absolute impartiality, unquestioned integrity. There was an unwonted charm in the childlike simplicity of his character. He was untouched and unstained by greed. His professional earnings were large, but they were like leaves and water. His generosity knew no bounds. His impulses were all generous and good, and he gave them freest rein.

We place on permanent record this memorial of our admiration for the brilliant and successful lawyer and advocate, our esteem for the judge, and our love for the man.

SETH NEWMAN,
V. R. LOVELL,
JNO. S. WATSON,
Committee.

Fargo, North Dakota, September 15, 1904.

On behalf of the Bar Association of Cass county, if your honors please, I ask that this memorial be spread upon the permanent records of this court.

GRAND FORKS COUNTY BAR ASSOCIATION.

Mr. Bangs said:

On behalf of the Grand Forks County Bar Association, of which Judge Cochrane was a member from its organization, I ask to have the following resolutions spread upon the records of this court:

Resolutions adopted by the Grand Forks County Bar Association at the special meeting held July 21, 1904, at Grand Forks, North Dakota.

Whereas, The hand of death has been laid upon the Hon. John M. Cochrane, late justice of the supreme court of the state of North Dakota, and formerly and for many years a member of the bar of Grand Forks county, and deeming it fit and proper, as a mark of the

high esteem in which we held him, that a memorial be entered upon our records, there to be preserved, now, therefore, be it

Resolved, That we, who through long and intimate association with him as our fellow citizen and as a member of our profession, had come to know him so well, hereby express our high estimate of him as a man and a lawyer. His knowledge of the principles and the practice of law was profound and accurate, but his mind was too broad and active to rest content with the exploration of any one field of human knowledge. He was a scholar of generous and varied culture. He was a close and discriminating student, not only of the science of jurisprudence but of other allied sciences and of the liberal arts. In addition to his varied learning, and as a crown of it all, he possessed in a high degree the divine gift of eloquence. As a practicing attorney he was ever fair to his opponent, to litigants and to the court. As a judge he was broad, tolerant and impartial. Taking him all in all, he approached closely the ideal of an advocate and a judge.

As a citizen he was fearless in the assertion of his rights and the rights of his fellows, and his eloquent voice was often heard on public questions and always in support of the pure ideals of popular government. As a friend he was loyal to the end, large hearted and kind.

In his death, therefore, the state has lost a noble man, an upright citizen and a great jurist; we, his associates, a true friend; and the legal profession, a distinguished leader.

STATE BAR ASSOCIATION.

Mr. Bosard said:

If the court please: I have been acquainted with Judge Cochrane ever since he moved to Grand Forks, a period of more than twenty years, during which time I have practiced law at this bar; and I join in the tributes that have been paid to him by his associates in his profession, but I am here on this occasion to speak particularly for the Bar Association of North Dakota:

The members of the Bar Association of North Dakota on this appropriate occasion give tribute to the memory of John M. Cochrane, the lawyer, whose love of his chosen profession so inspired his active life that he attained such eminence at the bar as is accredited only to the great.

His industry and perseverance were such that his success was assured. His professional pride led him to venture often in his efforts beyond the powers of his bodily strength to maintain. His devotion to the law led him to expend his resources in gathering together the finest library in the state.

His general attributes were such that he became the head and front of the bar, and the people held him in such regard that he was elevated to a seat upon the bench of this court, a position which he very justly held to be one of the greatest honor.

By Mr. Justice Young:

The resolutions which have been offered will be received, and the court will direct that they be spread upon the minutes of the court; and, as a further mark of respect, we will adjourn until 10 o'clock tomorrow.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

F. S. SARGENT, AS RECEIVER OF THE SECURITY TRUST COMPANY *v.* JOHN E. COOLEY AND MINNIE E. CLIFFORD.

Opinion Filed November 14, 1902.

Mortgage, and Agreement at Time of Delivery.

1. Action to foreclose a mortgage upon real estate. The defendant John E. Cooley answered the complaint, and alleged, as a defense against the foreclosure of the mortgage, that the mortgage was given without consideration, and that certain agreements were entered into between the mortgagor and the mortgagee at and prior to the execution and delivery of the mortgage, which agreements so alleged are, in effect, as follows: (1) That the mortgage should not, in any event, be available to the mortgagee as security for the debt evidenced by the note described in the same; (2) that the mortgage should only take effect in the event that the note described therein should be negotiated or transferred; (3) that, if the note should be negotiated or transferred, the mortgage should operate only while the note was held by some outside party; and finally that when the note was returned to the mortgagee, if it ever was returned, the mortgagee should at once surrender the mortgage to the mortgagor, viz., to John E. Cooley.

Discharge and Surrender of Mortgage.

2. The trial court admitted testimony to sustain the defense, and adjudged that the mortgage should be discharged and surrendered to the mortgagor. *Held,* that such ruling was error.

Evidence to Vary Terms of Mortgage—Common Law and Statute.

3. *Held,* further, under the common rule voiced by sections 3517 and 3890 of the Rev. Codes of 1899, that the evidence offered to establish said agreement was inadmissible to defeat the written instrument, or to establish any conditions not found in the mortgage.

Extraneous Agreements Discharged by Delivery.

4. *Held,* further, that the mortgage, when delivered, took effect absolutely and according to its terms, and the same was wholly discharged from all the extraneous agreements and conditions pleaded in the answer.

Previously Executed Note—Sufficient Consideration.

5. The mortgage was not given for some two months after the execution and delivery of the note described therein. *Held,* that the note is sufficient consideration to sustain the mortgage.

Defense of Failure of Consideration—Evidence to Vary Written Instrument.

6. *Held,* further, that, where the defense to a written instrument is failure of consideration, parol evidence is inadmissible to controvert or vary the terms of the instrument, or to create terms or conditions not found in the writing.

ON REHEARING.

Nondelivery—Parol Evidence.

7. Parol evidence is always admissible to show that a real estate mortgage was not delivered, and such evidence is not open to the objection that it contradicts or varies the terms of the instrument. Where, however, a delivery is shown to have been made, the mortgage, under section 3517, Rev. Codes 1899, takes effect freed from all conditions upon which the delivery was made.

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

Action by F. S. Sargent, as receiver of the Security Trust Company, against John E. Cooley and Minnie E. Clifford. Judgment for defendants, and plaintiff appeals.

Reversed.

Templeton & Rex, for appellant.

Proof to break down a mortgage must be "clear, satisfactory and specific, and of such a character as to leave in the mind of the Chancellor no hestitation or substantial doubt." *McGuin* v. *Lee,* 10 N. D. 160, 86 N. W. 717.

Under the statute of this state, "A grant cannot be delivered to the grantee conditionally. Delivery to him, or his agent, as such, is necessarily absolute; and the instrument takes effect thereupon, dis-

charged of any condition on which the delivery was made." Rev. Codes, 1899, section 3517. A mortgage is a grant. Rev. Codes, section 4727. The provisions of the chapter on transfers in general concerning the delivery of grants absolute and conditional, apply to all written contracts. Rev. Codes, 1899, section 3890. *Merrill* v. *Hurley,* (S. D.) 62 N. W. 958; *Mowry* v. *Henry,* 86 Cal. 471, 25 Pac. 17. The same rule applies to delivery of mortgages as to deeds. 20 Enc. of Law, 905.

Delivery without mistake or fraud, of a duly executed deed, passes a title, which can be divested only by a condition in the deed itself. 9 Am. & Eng. Enc. of Law 163. Deed, land contract or other instrument cannot be delivered to grantee, or obligee or other beneficiary, as an escrow. *Lowber* v. *Connit,* 36 Wis. 176. 11 Am. & Eng. Enc. of Law, 337.

The taker of a negotiable promissory note of a third person as collateral security to a pre-existing debt, is, under the great weight of authority, a bona fide purchaser. *Dunham* v. *Peterson,* 5 N. D. 417, 67 N. W. 293. The existing obligation is sufficent to sustain the security. Rev. Codes, 1899, section 3872. *Bank* v. *Lamont,* 5 N. D. 393, 67 N. W. 145.

Tracy R. Bangs, for respondents.

Mortgages have been recognized as accommodation paper, and are often made for the sole purpose of accommodation. *Bridges' Adm'r* v. *Blake, et al.* 6 N. E. 833.

The mortgage was simply left with Mr. Clifford to be retained as collateral to any liability of the Security Trust Company by reason of the negotiation of the notes; and if the notes were never negotiated, then the time never came when the mortgage was of any effect, Hence there never was a delivery, and the Trust Company has no rights in it. This would be true even though it were a deed. *Gilbert* v. *North America Fire Ins. Co.,* 23 Wend. 43.

WALLIN, C. J. This action is brought to foreclose a mortgage upon real estate, which mortgage was executed by the defendant, John E. Cooley, and delivered by him to the Security Trust Company; and, upon its face, the mortgage purports to secure a promissory note for $500, dated December 20, 1893, which note was executed by said Cooley, and was by him delivered at the date of its execution to the Security Trust Company. After a trial without a jury, the district court entered a money judgment against defendant Cooley

for the amount claimed in the complaint; but it was further adjudged by that court in substance, that the mortgage sought to be foreclosed by this action is invalid, and was at all times worthless as a security in the hands of the Security Trust Company, and the court below directed the plaintiff to cancel the same of record and surrender it to the defendant John E. Cooley. From such judgment, plaintiff appeals to this court, and demands a trial of certain issues of fact in this court, which are specified as follows: (1) Was the mortgage in suit executed, acknowledged and delivered by defendant Cooley? (2) If so, was the same given to secure a part of the debt evidenced by the note sued on herein? (3) If so, has said mortgage ever in any manner been released, discharged or otherwise rendered of no effect?

In this court the controlling question presented for determination is whether the mortgage is a valid security, and, as such, available to the plaintiff for purposes of foreclosure. The contention of the defendant Cooley is fully set out in his answer to the complaint as follows:

"(2) Further answering, this defendant alleges that the said mortgage was given to the said Security Trust Company by this defendant without any consideration whatever therefor, but simply as an accommodation to the said Security Trust Company, to enable it to sell, assign, transfer, negotiate, and hypothecate the note evidencing the indebtedness described in said mortgage to some person or persons to this defendant unknown, and to enable the said trust company to make a true statement to such purchaser, transferee, or pledgee that the said note was secured by mortgage on real estate, and to enable the said trust company to realize on said note by negotiating or hypothecating the same.

"(3) That at the time of the making and delivery of the said mortgage, it was understood and agreed by and between the said Security Trust Company and this defendant that the said mortgage should be, and was, given for the sole purpose as set forth in paragraph 2 of this third defense, and that the same should be, and was, accepted by the said trust company for the same purpose, and no other; that it was further stipulated and agreed by and between the said trust company and this defendant that the said mortgage was not given or received as security to the said trust company, but that the same was given and received, and was by the said parties understood and intended to be, as security only to the transferee or the pledgee of the said note; and it was further agreed that the said

mortgage should not be placed of record, but that the same should remain in the office of the said trust company until the said note should be returned to the said trust company, and that then the said mortgage should be delivered up to this defendant and canceled.

"(4) That the said mortgage has wholly fulfilled the purpose for which the same was made and accepted, that the said note evidencing the indebtedness purporting to be secured by said mortgage has been returned to the said trust company, and that the defendant, under the terms of the said agreement, is now entitled to have the same delivered up to him and canceled. Wherefore this defendant asks that the plaintiff's cause of action be dismissed, and that he, the said defendant, do have judgment against the said plaintiff for his costs and disbursements herein."

Upon the issues as specified in the statement of the case, the first question of fact presented is whether defendant John E. Cooley executed the mortgage, and delivered the same to the Security Trust Company. As to this question of mere fact there is, and can be, no contention. It is conceded that subsequent to the delivery of the $500 note described in the mortgage, and on February 19, 1894, the defendant Cooley did execute and deliver the mortgage to the Security Trust Company and further, that after said company became insolvent, and on July 27, 1897, said mortgage was recorded in the office of the register of deeds of Grand Forks county.

The second question of fact is whether the mortgage was given to secure a part of the debt evidenced by the note sued on. We are quite clear that an affirmative answer must also be given to this question. It appears by the answer, as well as by the testimony, that in so far as the mortgage was intended to operate as security for the performance of any act whatever, it was given, and intended to be given to secure the $500 note described in the mortgage, which note, it appears, has never been paid; and the same has been merged in, and forms a part of, the note sued on in this action. Nor is such merger controverted in this court. If we understand the position taken by appellant's counsel in this court, it is not that the mortgage was not, in any event, intended to be given as a security for the payment of the $500 note described in the mortgage. On the contrary, the contention of counsel corresponds to the averments in the answer of the defendant Cooley in this respect, and both are to the effect that the mortgage was given, and intended to be given, to secure the debt evidenced by the note described in the mortgage; but it is

further contended and alleged in behalf of John E. Cooley, that he executed the mortgage as an accommodation to the mortgagee, and without consideration, and pursuant to an agreement in substance as follows: (1) That the mortgage was in no event to take effect or operate as a security in favor of the mortgagee; (2) that the same should take effect only in the event that the note described in the mortgage should be negotiated, transferred, or hypothecated by the mortgagee; (3) that, whenever and as soon as the note should be returned to the mortgagee, the mortgage should cease to operate as a security, and in that event the mortgagee should surrender the mortgage to said John E. Cooley; and that the mortgage should not be recorded, but kept in the vaults of the Security Trust Company. Upon these allegations of the answer, we have no difficulty in reaching the conclusion that the mortgage was intended to be given, conditionally, as a security for the payment "of a part of the debt evidenced by the note sued on herein."

The third question presented is whether the mortgage has in any manner "been released, discharged, or otherwise rendered of no effect." This, obviously, is the crucial question in the case. The mortgage was given voluntarily, and there is no claim that it was obtained either by mistake or fraud, and there can be no doubt that the note which it purports to secure is a substantial consideration for its execution. True, the mortgage was given two months after the execution of the note, but it is well settled that the same consideration which supports a principal debt will likewise support any collateral undertaking given to secure the payment of the principal debt. Nor is it at all necessary that the collateral undertaking should be given at the inception of the principal debt. See *Red River Valley National Bank* v. *Barnes*, 8 N. D. 432, 438, 439, 79 N. W. 880. The mortgage therefore rests upon a valuable consideration, and, unless the agreement pleaded in the answer can be upheld, the mortgage is and at all times has been a valid security in favor of the mortgagee for the debt which it purports to secure.

At the trial, evidence was received, against objection, which was offered by the defense in support of the collateral agreements alleged in the answer to the complaint. The evidence was offered for the purpose of defeating and setting aside a written instrument which is plain and unambiguous in its terms. The mortgage, by its terms, purports to be a security in favor of the mortgagee named therein, and the evidence is offered to defeat the mortgage as security in the

hands of the mortgagee, and to show that it never was given or intended as such security. It is our opinion that the evidence is not admissible, and that the case must be governed by an established rule of the common law, which has been recognized and clearly expressed in the Civil Code of this state. The common-law rule to which we refer was applied to a grant or deed of real estate by the Supreme Court of California in *Mowry* v. *Heney*, 86 Cal. 471, 25 Pac. 17. In that case a deed of real estate was delivered to the grantee by the grantor at a time when the grantor was ill and expected to die, and it was the grantor's intent (known to the grantee), that the deed should not take effect if the grantor recovered from her illness. Upon these facts the court held that the deed took effect when delivered according to its written terms, and that its operation as a deed could not be defeated by parol evidence of the intent of the grantor in delivering the deed, or the conditions upon which the same was delivered. In its opinion (page 475, 86 Cal., page 19, 25 Pac.) the court quoted the following passage from Devlin on Deeds (section 314) with approval: "A deed cannot be delivered to the grantee as an escrow. If it be delivered to him, it becomes an operative deed, freed from any condition not expressed in the deed itself, and it will vest the title in him, though this may be contrary to the intention of the parties. One of the grounds upon which the rule is based is that parol evidence is inadmissible to show that the deed was to take effect upon condition." In 9 Enc. L. (2d Ed.) p. 163, the rule as applicable to deeds of conveyance is stated as follows: "The delivery, without mistake or fraud, of a duly executed deed, passes a title which can be divested only by a condition in the deed itself." See cases in note 2, Id. This rule has the support of an overwhelming weight of authority, and in this state it is clearly voiced by section 3517, Rev. Codes 1899, which reads: "A grant cannot be delivered to the grantee conditionally. Delivery to him or his agent, as such, is necessarily absolute; and the instrument takes effect thereupon, discharged of any condition on which the delivery was made." This common-law rule, as applied to deeds, was at the common law equally applicable to mortgages and other written instruments. The rule is stated in 20 Enc. L. 905, as follows: "A mortgage, like any other deed, must be delivered, and rules respecting delivery that are applicable to deeds generally must be applied to mortgages." Nor is there any reason apparent to us why the same rule should not be applied to all agreements entered into without mistake or

fraud, and which have been deliberately reduced to writing, and we find that such is the established rule of law. The rule is expressed in 11 Enc. L. (2d Ed.) 337, as follows: "It is a general rule that a deed or other instrument cannot be delivered to the grantee, obligee, or other party to have the benefit of the instrument, as an escrow, to take effect on a condition not appearing on its face. To allow a different rule would be to permit the legal effect of a written instrument, complete to all outside appearances, to be varied and in many instances defeated by oral proof." In *Lowber* v. *Connit*, 36 Wis. 176, this rule was applied to a written agreement to convey land; and the court, referring to the cases which apply the rule as to conditional delivery of deeds of conveyance, said: "We see no reason why the same rule should not apply to the delivery of a written contract for the sale of real estate." But in the state of North Dakota all questions of the applicability of this rule to all written instruments is set at rest by section 3890, Rev. Codes 1899, which is as follows: "The provisions of the chapter on transfers in general concerning the delivery of grants, absolute and conditional, apply to all written contracts." We have seen that section 3517, which governs "transfers," declares that a transfer takes effect on its delivery, "discharged of any condition on which the delivery was made"; and, under section 3890, this provision applied with equal force to "all written contracts," and hence it must be applied and must govern the alleged conditional delivery of the mortgage in question.

The agreements set out as a defense in the answer of John E. Cooley are squarely repugnant to the terms of the mortgage, and are of such a character as not only to vary and contradict its terms, but they go much further, and embody a contract wholly different from that stated in the written instrument. It is alleged that this contract was entered into at the time the mortgage was executed, and that the same was the inducement for its execution. If this extraneous agreement is valid and binding in the law, it will follow that the writing itself must give way to such agreement. But the rule is that contemporaneous agreements and negotiations are conclusively presumed to be merged in the writing. Proof is allowed of such agreements in cases where fraud, mistake, or failure of consideration is alleged as a ground of defense. But in the case at bar there is an attempt not only to defeat the mortgage for want of consideration, but to create a new and wholly different contract by an alleged agreement not embraced in the instrument. The recent case of *First*

National Bank of Langdon v. *Prior,* 10 N. D. 146, 86 N. W. 362, is directly in point against the defendant's position. In that case a mortgage upon real estate upon its face was given to secure a series of four notes, and two notes had been paid before the forclosure suit was commenced. In that case the defense attempted to show that under their answer the mortgage should be satisfied for the reason that, when the same was given, it was orally agreed that, when the two notes first falling due were paid, the mortgage should be released and surrendered to the defendants. In overruling this defense the following language was used: "As soon as the first two notes would be paid, the mortgage ceased as security for the last notes. The mortgage provided otherwise. The proposed oral agreement was inconsistent with the terms of the mortgage. It varied and contradicted its terms. It defeated its operation so far as two notes are concerned. It in no way was a collateral undertaking to the mortgage, but concerned the very essence of the security, and embodied a new contract directly antagonistic to the provisions of the notes and mortgage. It proposed to limit the operation of the mortgage so that it would be security for two notes only, when, in terms, it is security for four. We cannot give effect to the proposed agreement, and hold that evidence concerning it was inadmissible for the reasons given. None of the numerous cases cited by appellants is based on a similar state of facts. They are adjudications holding that a different or additional consideration may be proven when the operaton of the written instrument would not be defeated, or they are cases holding that the modification of the written contract pertained to a collateral undertaking not inconsistent with the terms of the written instruments. *Bank* v. *Lang,* 2 N. D. 66, 49 N. W. 414, and cases there cited."

Under the rule of law established by the adjudications and recognized by the provisions of the Code which we have cited, it follows that the delivery of the mortgage in question was absolute, and when delivered the same took effect according to its terms, wholly discharged from the several conditions and agreements set out as a defense thereto in the answer to the complaint. The judgment of the trial court will therefore be reversed in so far as it adjudges that the mortgage herein is null and void, and in so far as it directs that the same be discharged of record and surrendered to the defendant Cooley; and the trial court will be further directed to

enter judgment in favor of the plaintiff as demanded in its complaint.

YOUNG and MORGAN, JJ., concur.

ON REHEARING.

(April 28, 1903.)

YOUNG, C. J. A petition for rehearing was granted in this case, and the same was fully argued at the first session of the March term. Counsel for defendant, in his petition for rehearing, in refering to the admissibility of parol evidence offered at the trial to defeat the mortgage, very properly concedes that "there is no question about the effect of the provisions of our Code (section 3517, Rev. Codes 1899), if it is to be held that the mortgage was delivered to the Security Trust Company for its use with any conditions attached." His contention is that the mortgage "was not delivered to the Security Trust Company to be used by them either absolutely or conditionally." Again he says: "We have contended all along, and what we contend now is, that this mortgage never was delivered to the Security Trust Company, in the ordinary meaning of the term 'delivered.'" Further, that "in this case there was no mortgage that was effective between the mortgagor and the mortgagee. The verbal agreement was simply as to the disposition to be made by the Security Trust Company of an instrument left in its hands, and in which it had no interest. There was no attempt to make an instrument which would be operative between the parties." The petition presents for determination the question whether the mortgage was delivered—a question which was not seriously considered in the original opinion, it being taken as a conceded fact that there was a delivery. As already stated, counsel for defendant concedes that if there was a delivery of the mortgage, within the meaning of section 3517, Rev. Codes 1899, it took effect freed from any oral conditions upon which the delivery was made, and that in that event the parol evidence offered to establish such conditions was inadmissible. His contention is that the mortgage was not delivered, and that the oral evidence objected to was admissible to establish the fact of nondelivery. That parol evidence is admissible to show that a written instrument was never delivered, and therefore never became effective, cannot be doubted; and such evidence is not open to the objection that it contradicts or varies the terms of the written instrument, for it does nothing of the kind, but merely goes to one element of the contract

resting in parol, and essential to its existence as a contract, namely, the delivery. In this case we think the fact is conclusively established both by the pleadings and by the evidence that the mortgage was delivered. The complaint alleges a delivery, and the answer, in effect, admits it. In paragraph 2 of the defendant's third defense, he alleges that "the said mortgage was given to the Security Trust Company by this defendant * * * to enable it to sell * * * the note evidencing the indebtedness described in said mortgage, * * * and to enable the said trust company to make a true statement to the purchaser that the said note was secured by mortgage on real estate; * * * that, at the time of the making and delivery of the said mortgage, it was understood and agreed * * * that the said mortgage should be and was given for the sole purpose as set forth." After alleging that the mortgage was to be effective as security to the transferee of the note, he alleges that it was agreed that when the note should be returned to the Security Trust Company "the said mortgage should be delivered up to this defendant and canceled, * * * and that the defendant, under the terms of the said agreement, is now entitled to have the same delivered up to him and canceled." Briefly stated, the defendant alleges that he executed and delivered this mortgage to the mortgagee, who was engaged in negotiating real estate loans, so that the later might truly state and represent to a prospective purchaser of the note that it was in fact a secured note, and secured by the mortgage here in question. In our opinion, the defendant has alleged a complete delivery. He alleges that he gave the mortgage into the mortgagee's hands so that the latter might truly represent that the note was a secured note. Now, it is apparent that no such representation could truly have been made by the mortgagee unless the mortgage had been delivered for the purpose of becoming effective, and the note was in fact secured. Further, the mortgage was delivered to the mortgagee beyond his right to recall it, and no further act remained to be done by him to make it effective.

The case shows a delivery of the mortgage, accompanied by oral conditions; and, both under the common law and under our statute (section 3517), such oral conditions were extinguished by the delivery, and the delivery became absolute. Section 3517, Rev. Codes 1899, provides that "a grant cannot be delivered to the grantee conditionally. Delivery to him or his agent as such is necessarily absolute; and the instrument takes effect thereupon discharged of any

condition on which the delivery was made." This section was formulated by the Field code commission, and embraces the doctrine laid down in *Worrall* v. *Munn,* 5 N. Y. 229, 55 Am. Dec. 330, and *Braman* v. *Bingham,* 26 N. Y. 483. In *Worrall* v. *Munn* it appears that one Prall had, by a contract under seal, agreed to convey to Noah Worrall certain lands. Prall resisted an action for the specific performance of the contract upon the ground that "the agreement was delivered (by his agent) upon the express condition that it should be subject to the sanction of Prall, and was therefore not binding on him unless he subsequently approved and ratified it. Prall expressly refused to ratify the agreement. The delivery of the agreement to Henry Worrall (Noah Worrall's agent) was not an absolute delivery, in law." The court, in considering the question as to whether the agreement was delivered absolutely or conditionally, stated that "the law puts that question at rest. Here, according to the evidence of Warner and Nixen, the delivery of the agreement was directly to the agent of Noah Worrall, and that is equivalent to a personal delivery to Worrall himself. The agreement was in a perfect condition. It was signed and sealed by Prall. It was delivered on condition that it be subsequently approved by Prall. This was a delivery as an escrow. Such a delivery can only be made to a stranger. It cannot be made to the party. If made to the party, no matter what may be the form of the words, the delivery is absolute, and the deed takes effect presently, as the deed of the grantor, discharged of the conditions upon which the delivery was made; and, where such a delivery is made, parol evidence of the conditions, being contrary to the terms of the deed, is inadmissible. Here the intent of Warner was to deliver the agreement to the appellant as an escrow. It was not handed to Henry Worrall as an unexecuted and imperfect paper. There was no direction to him to retain it, and not to deliver it to the appellant, until it was ratified by Prall. It was not left in his hands for a temporary purpose, and to be returned in case Prall did not assent to it; but it was delivered to Henry Worrall, as the agent of the appellant, as an executed and perfect instrument, on condition that Prall subsequently assented to it. Such a delivery was in law, an absolute delivery. *Ward* v. *Lewis,* 4 Pick. 520; *Fairbanks* v. *Metcalf,* 8 Mass. 238; *Gilbert* v. *Insurance Co.,* 23 Wend. 45, (35 Am. Dec. 543); *Clark* v. *Gifford,* 10 Wend. 313."

In *Braman* v. *Bingham* the question involved the effect of the delivery of a deed to the grantee. Upon the question of the admissibil-

ity of parol evidence to defeat the deed, the court said: "The questions in regard to the delivery of the deed were properly overruled. The question, 'Was the deed delivered to take effect?' addressed to the party who signed the deed, I am inclined to think was objectionable, without reference to the circumstances under which the inquiry was made, as calling for a legal conclusion, or for the intention of the party, aside from what was said and done. The other question, 'Was the deed ever delivered?' would undoubtedly be proper where a delivery in fact was the matter in dispute. But here the defendant's answer admitted the delivery in fact, and the question in controversy was as to the intention of the parties, or the legal effect of such delivery. The only competent evidence bearing upon that question was what was said and done at the time. This the court decided to admit. The questions addressed to the witness, under the circumstances, called for his opinion as to the legal effect of the conceded actual delivery. That was a question to be decided by the court after all the facts attending the delivery should be proved." Again the court said in the same case: "A fatal objection to the third division of the answer, as a defense, is that it shows that the deed was delivered to the grantee, to be held by him in escrow. It is well settled that such a delivery vests the title in the grantee, although it may be contrary to the intention of the parties. *Lawton* v. *Sager,* 11 Barb. 349; *Worrall* v. *Munn,* 5 N. Y. 229 (55 Am. Dec. 330); *Gilbert* v. *N. A. Fire Ins. Co.,* 23 Wend. 45, (35 Am. Dec. 453). * * * It has been held in one case that a deed may be delivered to the grantee for the purpose of transmission to a third person, to be held by him in escrow until the happening of some event when it should take effect as a conveyance, and that such delivery would not be absolute. *Gilbert* v. *N. A. Fire Ins. Co.,* 23 Wend. 43, (35 Am. Dec. 543). In that case the grantee had deposited the deed with the third person in pursuance of the arrangement, the condition had not been performed, and the grantee made no claim under the deed. The case presented merely the question whether the grantor still retained an insurable interest in the premises described in the deed, the nominal grantee testifying to the terms in which the deed was delivered to him. Limited to its peculiar circumstances, no fault can be found with the decision; but if the grantee had retained the deed claiming that its delivery to him was absolute, and, in a contest between him and the grantor, parol proof of a conditional delivery had been offered, I think the result would have been different. If I am wrong

in this conclusion, the case discloses an avenue for the overthrow of titles by parol proof which was supposed to be closed by the rule to which it would seem to form an exception. The reason given for the rule excluding parol evidence of a conditional delivery to the grantee applies to all cases where the delivery is designed to give effect to the deed in any event, without the further act of the grantor. 'When the words are contrary to the act, which is the delivery, the words are of none effect.' Co. Litt. 36a. 'Because, then, a bare averment, without any writing, would make void every deed.' Cro. Eliz. 884. 'If I seal my deed and deliver it to the party himself, to whom it is made, as an escrow, upon certain conditions, etc., in this case let the form of the words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently.' Shep. Touch. 59; Whyddon's Case, Cro. Eliz. 520; Cruise, Dig. tit. 33, 'Deeds,' c. 2, section 80. If a delivery to the grantee can be made subject to one parol condition, I see no ground of principle which can exclude any parol condition. The deed having been delivered to the grantee, I think the parol evidence that the delivery was conditional was properly excluded."

The cases just referred to have been followed in New York, and represent the settled rule in that state. In *Lawton* v. *Sager,* 11 Barb. 349, the court, in considering the question as to whether a deed was delivered absolutely or conditionally, said: "A deed can only be delivered as an escrow to a third person. If it be intended that it shall not take effect until some subsequent condition shall be performed, or some subsequent event shall happen, such condition must be inserted in the deed itself, or else it must not be delivered to the grantee. Whether a deed has been delivered or not is a question of fact, upon which, from the very nature of the case, parol evidence is admissible. But whether a deed, when delivered, shall take effect absolutely, or only upon the performance of some condition not expressed therein, cannot be determined by parol evidence. To allow a deed absolute upon its face to be avoided by such evidence would be a dangerous violation of a cardinal rule of evidence. *Gilbert* v. *The North American Fire Insurance Company,* 23 Wend. 43, (35 Am. Dec. 543); *Ward* v. *Lewis,* 4 Pick. 518; 4 Kent's Com. 454; *Jackson* v. *Catlin,* 2 Johns. 248, (3 Am. Dec. 415), per Platt, arguendo. The deed in this case, being absolute upon its face, and having been delivered to the grantee himself, took effect at once. It could not have been delivered to take effect upon the happening of a future

contingency, for this would be inconsistent with the terms of the instrument itself. Without regard, therefore, to any understanding which may have existed between the parties at the time the deed was delivered, it must be held to be an absolute conveyance, operative from that time." In *Blewett* v. *Boorum et al.*, 142 N. Y. 357, 37 N. E. 119, 40 Am. St. Rep. 600, Peckham, J., speaking for the court, said: "The rule in this state regarding deeds conveying real estate, or an interest therein, or agreements for the sale thereof, is that a delivery cannot be made to the grantee or other party thereto conditionally, or, as is said in escrow, and when delivered to a party the delivery operates at once, and the condition is unavailable. *Gilbert* v. *The North American Fire Insurance Co.*, 23 Wend. 43, (35 Am. Dec. 543); *Worrall* v. *Munn*, 5 N. Y. 229, (55 Am. Dec. 330); *Braman* v. *Bingham*, 26 N. Y. 483; *Wallace* v. *Berdell*, 97 N. Y. 13, 25. Whether there is any sound basis for a distinction between cases relating to real estate and other kinds of written instruments, it is not now important to inquire, for the rule that instruments of the former character cannot be conditionally delivered to a party is too firmly established in this state to be overruled or even questioned. In the case in 23 Wend. supra, Bronson, J., says it is one of the cases in which the law fails to give effect to the honest intention of the parties, for the reason that they have not adopted the proper legal means of accomplishing their object." *Wallace* v. *Berdell et al.*, 97 N. Y. 13, is to the same effect. As already stated, the doctrine of the two cases first cited is the statutory law of this state (section 3517, Rev. Codes 1899), and is controlling in this case.

Counsel for defendant, in support of his contention that evidence of the conditions attending the delivery of the mortgage was admissible, relies upon the case of *Burke* v. *Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698, which lays down the rule that "the effect of the delivery and the extent of the operation of an instrument such as a promissory note may be limited as between the original parties thereto by the conditions on which delivery is made." This case does not sustain counsel's contention. In the first place, the decision is not based upon a statutory provision like ours, but rests entirely upon the common law; and, in the second place, the instrument in question in that case did not relate to real estate. It was a promissory note. And the decision does not purport to announce a rule as to the effect of the delivery of instruments relating to real estate, but does relate wholly to the rule which obtains in reference

to the delivery of unsealed instruments, or instruments not affecting real estate. As to such instruments, the common-law rule undoubtedly is (and this is true in New York also) that conditions attending their delivery may be shown by parol evidence. The cases cited in the opinion above referred to will be found to be of this class. The earlier cases, in determining whether a delivery in fact might be shown to have been conditional, made the test depend upon whether the instrument belonged to the class known as sealed, or unsealed. The later cases rest the distinction upon the subject matter of the instrument, and in *Blewitt* v. *Boorum,* supra, Peckham, J., after reviewing the English and American authorities, confines the rule which requires the exclusion of parol evidence of the conditional delivery of written instruments "to deeds or writings conveying or relating to the conveyance of real estate, or some interest therein." And that was the rule adopted by the Legislature of this state. Section 3517, supra. The common-law rule undoubtedly was that "an instrument not under seal may be delivered upon conditions, the observance of which as between the parties is essential to its validity, and the annexing of such conditions to the delivery is not an oral contradiction of the written obligation." *Bookstaver et al.* v. *Jayne,* 60 N. Y. 146; *Jamestown Business College Association* v. *Allen,* 172 N. Y. 302, 64 N. E. 956, and cases cited. This rule, however, does not aid defendant in this case, for we are dealing with an instrument affecting real estate, which, even under the rule of the common-law, (ignoring the statute), could not be delivered with conditions attached.

Counsel for defendant also contends that the conditions attending the delivery of the mortgage, and upon which he relies to defeat its enforcement, do not rest in parol, but that they were in writing. There is testimony to the effect that George B. Clifford, the western manager of the Security Trust Company, wrote a letter from Nashua, N. H., addressed to the Security Trust Company, or J. E. Clifford, assistant treasurer, at Grand Forks, requesting the latter to procure the mortgage in question. The letter in question was not produced, and secondary evidence as to its contents was received, over plaintiff's objection. The testimony shows that the letter was one of instruction to the Security Trust Company's officers at Grand Forks to procure the execution and delivery of the mortgage substantially upon the conditions pleaded by the defendant in his answer. The contention "that the written instrument consisted of

two parts—one, the instrument in form of a mortgage; the other, the written instrument in the form of a letter"—cannot be sustained. Conceding, merely for the purpose of this opinion, that sufficient foundation was laid for the admission of secondary evidence of its contents, we are agreed that this letter is in no sense a part of the mortgage. It was not addressed to the defendant, and contained no promises to the defendant directly. It was merely a letter of instructions to the local officers of the mortgagee, authorizing them to procure the mortgage upon the conditions named. The promises which they were authorized to make were made to the defendant orally, and in no sense can it be said that the mortgagor executed and delivered to the defendant a writing embracing the provisions upon which he now relies to defeat the mortgage. The letter of instructions may have been sufficient to have authorized the local officers of the mortgagee to execute a writing embracing such conditions, but they did not do so. The defendant was content to accept their oral promises as to the use to which they would put the mortgage executed and delivered by him. The Legislature of this state deemed it wise to withhold the right to rely upon such conditions where the instrument which would be defeated relates to real estate, and there had been a delivery in fact.

The conclusions in the original opinion will be adhered to.

MORGAN and COCHRANE, JJ., concur.

MELVINA DE ROCHE *v.* LEON DE ROCHE.

Opinion filed April 23, 1903.

Divorce—Cruelty—Evidence.

1. In an action for divorce based upon the ground of extreme cruelty, evidence examined upon a trial *de novo*, and found sufficient to justify the granting of a decree of divorce to plaintiff upon that ground.

Alimony—Gross Amount.

2. When a divorce is granted to the wife for the wrong of the husband, the court, under section 2761, Rev. Codes 1899, may, in its discretion, grant alimony in a gross amount in lieu of an allowance payable at stated periods.

Award Not Excessive.

3. Evidence shows that husband and wife jointly accumulated $14,000; the husband has a business which will support him; wife has

the custody of three minor children, and gives a $1,000 bond to insure their support; an award to the wife of $7,000 in gross sum *held* not excessive.

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

Action by Melvina De Roche against Leon De Roche. Judgment for plaintiff, and defendant appeals.

Affirmed.

Bosard & Bosard, for appellant.

Granting of alimony is a statutory, not a common law right. *Davol* v. *Davol*, 13 Mass. 264. Alimony should be a sum payable from time to time, and in the absence of special agreement, or statutory authorization, should not be allowed in gross amount, or specific property. 2 Am. and Eng. Enc. of Law (2nd Ed.) 129; *Ross* v. *Ross*, 78 Ill. 402; *Von Glahn* v. *Von Glahn*, 46 Ill. 136; *Keating* v. *Keating*, 48 Ill. 241; *Maguire* v. *Maguire*, 7 Dana (Ky) 181; *Wallingsford* v. *Wallingsford*, 6 H & J. (Md) 489; *Calame* v. *Calame*, 25 N. J. Eq. 548; *Almond* v. *Almond*, 15 Am. Dec. (Va.) 781.

The proposition is further discussed in the following cases: *Lockridge* v. *Lockridge* (Ky), 28 Am. Dec. 52; *Cole* v. *Cole*, 34 Am. St. Rep. 56; *Stillman* v. *Stillman*, 99 Ill. 196, 39 Am. Rep. 21; *Resser* v. *Resser*, 82 Ill. 442; *Walling* v. *Walling*, 16 N. J. Eq. 389; *Miller* v. *Clark*, 23 Ind. 370; *Albee* v. *Wyman*, 10 Gray, 222; *Doe* v. *Doe*, 5 N. Y. Supp. 514; *Allan* v. *Farmers' Loan and Trust Co.*, 45 N. Y. Supp. 398; *Romaine* v. *Chauncey*, 129 N. Y. 566, 29 N. E. Rep. 826; *Wetmore* v. *Wetmore*, 44 N. E. Rep. 169; *Brown* v. *Brown*, 38 Ark. 324; *Burr* v. *Burr*, 10 Paige Ch. 20. If allowable to grant a gross sum, the amount allowed was excessive, under the evidence. *Hooper* v. *Hooper*, 44 L. R. A. 725; *Williams* v. *Williams*, 36 Wis. 362. The following cases are illustrative of just proportions of alimony, relative to the value of the husband's estate: $2,000 out of $8,500. *Wilde* v. *Wilde*, 56 N. W. Rep. 724; $1,000 when husband had $700 of wife's property, and he was worth $3,000; *Lacey* v. *Lacey*, 95 Ky. 110; $1,500 out of $5,000, for wife and two children. *Robinson* v. *Robinson*, 79 Cal. 511, 21 Pac. 1095; $15,000 out of $37,000. *Douglas* v. *Douglas*, 47 N. W. Rep. 92; $5,000 when husband was in possession of a liberal estate, was of high social standing, and great physical and mental ability. *Pauley* v. *Pauley*, 34 N. W. Rep. 512. See also *Draper* v. *Draper*, 68 Ill. 17; *Burr* v. *Burr*, 10 Paige 20; *Williams* v. *Williams*, 61 N. W. Rep. 38 (S. D.) *Van*

Glahn v. *Van Glahn,* 46 Ill. 134; *Graft* v. *Graft,* 76 Ind. 136; *Becker* v. *Becker,* 79 Ill. 532.

Guy C. H. Corliss, for the respondent.

The authorities are very numerous, which support the view that a gross sum may be awarded. *Johnson* v. *Johnson,* 36 Ill. App. 152; *Wilde* v. *Wilde,* 56 N. W. Rep. 724; *Lacey* v. *Lacey,* 95 Ky. 110; *Gerke* v. *Gerke,* 13 S. W. Rep. 400; *Hoering* v. *Hoering,* 85 N. W. Rep. 346; *Templeton* v. *Templeton,* 85 N. W. Rep. 247; *Barkham* v. *Barkham,* 94 Ill. App. 440; *DeRuiter* v. *DeRuiter,* 62 N. E. Rep. 100; *Robinson* v. *Robinson,* 79 Cal. 511; *Douglass v. Douglass,* 81 Ia. 258; *Evans* v. *Evans,* 93 Ky. 510; *Pauly* v. *Pauly,* 69 Wis. 419; 34 N. W. Rep. 512; *Barber* v. *Barber,* 37 N. W. Rep. 381; *Burr* v. *Burr,* 10 Paige 20; *Metzler* v. *Metzler,* 99 Ind. 348; *Graft* v. *Graft,* 76 Ind. 136; *Williams* v. *Williams* (S. D.) 61 N. W. Rep. 38); *Burrows* v. *Purple,* 107 Mass. 432; *Jeter* v. *Jeter,* 36 Ala. 391; *Hedrick* v. *Hedrick,* 28 Ind. 291; *Wheeler* v. *Wheeler,* 18 Ill. 39; *Piatt* v. *Piatt,* 9 Ohio 37; *Lyon* v. *Lyon,* 21 Conn. 85; *Taylor* v. *Gladwin,* 40 Mich. 232; *Irwin* v. *Irwin,* 49 S. W. Rep. 432; 2 Nelson on Divorce and Separation, sections 900 and 903. Same, section 931.

Considering the wife's sufferings and sacrifices; her efforts and deprivation during the period in which the husband has accumulated what he has, an estate of about $15,000; and considering that the wife is charged with the burden of rearing the children, the allowance in the decree is not excessive. *Johnson* v. *Johnson,* 36 Ill App. 152; *Hoering* v. *Hoering,* 85 N. W. Rep. 346; *Van Derbeck* v. *Van-Derbeck,* 83 N. W. Rep. 150; *Metzler* v. *Metzler,* 99 Ind. 384; *Williams* v. *Williams,* 61 N. W. Rep. 38; 2 Nelson on Divorce and Separation, section 909; *Hooper* v. *Hooper,* 44 L. R. A. 725; *Gerke* v. *Gerke,* 13 S. W. Rep. 400; *Irwin* v. *Irwin,* 49 S. W. Rep. 432; *McGechie* v. *McGechie,* 61 N. W. Rep. 692.

Action by Melvina De Roche against Leon De Roche for divorce. Both plaintiff and defendant are citizens of the United States, residents of and domiciled in Grand Forks since the year 1879. They were married March 31, 1872. Nine children were born, the fruits of such marriage. Six only are living, three of whom—two girls and one boy—are of full age, the oldest girl being married; and three girls aged 17, 13 and 11, respectively. The three younger children have always lived at home, and are now in the custody of the mother. The plaintiff alleges that during the greater portion of her married

life defendant has treated her in a cruel and inhuman manner; that he has threatened and actually committed upon her personal violence; that the same are such as to cause her to feel in peril of her life if she continues longer to live with him. She further alleges that for years defendant has abused her, applying to her the most opprobious, vile and degrading epithets, cursing and swearing at her, charging her with unchastity—all in the presence and hearing of her children; and has specially neglected her when sick, and was guilty of other misconduct largely incident to that above cited. Plaintiff further alleges that defendant has a good business, and is worth at least $25,000. The relief asked is an absolute divorce, the custody of the minor children, permanent alimony for the support of herself and minor children, and suit money. The defendant, in his answer, admits the marriage, parentage, and ages of children named, but denies all acts of wrongdoing charged against him, and, while admitting his ownership of some property, denies its value to be $25,000, or any sum in excess of $13,545. The lower court found the defendant guilty of extreme cruelty, as alleged by the plaintiff; that his property is worth $14,000, and that defendant is also carrying on a business, the income from which is ample for his own support; that the property has been accumulated by the joint efforts of both parties: that it is for the best interests of the minor children that their custody be awarded to the mother. Judgment was ordered for plaintiff that she have a decree of absolute divorce, and that, considering the age of the plaintiff and of the minor children, and the inconvenience of having a monthly allowance of alimony, it is just and equitable that she be allowed, in lieu of all further alimony, counsel fees, and expenses, a gross sum of $7,000 in cash, to be paid as follows: $3,000 to be immediately paid upon the entry of judgment, $2,000 November 1, 1903, and $2,000 November 1, 1904, with interest until paid at 7 per cent. per annum; defendant to be exonerated from all obligations to maintain plaintiff or the minor children; plaintiff to give defendant a bond in the sum of $1,000, to be approved by the court, to insure the maintenance of the children; defendant to pay plaintiff, during the pendency of this appeal, $50 per month, beginning with November 1, 1902.

Bosard & Bosard, for appellant.

Guy C. H. Corliss, for respondent.

POLLOCK, District Judge (after stating the facts). The appeal in this case calls for a trial *de novo.* Three questions are presented by the record. First. Does the testimony sustain the findings and conclusion that a decree should be granted to plaintiff? Second. If it does, can the court, under our statute (section 2761, Rev. Codes 1899), grant alimony in a gross sum? Third. If it can, was the amount fixed by the lower court excessive?

1. We have carefully examined the record, covering, as it does, 240 pages, and are of the unanimous opinion that the findings and conclusions of the lower court upon the merits should be sustained. It would subserve no useful purpose to discuss this voluminous abstract at length, and spread upon a permanent record unfortunate family relations. Suffice it to say that the mother's testimony is fully corroborated by that of four of the older children. Against these statements is the unsupported testimony of the defendant, and in his testimony he did not positively deny many of the accusations made, but seemed to rest content upon the fact that he had apologized for his foul words and deeds. The testimony shows that defendant frequently called his wife a whore, a bitch, and other vile and approbious epithets; swore at her, and made threats against her of bodily injury, all of which have taken place in the presence of the children. His treatment of her, also, when sick and caring for sick children, can only be accounted for by believing the defendant unresponsive to all those finer feelings which control the average man in dealing with his family and those he loves. We are agreed that the defendant's conduct produced grievous mental suffering upon the part of the plaintiff, and was of such a character as clearly, under the statute (section 2739, Rev. Codes 1899), as well as the adjudicated cases in this and other states, to warrant the court in granting the decree. *Mahnken* v. *Mahnken,* 9 N. D. 191, 82 N. W. 870, and cases cited.

2. Can alimony be allowed in a gross sum? Counsel for defendant stoutly insist that it cannot. It is conceded that whatever power the court has is derived from section 2761, Rev. Codes 1899, which reads as follows: "When a divorce is granted for an offense of the husband, the court may make such suitable allowance to the wife for her support during her life or for a shorter period as the court may deem just; and when such divorce is granted for the offense of either the husband or wife, the court may compel such husband to provide for the maintenance of the children of the marriage, hav-

ing regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects." This section, so far as the point here involved is concerned, is the same as section 73, Civil Code, 1877, Dakota T., adopted January 12, 1866, and is identical with section 73 of the Field Code, reported for adoption in New York, February 13, 1865. Counsel for defendant, in their oral argument, contended that when reported in New York for adoption section 73 of the Field Code merely embodied the common law of that state, and that under the common law of New York a gross sum was not allowable. They further contend that in states where a gross sum has been granted it was alone by authority of express statutes, except in the states of California and South Dakota. Their conclusion is that, having adopted the Field Code, we should be controlled by the decisions of the New York courts made prior to the adoption of the Field Code in Dakota Territory. In this discussion it ought to be remembered that in the state of New York, at the time of the preparation of the Field Code, as now, the only cause for a divorce *a vinculo* was adultery. It was, however, provided that for certain other causes, such as extreme cruelty, etc., a bill of separation *a mensa et thoro* could be maintained. When we adopted our statute, the causes for an absolute divorce were increased, and many, if not all, of the causes for a separation as found in the Field Code were united under one head as causes for an absolute divorce. Section 73, Field Code, with reference to alimony, was adopted by our territorial legislature unchanged. In the state of New York a decree of separation did not *per se* affect the question of property between the parties. The wife lost none of her rights of dower, and the whole theory of the law looked to ultimate reunion of the parties. Such results could not be hoped for if the property was permanently divided. Alimony, under such conditions, was the allowance which a husband, by order of the court, paid to his wife, living separate from him, for her maintenance, and was generally made payable monthly, quarterly or yearly, as the court considered best for all parties concerned. Our attention has not been called to any case nor have we been able to discover any, from New York, prior to the Field Code, which decided that in cases of a divorce *a vinculo* a gross sum could not be allowed. Counsel for defendant bases his contention that a gross sum was not allowed in New York upon the authority of *Burr* v. *Burr*, 10 Paige (N. Y.) 20-37; Id., 4 L. Ed. 872. This case was a separation "*a mensa et thoro*," not a divorce "*a vin-*

culo." The vice chancellor said: "The remaining question is as to the amount of alimony to which the complainant is entitled. Section 54 enacts that, upon decreeing a separation, the court may make such further decree for the suitable support and maintenance of the wife by the husband, or out of his property, as may appear just and proper. Section 56 allows a decree for a separation to be revoked on a reconciliation of the parties, under such regulations and restrictions as the court may impose. * * * I find no case where the chancellor, or any other court, has directed a sum in gross to be paid the wife. There is a looseness of expression in the marginal note to some of the cases and in some of the opinions which give countenance to the claim set up by the complainant. But the cases themselves do no sustain it. I think it has been shown that the claim to a gross sum is incompatible with some of the provisions of the statute, *where, as in this case, the claim arises out of a limited divorce.*" (The italics are ours.) The chancellor, in rendering the final decision (at page 37), says: "Whether the court in such cases is authorized to award a gross sum to the wife, instead of an annual allowance, it is not necessary in this case to consider; for it will be more beneficial to the complainant to have a liberal quarterly allowance for life than any gross sum which the court would think it proper to give, and which gross sum, in case of her death in the lifetime of the husband, might belong to him, under the statute of distributions." So that, under the ruling of the chancellor in the case relied on, it was not decided, even in a case of separation, that a gross sum could not be allowed.

A careful examination of the decided cases in New York also shows that when a divorce *a vinculo* was granted the courts awarded such alimony as was deemed just and reasonable. This power was conceded in *Peckford* v. *Peckford,* 1 Paige (N. Y.) 274, 2 L. Ed. 644, decided in 1828, where the chancellor says: "The usual course in such cases is to order a reference to ascertain by the report of a master the value of the defendant's property, and what would be a suitable allowance." And again, after finding the value of the property to be $12,000, said: "If the wife had been perfectly discreet, provident, and submissive to her husband, I should have allowed her half this property." In *Lawrence* v. *Lawrence,* 3 Paige (N. Y.) 267, 3 L. Ed. 148, decided in 1832, which was an action for a separation, the chancellor says: "The proportion of the husband's property or income which is allowed to the wife as ali-

mony, either *pendente lite* or after the termination of the suit, is in the discretion of the court. And in fixing upon the amount which is proper to be allowed the court must take into consideration the nature of the husband's means, the situation of the parties in society, the amount of the husband's income, and whether the same is derived from property already acquired or from his own personal and daily exertions. It is also proper for the court to take into consideration the question whether there are or are not children or other relatives of the husband who have claims upon him for sustenance or education. * * * Where the amount of the estate is considerable, it is usual to allot the wife for permanent alimony from one-fourth to one-half thereof, where she is not to have the custody of the children of the marriage."

The diligence of counsel for defendant makes it possible to see at a glance, in his brief, the statutes of the several states of the Union which in express language permit courts in case of a divorce to grant a gross sum, if, in their discretion, the same is deemed proper. Those mentioned are Massachusetts, Wisconsin, Indiana, Kentucky, New Hampshire, Illinois, Michigan, Connecticut, Iowa, Ohio, Missouri and Vermont. In none of these has the Field Code been adopted, nor was the precise language of section 73 (found in section tion 2761, Rev. Codes 1899) with reference to alimony; although it is apparent that the principle laid down in the New York cases above cited was approved. It may be profitable to inquire why this unanimity of statutory language upon the question of permitting a gross amount to be allowed exists in the several states named. A divorce *a vinculo* is a final winding up of the relation existing between man and wife. It is an absolute breaking of all marital ties. The chain which has bound the parties together is broken; the effect of which, to use the language of our statute, is "to restore the parties to the state of unmarried persons." Section 2736, Rev. Codes 1899. What could be more humiliating to the wife than to be constantly placed as a pensioner upon the bounty of a man who had destroyed her happiness, subjected to his insults, and reminded each month, quarter or year of past misfortunes; caused frequently to resort to legal proceedings to secure her stipend, and made the unhappy recipient of a fund which, upon each recurring payment, the husband will take occasion to remind her is not her own? It would be likewise irritating to the husband, provocative of strife, and in the end destroy his comfort and repose to feel that the debt incurred would end only with

death. Private interest and public policy unite in saying that in the majority of cases such a winding up of the affairs of the parties should be made as will reduce to the minimum the evils of the dissolution. This, in many cases, can be better done by the allowance of a gross sum. Does, then, the wording of our statute permit such an allowance? In our opinion, a fair interpretation of the section leaves it for the court to decide what is right and proper for the particular case in hand. It says: "The court may make such suitable allowance to the wife for her support during her life or for a shorter period as the court may deem just." Counsel contend that the use of the word "allowance" negatives the idea of a gross sum. Webster defines an allowance as "that which is allowed; a share or portion allotted or granted; a sum granted as a reimbursement; a bounty; an appropriation for any purpose; a stated quantity, as of food or drink." It would appear, therefore, that, if we should rest our construction upon the language of the section in question, and omit the reason of the rule, the conclusion of counsel for defendant could not be followed.

But we are not without authority in the matter. The only states having our statute, both taken from the Field Code, Section 73, are South Dakota and California, and their supreme courts have decided that under it a gross sum can be allowed. In the case of *Williams* v. *Williams,* 6 S. D. 295, 61 N. W. 38, the court says: "The appellant also contends that the court had no authority to award alimony payable in one sum, instead of payable monthly or annually. But we are of the opinion that our statute fully authorizes the court to render the judgment complained of. The statute reads as follows: 'Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects.' Comp. Laws 1887, section 2584. The California Civil Code contains identically the same section, and in *Robinson* v. *Robinson,* 79 Cal. 511, 21 Pac. 1095, the question was presented and fully considered. In that case the court says: 'The question is, had the court the power, under this section, to require a gross sum to be paid to the plaintiff for her support? We think the language broad enough to confer this power. It will be observed that the al-

lowance may be for the wife's support during her life, and there is nothing limiting it to periodical payments. If it were so limited, it would be possible, where no security had been required, for the husband to dispose of all his property, and then go away or die, and thus defeat the allowance altogether. And this has been the practical construction of similar statutes in many other states.' In *Burrows* v. *Purple,* 107 Mass. 432, Mr. Justice Gray, speaking for the court, says: 'This court has long been vested, by successive statutes, with authority, upon granting to a wife a decree of divorce, either from bed or board or from the bond of matrimony, to allow her reasonable alimony out of her husband's estate. And the practical construction of these statutes has always been that such alimony might, at the discretion of the court, be ordered to be paid in one gross sum, instead of being made payable at stated periods. In many other states, also the word "alimony" is commonly used as equally applicable to all allowances, whether annual or in gross, made to a wife upon a decree of divorce under similar circumstances'—citing *Parsons* v. *Parsons,* 9 N. H. 309, 32 Am. Dec. 362; *Whittier* v. *Whittier,* 31 N. H. 452; *Buckminster* v. *Buckminster,* 38 Vt. 248, 88 Am. Dec. 652; *Piatt* v. *Piatt,* 9 Ohio, 37; *Hedrick* v. *Hedrick,* 28 Ind. 291; *Wheeler* v. *Wheeler,* 18 Ill. 39; and *Jeter* v. *Jeter,* 36 Atl. 391."

3. Was the amount fixed excessive? We are of the opinion it was not. It must not be forgotten that the plaintiff did as much for the accumulation of the property as the defendant. The evidence certainly warrants that conclusion. The mother also must have the care and custody and incur the responsibility of bringing up and educating the three minor children. To secure the performance of this obligation by her, the trial court required her to give a bond in the sum of $1,000. We think the evidence fully justifies the finding of the lower court that the defendant has property worth $14,000, and is also carrying on a business, the income from which is ample for his own support. The lower court had before him all the witnesses in this case, and therefore had special advantages for judging of their credibility, and has arrived at what seems to us from the record a fair and equitable allowance to the wife out of the joint estate.

The judgment appealed from is affirmed.

YOUNG, C. J., and MORGAN, J., concur. COCHRANE, J., having been of counsel in the court below, took no part in deciding the case;

CHARLES A. POLLOCK, Judge of the Third Judicial District, sitting in his stead.

(94 N. W. Rep. 767.)

J. W. ROSS *v.* ALVIN ROBERTSON.

Opinion filed April 25, 1903.

Reduction of Verdict—New Trial.

The trial court has authority to order a reduction of the verdict of a jury which he considers excessive, and to require the prevailing party to accept the reduced amount, or submit to a new trial.

Granting New Trial Discretionary.

The granting of a new trial because of the insufficiency of the evidence to justify the verdict, when there is a substantial conflict in the evidence, rests in the sound legal discretion of the trial court. This discretion will not be disturbed, except in cases of abuse.

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

Action by J. W. Ross against Alvin Robertson. Verdict for plaintiff. From an order granting a new trial, plaintiff appeals.

Affirmed.

B. G. Skulason, for appellant.

Bosard & Bosard, for respondent.

COCHRANE, J. The issue in this case is as to the value of services rendered by plaintiff, an architect, in the preparation or reproduction of plans, specifications, and detail drawings for a dwelling house for defendant. This value depends largely upon the consideration whether plaintiff was the originator of the particular design, or whether he copied certain plans, specifications, and drawings left with him by defendant as models; making only such changes as would be necessary for a house five feet longer and one foot wider in the main part, and one foot narrower in the rear, than the one called for in the models furnished him, with some changes in the location of partition walls. The specifications and blue prints of drawings left with plaitniff as models were offered and received in evidence; also the specifications and blue prints from drawings made by plaintiff under his employment. These were examined and compared by the trial court before making the order from which this appeal was taken. Besides the parties, but one witness (De Remer,

an architect) was sworn and examined, first for the plaintiff and then for defendant. A review of the evidence can serve no good purpose. It is sufficient to here state that there was a conflict in the testimony. A verdict was returned in plaintiff's favor for $241.83, and judgment was entered thereon. Defendant moved for a new trial; specifying, among other grounds therefor, that the evidence was insufficient to justify the verdict. The trial court, upon hearing, ordered that the verdict and judgment be modified and reduced to the sum of $63.49 and costs, and directed that plaintiff file his written election to accept such reduction, else the verdict and judgment would be set aside, and a new trial granted. Plaintiff refused to accept the reduction. This appeal is from the order granting a new trial. Appellant assigns error upon the reduction of the amount of the verdict, and the requirement that he accept a reduced amount in full satisfaction of his claims, or submit to a new trial.

The power of the court to require a remittitur in a proper case is not challenged, but it is claimed that the court abused its discretion in requiring it in the state of the evidence in this case; that, properly interpreted, the evidence in support of the jury's verdict was uncontradicted. For the same reason, appellant insists that the order granting a new trial for insufficiency of the evidence was so palpably wrong as to require a reversal by this court. We do not so view the case. After a careful reading of the evidence, and comparison of the exhibits, we conclude that the case was a proper one for the trial court to exercise its discretion upon in each of the particulars in which its action is challenged. There was no abuse of discretion. *Patch* v. *Railway Co.*, 5 N. D. 55, 63 N. W. 207; *Gull River Lumber Co.* v. *Elevator Co.*, 6 N. D. 276, 69 N. W. 691; *Dinnie* v. *Johnson*, 8 N. D. 153, 77 N. W. 612; *Pengilly* v. *J. I. Case Threshing Machine Co.*, 11 N. D. 249, 91 N. W. 63.

This disposes of the case, and renders a consideration of other assignments unnecessary. The order appealed from is affirmed.

All concur.

(94 N. W. 765.)

S. A. IRELAND *v.* LILLIAN ADAIR.

Opinion filed April 25, 1903.

Levy on Property Incapable of Manual Delivery—Notice.

1. A levy upon personal property incapable of manual delivery, under a warrant of attachment, must be made in strict compliance with subdivision 4, section 5632, Rev. Codes. To impound a debt or demand due to the defendant, a copy of the warrant of attachment, and a notice showing the property attached, must be delivered to and left with the person against whom the demand exists.

Contents of Sheriff's Return.

2. The sheriff's return upon a warrant of attachment must set forth the acts performed in the execution of its mandate, so that the court may decide upon its sufficiency. The presumption is that the sheriff, in his return, has stated all acts done by him toward effecting a levy.

Jurisdiction—Void Judgment.

3. The judgment entered in this case is void for want of jursidiction in the court to enter it; it appearing from the judgment roll that no property was attached, that the defendant was not a resident of the state, was not served with summons, and did not voluntarily appear in the action.

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

Action by S. A. Ireland against Lillian Adair. Judgment as entered as by default. Defendant appeals.

Reversed.

Ball, Watson & Maclay, for appellant.

Complaint is not properly verified since its matter could not be with the personal knowledge of plaintiff's attorney; and so far as affidavit of verification states, that he "believes it to be true," it carries no force, since none of the matters contained in such complaint is alleged upon information and belief. The verification does not comply with section 5281, Rev. Codes. *Oelbermann et al.* v. *Ide,* 68 N. W. Rep. 393. There being no valid levy of a writ of attachment, the Court acquired no jurisdiction. Judgment in such a case has no force, other than it may be satisfied out of the property attached. *Cooper* v. *Reynolds,* 77 U. S. 308, 19 L. Ed. 931. Under section 5362, sub-div. 4, the sheriff must serve on the person holding property of defendant, a notice specifying the property attached; and the lien of the attachment exists only from the time that levy is made in

accordance with that provision. Sheriff must file the inventory provided in such section within twenty days from the time of the seizure. *Clark* v. *Goodridge*, 41 N. Y. 210; *O'Brien* v. *Ins. Co.*, 56 N. Y. 52; *Hamilton* v. *Hartinger*, 64 N. W. Rep. 502; *Sioux Valley State Bank* v. *Kellogg*, 46 N. W. Rep. 859. The affidavit for publication was fatally defective. It did not state defendant's residence, nor show that it was unknown. Sec. 5254 Rev. Codes. *Ricketson* v. *Richardson*, 26 Cal. 153; *Ligare* v. *California South. R. Co.*, 76 Cal. 610, 18 Pac. 777; Appendix, 1 Dak. 479, 480. *Abell* v. *Cross*, 17 Ia. 171; *Hodson* v. *Tibbets*, 16 Ia. 97. Affidavit is defective in that it has no venue. Appendix, 1 Dak. 485.

T. A. Curtis and *F. S. Thomas*, for respondent.

The object of a verification is to insure good faith in the averments of the parties, and need not pursue the exact language of the Code. *Patterson* v. *Ely*, 19 Cal. 28. Verification is no part of the pleading and not necessary to give the Court jurisdiction. *George* v. *McAvery*, 6 How. Pr. 200; *Johnson* v. *Jones*, 2 Neb. 136. Objection to verification cannot be raised for the first time in the Supreme court. *Kuhland* v. *Sedgwick*, 17 Cal. 123. Under Rev. Codes, section 5281, a verification of a pleading to compel verification of subsequent pleadings, does not apply to a complaint verified to obtain an attachment under section 5356, Rev. Codes. *Sioux Valley State Bank* v. *Kellogg*, 46 N. W. Rep. 859. Receipting for personal property attached under subdivision 4 of section 5362, Rev. Codes, waives notice required by the section. *Foster* v. *Davenport*, sheriff et al., 80 N. W. Rep. 403. An affidavit alleging that the defendant is a nonresident of the state is sufficient to obtain an order for publication. *Byrne* v. *Roberts*, 31 Ia. 319. *Dornillard* v. *Whistler*, 29 Ind. 552. The sheriff made diligent seach and inquiry to serve summons on defendant and was unable to find him in Ransom county, N. D. Affidavit and return show sufficient proof to give the Court jurisdiction. *D. Marx* v. *William M. Ebner*, 180 U. S. 314, 45 L. Ed. 547. Amendment of affidavit stating place of defendant's residence may be properly made, and when not called to the attention of the court below, appellate court should allow it. *Hogue* v. *Corbit*, 156 Ill. 540, 41 N. E. Rep. 219; *Kuhland* v. *Sedgwick*, 17 Cal. 123. In most jurisdictions it is presumed that officers act within their jurisdictions, and while proper to prefix the venue, its omission is not fatal. *Reavis* v. *Cowell*, 56 Cal. 588; *Stone* v. *Williamson*, 17 Ill.

App. 175; *Baker* v. *Agricultural Land Co.*, 61 Pac. 412; *Young* v. *Young*, 18 Minn. 90; *Merriam* v. *Coffee*, 16 Neb. 450; *State* v. *Hemming*, 3 S. D. 492; *Ormsby* v. *Ottman*, 85 Fed. 492.

COCHRANE, J. This action was to recover the amount of a running account. An affidavit for attachment, containing the statutory requirements, was made, and the proper undertaking for attachment was given and approved. All papers were filed in the office of the clerk of the district court of Ransom county. A warrant of attachment, in proper form, was issued and delivered to the sheriff of the county, who made the following return of his procedure under the warrant: "I, A. C. Cooper, as sheriff of the county of Ransom, state of North Dakota, certify that the summons, affidavit of attachment, undertaking on attachment, and warrant of attachment herein came into my hands for service on the 5th day of July, 1902; that I served the same upon C. E. Pearson and Gilbert La Du, as executors under the last will and testament of James Adair, deceased, by leaving with them a true and correct copy of the same; that C. E. Pearson and Gilbert La Du, as executors of the last will and testament of James Adair, deceased, certify under their hands and seals that they hold a sum of money, to wit, $500, belonging to Lillian Adair, defendant." Nothing further appears from the judgment roll to have been done by the sheriff in execution of his warrant, or in fulfillment of the directions of sections 5631, 5632, 5381, Rev. Codes. Before the issuance of this warrant of attachment, an affidavit for publication of summons was made by plaintiff's attorney, in which it was stated that the defendant is not a resident of the state; that she has property in the state, and debts owing her from residents thereof. The sheriff's return upon the summons shows that defendant could not be found and was unserved. The summons was published and proof of publication made, and, on affidavit of default, a judgment was entered for the amount claimed in the complaint, with interest and costs. This appeal is from the judgment.

Personal service was not made upon defendant in this case, and she did not voluntarily appear. But the jurisdiction of the court to enter judgment, if any existed, was secured by publication of summons pursuant to the statute. The appellant assails the judgment as void for want of jurisdiction, on several grounds.

It is urged that there was no valid levy of the attachment, and consequently no property of the defendant was subjected to the jurisdiction of the court. The

sheriff's return on the warrant of attachment does not show a valid levy of the attachment upon the $500 due from Pearson and La Du to the defendant, Lillian Adair, because the sheriff did not serve upon Pearson and La Du a notice to the effect that he attached or levied upon the indebtedness. The statute (section 5362, subd. 4, Rev. Codes) provides that a levy under a warrant of attachment must be made upon personal property not capable of manual delivery by leaving a copy of the warrant and a notice showing the property attached with the person holding the same, and if it consists of a demand other than bonds, promissory notes, and instruments for the payment of money, the copy of the warrant and notice showing the property attached must be left with the person against whom it exists. The lien of the attachment is effectual from the time such levy is made. The property here sought to be subjected to the lien of the attachment was a debt due to the defendant, and, under the imperative requirements of the statute, could only be attached in the method indicated. The proceedings by attachment are statutory and special, and the provisions of the statute must be strictly followed, or no rights will be acquired thereunder. *Rudolph* v. *Saunders*, (Cal.) 43 Pac. 619; *Courtney* v. *Bank*, 154 N. Y. 688, 49 N. E. 54; 4 Cyc. 583, 589. Section 5381, Rev. Codes, requires the sheriff, when the warrant of attachment has been fully executed, to return the same, with his proceedings thereon, to the court in which the action was commenced. It is his duty to state in his return what acts he performed in the execution of the warrant, so that the court may decide upon its sufficiency. We must therefore assume that in his return the sheriff stated all he did toward effecting a levy. *Sharp* v. *Baird*, 43 Cal. 577; *Watt* v. *Wright* (Cal.) 5 Pac. 91; *Rudolph* v. *Saunders*, (Cal.) 43 Pac. 619. The sheriff's return in this case does not show even a substantial compliance with the statute. It does not disclose the service upon Pearson and La Du, or either of them, of a notice showing the property levied on. This is fatal to the attachment. In *Clarke* v. *Goodridge*, 41 N. Y. 213, the court, in construing a statute much like our own, said: "In executing the attachment upon the other kind of property, the sheriff is directed to leave a certified copy of the warrant of attachment with the head or agent of the corporation, or with the individual holding such property, with a notice showing the property levied on. * * * Those words were intended to perform an office, and by them the levy is confined to the items specified in the notice." *Wilson* v. *Duncan*, 11 Abb.

Prac. 3; *O'Brien* v. *Ins. Co.,* 56 N. Y. 52; *Courtney* v. *Bank,* 154 N. Y. 691, 49 N. E. 55. In the last case the following language is used: "The delivery of the certified copy of the warrant must be accompanied with a notice showing the property attached. Neither of these requirements can be dispensed with, and have a substantial compliance with the statute." There being no lawful attachment of property in this case, the court was without jurisdiction. *Cooper* v. *Reynolds,* 77 U. S. 308, 19 L. Ed. 931; *Hartzell* v. *Vigen,* 6 N. D. 117, 69 N. W. 203, 35 L. R. A. 451, 66 Am. St. Rep. 589; *Plummer* v. *Hatton,* 51 Minn. 181, 53 N. W. 460. The facts in this case do not bring it within the rule declared in *Foster* v. *Davenport* (Iowa) 80 N. W. 404, cited by respondent. Pearson and La Du did not recognize the act of the sheriff as a valid levy, and the certificate that they held $500 belonging to Lillian Adair is not equivalent to a receipt to the sheriff that property is held by them subject to the lien of the attachment, and to be delivered to the sheriff on demand. There is nothing shown here upon which an estoppel could be built up in favor of the sheriff and against the executors of James Adair, should he seek to recover from them, claiming right to possession because of an attachment levy.

This renders a reversal of the judgment necessary, and a consideration of further assignments unnecessary. The judgment appealed from is reversed and declared void and of no effect. All the judges concurring.

(94 N. W. 766.)

STATE OF NORTH DAKOTA *v.* BENJAMIN K. CLIMIE.

Opinion filed April 28, 1903.

Information—Duplicity.

1. When the offense charged in the information includes another smaller constituent offense, the charge of such other offense will not render the information *duplicitas.*

Assault with Dangerous Weapon.

2. On an indictment or information for assault and battery with a dangerous weapon, without justifiable or excusable cause, and with intent to do bodily harm, as defined in section 7145, Rev. Codes, accused can lawfully be convicted of simple assault and battery.

Conviction.

3. An information is sufficient which sets out every ingredient of the offense defined by statute, and in the language of the statute, together with the identifying particulars indicated by sections 8039, 8040, and 8047, Rev. Codes.

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

Benjamin K. Climie was convicted of assault and battery, and appeals.

Affirmed.

Lee Combs, for appellant.

The crime of assault and battery is no part of the offense of assault with a dangerous weapon; the court erred in instructing the jury that it could return a verdict of assault and battery; it further erred in denying defendant's motion to arrest the judgment, and motion for a new trial, and to set aside the verdict. The court also erred in overruling the demurrer to the information. Such errors of the court are based upon the claim made by the defendant, that the information states two separate offenses.

The offense alleged is assault with a dangerous weapon, and without justifiable or excusable cause, with intent to do bodily harm. The pleader then follows with an allegation of facts that tend to show the commission of an assault and battery with a dangerous weapon, which invalidates the information, as incorporating two separate and distinct offenses, contrary to law. *State* v. *Smith*, 2 N. D. 515, 52 N. W. Rep. 320; *State* v. *Marcks*, 3 N. D. 532, 58 N. W. Rep. 25; *State* v. *Garvey*, 11 Minn. 154.

Benjamin Tufte, state's attorney, for respondent.

In the case of *State* v. *Marcks*, 3 N. D. 532, 58 N. W. Rep. 25, the information was drawn under section 6510 Comp. Laws of 1887. There was then no such offense as an aggravated assault and battery. The court simply held, inasmuch as a battery is not included in an assault, an information alleging an aggravated assault and battery would be double and subject to a demurrer. The crime of simple assault and battery is necessarily included in the charge of aggravated assault and battery, defined in section 7145. *State* v. *Maloney*, 7 N. D. 119, 72 N. W. Rep. 927. An indictment for assault, assault and battery with intent to murder must set out the assault, or assault and battery with such accuracy as is ordinarily employed in setting

out these charges. Enc. Pl. & Pr. Vol. 8, page 851; *Miller* v. *State,* 53 Miss. 403; *Williams* v. *State,* 42 Miss. 328.

COCHRANE, J. The accused was informed against by the state's attorney of Griggs county for an assault and battery with a dangerous weapon, with intent to do bodily harm, and without justifiable or excusable cause, as defined in section 7145, Rev. Codes. The information, omitting the title, commencement, and concluding part, reads as follows: "Benjamin Tufte, state's attorney in and for said county of Griggs and state of North Dakota, in the name and by the authority of the state of North Dakota, informs this court that heretofore, to wit, on the twelfth day of June, in the year of our Lord one thousand nine hundred and two, at the county of Griggs, in the state of North Dakota, one Benjamin K. Climie, late of the county of Griggs and state aforesaid, did commit the crime of assault and battery, with a dangerous weapon, in the manner following, to wit: That at said time and place the said Benjamin K. Climie, without justifiable or excusable cause, armed with a dangerous weapon, and with intent to do bodily harm in and upon the person of one George H. Lawrence, then and there being, did willfully, unlawfully and feloniously commit an assault, on him, the said George H. Lawrence, the said Benjamin K. Climie, then and there armed with a dangerous weapon, and without justifiable or excusable cause, willfully, unlawfully, and feloniously, and with said dangerous weapon; and with intent to do bodily harm to said George H. Lawrence, did strike and ill treat and wound in and about the head." The statute upon which this information was drawn reads: "Every person who, with intent to do bodily harm and without justifiable or excusable cause, commits any assault or assault and battery upon the person of another, with any sharp or dangerous weapon, or who without such cause shoots or attempts to shoot at another, with any kind of firearm or air gun or other means whatever, with intent to injure any person, although without intent to kill such person or to commit any felony, is punishable by imprisonment in the penitentiary not less than one and not exceeding five years, or by imprisonment in a county jail not exceeding one year." Section 7145, Rev. Codes.

Appellant assails this information, as duplicitous, and claims to have saved his right to insist upon this objection on appeal by the interposition in proper time of a demurrer, specifying as grounds therefor that more than one offense is charged in the information. Counsel

for the state seek, by a preliminary motion, to eliminate from the record in this case the demurrer to the information, because it was not reduced to writing and signed by defendant's counsel and filed with the clerk before trial. Counsel for appellant insists that his objections to the information were dictated to the stenographer before pleading and in open court; that permission was given him to file his formal demurrer later, as of the date when his objections were in fact made.

We will, for the purposes of this case, assume, without deciding the motion, that the demurrer, as required by section 8092, Rev. Codes, was filed in proper time. Unless the demurrer was so filed, distinctly specifying duplicity as one ground of objection, the assignment that the information is duplicitous could not be considered on this appeal, as the point is waived if not taken by demurrer. Section 8099, Rev. Codes.

Appellant insists that the information charges a felonious assault, and also an assault and battery with a dangerous weapon, with intent to do bodily harm, and is therefore duplicitous. An assault is necessarily included as a constituent element in every assault and battery, and of assault and battery with a dangerous weapon, with intent to do bodily harm. While an assault is an offense, an assault followed by a battery is also a single offense. There cannot be a battery without an assault. At common law, an assault and battery committed at the same time was considered as but one offense, and could be so charged. An assault not followed by a battery could be punished as an offense, but if followed by a battery the assault was merged in the battery. 1 Hawkins' P. C. 263, c. 62, section 1; *Com.* v. *Eaton,* 15 Pick. 273; *Com.* v. *Tuck,* 20 Pick. 361; *State* v. *Reed,* 40 Vt. 603; *State* v. *Locklin,* 59 Vt. 654, 10 Atl. 464. In *Com.* v. *Tuck,* the court, in citing the rule against duplicity, said: "It has exceptions. Where two crimes are of the same nature, and necessarily so connected that they may, and, when both are committed, must, constitute but one legal offense, they should be included in one charge." The court then instances assault and battery as a familiar example of the rule stated. Our statute follows this distinction. An assault is defined as "any willful and unlawful attempt or offer, with force or violence, to do a corporal hurt to another." Section 7141, Rev. Codes. "A battery is any willful and unlawful use of force or violence upon the person of another." Section 7142, Rev. Codes. Every willful use of force necessarily includes a willful attempt or

offer to use force. If the attempt falls short of actual accomplishment, it is punishable, if willfully and unlawfully done; but if the attempt is successful of accomplishment, and an actual battery results, the assault and battery is by the statute described as but a single offense. The assault is merged in the assault and battery. Section 7144, Rev. Codes. Likewise the aggravated assault and battery with a sharp or dangerous weapon (described in section 7145, Rev. Codes) includes within it the smaller constituent offense of simple assault and battery; and it would be absurd to say that an information could not charge the aggravated assault and battery defined by this section without rendering it obnoxious to the section declaring that the information must charge but one offense. The rule is that, when the offense charged includes another or smaller constituent offense, the charge of such other offense will not render the information double. *State* v. *Lillie,* 21 Kan. 729; *State* v. *Hodges,* (Kan.) 26 Pac. 676; *Territory* v. *Milroy* (Mont.) 20 Pac. 650; *Lawhead* v. *State* (Neb.) 65 N. W. 779; *Aiken* v. *State* (Neb.) 59 N. W. 888. The statute authorizing the conviction of one accused of any offense necessarily included in that with which he is charged in the information is a legislative recognition of this rule. Section 8244, Rev. Codes. In the case at bar the information does not charge simply an assault with a dangerous weapon, but an assault and battery with a dangerous weapon. Therefore the language quoted by counsel for appellant from the opinion in *State* v. *Marcks,* 3 N. D. 532, 58 N. W. 25, is inapplicable. For the reasons already expressed, defendant's objection that he could not be legally convicted of assault and battery upon this information is without merit. *State* v. *Maloney,* 7 N. D. 119, 72 N. W. 927; *State* v. *Montgomery,* 9 N. D. 405, 83 N. W. 873; *State* v. *Belyea,* 9 N. D. 353, 363, 83 N. W. 1.

Defendant's demurrer stated the second and further ground that the information does not charge facts sufficient to constitute a public offense. Defendant's counsel does not point out wherein he considers the accusation insufficient. A comparison of this pleading with the statute on which it is drawn will disclose the fact that the pleader has set forth every ingredient of the offense defined by the statute, and in the language of the statute, and also such identifying particulars of time, place, means, party injured, and circumstance as to fully advise the accused of the exact nature of the charge against him. It fully answers the statutory provisions as to certainty and sufficiency. Sections 8039, 8040, 8047, Rev. Codes.

The judgment appealed from is affirmed. All concur. (94 N. W. Rep. 574.)

FIRST NATIONAL BANK OF CASSELTON *v.* WILLIAM F. HOLMES.

Opinion filed April 28, 1903.

Attachment—Service on Nonresident.

1. An attachment on real estate belonging to a nonresident was levied in this state in 1895. An order directing that the summons be published was procured, but the summons was never published. After publication was ordered, the summons and complaint in the action were left at defendant's dwelling house in Minnesota, in the presence of a member of his family over 14 years of age.

Held, construing section 4900, Comp. Laws 1887, making personal service on the defendant out of the state equivalent to publication and mailing in cases where publication has been ordered, that service by leaving at his dwelling house, outside the state, was not personal service, within the meaning of said section; and the failure to make such personal service, or to publish the summons, and mail copies of the summons and complaint to the defendant at his known address, defeated the attachment.

Leaving at Dwelling Applies Only to Service in the State.

2. *Held,* further, that the provisions of section 4898, Comp. Laws 1887, providing that service by leaving at defendant's dwelling house, in the presence of a member of his family over 14 years of age, "shall be taken and held to be personal service," applies only to such service within the state.

Appeal from District Court, Stutsman County; *W. H. Winchester,* J.

Action by First National Bank of Casselton against William F. Holmes. From an order dissolving an attachment, plaintiff appeals. Affirmed.

S. B. Bartlett and *Benton, Lovell & Holt,* for appellant.

Under section 4993 Rev. Codes, providing that personal service of summons must be made, or publication commenced, within thirty days, means thirty days from the issue of the writ. *Rhode Island Hospital Trust Company* v. *Keely,* 1 N. D. 412, 48 N. W. Rep. 341; *Taddiken* v. *Cantrell,* 1 Hun. 710; *Simpson* v. *Birch,* 4 Hun. 315; *Waffle* v. *Goble,* 35 How. Pr. 370. Although the return omits the name of the member of the family with whom process was left, the service is, nevertheless, good. *Vaule* v. *Miller,* 64 Minn. 485, 67 N.

W. Rep. 540; *Robinson* v. *Miller,* 57 Miss. 237; *Tremper* v. *Wright,* 2 Cai. (N. Y.) 101; *Shea, assignee,* v. *Plains Township,* 7 Kulp (Pa.) 554; *Goldman* v. *Teitlebaum,* 10 Pa. Dist. R. 53. Bond in attachment proceedings need not bear the endorsement of the clerk's approval; such approval is evidenced by his filing it, and issuing the warrant. *Hyde* v. *Adams,* 80 Ala. 111; *Mandel* v. *Peet,* 18 Ark. 236; *State* v *Hesselmeyer,* 34 Mo. 76; *Bascom* v. *Smith,* 31 N. Y. 595; *Griffith* v. *Robinson,* 19 Tex. 219; *Anderson* v. *Kanawha,* 12 W. Va. 526.

Marion Conklin and *Newman, Spalding & Stambaugh,* for respondent.

The affidavit for publication is insufficient. The statute requires that evidential facts must be made to appear to the satisfaction of the court by affidavit. The affidavit in question contains no facts bearing upon the question, "whether the defendant after due diligence could be found in the state." The sheriff's return states only opinions and conclusions and no facts. Under all the cases, such showing is not sufficient to inform the court as to the diligence used, to enable it to order publication. *Warren* v. *Tiffany,* 9 Abb. Pr. 66; *Waffle* v. *Goble,* 35 How. Pr. 356; *Bixby* v. *Smith,* 49 How. Pr. 50; *Wortman* v. *Wortman,* 17 Abb. Pr. 66; *Forbes* v. *Hyde,* 31 Cal. 351; *Beach* v. *Beach,* 6 Dak. 371, 43 N. W. Rep. 701; *Boethell* v. *Hoellwarth,* 74 N. W. Rep. 231; *Rickettson* v. *Richardson,* 26 Cal. 149; *Yolo County* v. *Knight,* 70 Cal. 431, 11 Pac. Rep. 662; *Carleton* v. *Carleton,* 85 N. Y. 313; *Iowa State Sav. Bank* v. *Jacobson,* 8 S. D. 292, 66 N. W. Rep. 453; *York* v. *York,* 3 N. D. 373, 55 N. W. Rep. 1095. Affidavit is insufficient in that it does not show that the defendant had property in this state subject to attachment, levy and sale upon execution. *Winner* v. *Fitzgerald,* 19 Wis. 394-415; *Towsley* v. *McDonald,* 32 Barbour, 604. The alleged service on the defendant in Minnesota is insufficient. Personal service of a copy of the summons and complaint out of the state must mean service on the defendant in person. *Armstrong* v. *Brant,* 21 S. E. Rep. 634. The alleged service was made on the thirty-first day after the summons was issued. *Smith* v. *Nicholson,* 5 N. D. 426, 67 N. W. Rep. 296.

MORGAN, J. The appeal in this case is from an order of the district court granting a motion to dissolve an attachment. The defendant was a nonresident at the time of the issuing and levy of the writ

of attachment. An order of publication of the summons was made, but the summons was never published, nor a copy mailed to the defendant at his home address, in the state of Minnesota. In lieu of such publication and mailing of the summons, copies thereof and of the complaint were left at the defendant's residence, in Minnesota, in the presence of a member of his family over 14 years of age. It is claimed by the plaintiff that such service was a personal service of the summons and complaint outside of the state, and, in consequence thereof, that the attachment did not fail for want of such service. In his moving papers, the defendant, appearing specially, challenges the sufficiency of such service, and claims that the attachment should be dissolved. The action was brought and the attachment proceedings had in the year 1895, and the question whether such proceedings were regular must be determined by the provisions of the Compiled Laws of 1887 then in force. Section 4993, Comp. Laws 1887, provides that, when property has been attached in an action, personal service of the summons shall be made, or publication thereof commenced, within thirty days. Section 4898, Comp. Laws 1887, provides the manner in which a summons may be served, and subdivision 6 of said section is as follows: "(6) In all other cases to the defendant personally; and if the defendant cannot conveniently be found, by leaving a copy thereof at his dwelling house in the presence of one or more of the members of his family over the age of fourteen years. * * * Service made in any of the modes provided in this section shall be taken and held to be personal service." Section 4900, *supra*, provides what must be done to procure an order for the publication of the summons, and specifies the cases in which such an order may be made. This section further provides that, "when publication is ordered, personal service of a copy of the summons and complaint out of the territory is equivalent to publication and deposit in the post office."

The question is therefore presented whether the service made in this case outside of the state, after an order of publication had been made, and pursuant to it, was personal service, such as the statute prescribes shall be the equivalent of the publication of the summons, and deposit in the post office of the summons and complaint. The provisions of the Compiled Laws relating to service of the summons include distinct provisions referring to service upon persons residing in the state and upon persons residing outside of the state. Section 4898 refers exclusively to service on persons residing within the

state. Section 4900 refers more particularly to persons not residing within the state. Section 4898 alone contains the provision above quoted in reference to service of the summons on residents by leaving a copy at the dwelling house in the presence of members of the family. This provision authorizing substituted or domiciliary service must be held to authorize this mode of service in case of residents only. Such substituted service is not strictly personal service. The statute provides that such service "shall be taken and held to be personal service," but the statute gives such substituted service the force and effect of personal service in cases of such service within the state only. The term "personal service" has a fixed and definite meaning in law. It is service by delivery of the writ to the defendant personally. Other modes of service may be given the force of such service by legislative enactment. But the use of the words "personal service," unqualified, in a statute, means actual service by delivering to the person and not to a proxy. *Hobby* v. *Bunch* (Ga.) 10 S. E. 113, 20 Am. St. Rep. 301. The use of the words "personal service" in section 4900 is without any qualification. The section does not authorize any substitute for personal service which shall be the equivalent of publication and mailing. Nor does section 4898 refer to personal service outside the state. These two sections (4898 and 4900) refer to different subjects, and each must govern as to the subjects included in its provisions. The provisions of section 4900 have no application to the subjects concerning which section 4898 treats, and section 4898 has no application to the subjects concerning which section 4900 treats. Statutes regulating the manner in which both substituted and constructive service is to be made and jurisdiction acquired are to be strictly followed, or jurisdiction will not be acquired. The case of *Armstrong et al* v. *Brant,* (S. C.) 21 S. E. 634, is in point on this question, and is based on statutes identical in all respects with the Compiled Laws, so far as the point involved is concerned. In that case it is held that under the Code in that state, making personal service of a summons out of the state equivalent to publication of the summons and mailing a copy thereof to a nonresident defendant, is not sufficiently complied with by levying an attachment on land within the state belonging to a nonresident defendant, and leaving a copy of the summons at his place of residence, out of the state, in his absence, without publishing the summons, and that the Code of Civil Procedure, providing that the summons may be served by delivering a copy thereof to any person

of discretion, residing at the residence of defendant, applies only to service on a person within the state. See also *Mayer* v. *Cook*, 12 Wis. 335. The appellant relies upon the case of *Rhode Island Hospital Trust* v. *Keeney*, 1 N. D. 411. 48 N. W. 341, as decisive of this question. In that case the question involved was whether there was a personal service of the summons upon the defendant out of the state. The summons had been mailed to her out of the state, and the sealed envelope containing the summons was handed to her by her husband. This was held not to be personal service. What was said in that case, on which appellant relies in this case, was applicable to the facts of that case, but we fail to see wherein it can be taken as authority for holding that domiciliary or substituted service is permissible out of the state after publication has been ordered. The question involved in that case is not at all involved in this case.

As there was no personal service out of the state, nor any publication and mailing of the summons after publication was ordered, nor a general appearance, the attachment failed, because not followed by one of these jurisdictional requisites.

The order appealed from is affirmed. All concur.

(94 N. W. Rep. 764.)

B. S. BRYNJOLFSON *v.* ANDREW OSTHUS, *et al.*

Opinion filed May 5, 1903.

Appointment of Receiver—Effect on Insolvent Corporation.

1. The appointment of a receiver for an insolvent corporation has the legal effect of suspending its right to exercise its corporate functions, and thereafter the officers of such insolvent corporation are without authority to make valid transfers of the corporate assets.

Property of Insolvent Corporation Passes to Receiver on His Appointment.

2. Upon the appointment of a receiver for an insolvent corporation, the title and right of possession of its property pass by operation of law to the receiver, as an officer of the court, for the use and benefit of its creditors.

Collateral Attack.

3. An order appointing a receiver, made by a court having jurisdiction of the person and subject-matter, cannot be attacked collaterally.

Promissory Note Prima Facie Evidence of Ownership Thereof.

4. The introduction in evidence by plaintiff of a negotiable promissory note, properly indorsed, establishes prima facie his ownership thereof.

Transfer of Note Carries Mortgage With It.

5. In this state a transfer of a promissory note carries with it a mortgage securing it, and in an action to foreclose the mortgage the want of a formal written assignment of the mortgage will not defeat the foreclosure action.

Acts of Officers of Defunct Corporation After Appointment of Receiver.

6. In an action to foreclose a real estate mortgage securing a promissory note payable to the Bank of Minot, which said note was purchased by the plaintiff from the receiver of that corporation, and in which plaintiff's ownership of the note is placed in issue, it is *held* that the title of the note secured by said mortgage passed from said bank to the receiver upon his appointment, and, by a subsequent sale of the assets of the defunct corporation, to this plaintiff. *Held,* further, that a certain warranty deed of the land covered by the mortgage, executed by the president of the corporation before its insolvency, but delivered after its insolvency, did not operate as an equitable assignment of the mortgage, for the reason that, when the delivery of the deed occurred, the title to the note had already passed to the receiver, and for the further reason that at that time the president of the defunct bank had no authority to make such delivery.

Appeal from District Court, Ramsey County; *John F. Cowan,* J.

Action by B. S. Brynjolfson against Andrew Osthus and others. Judgment for plaintiff. Defendants appeal.

Affirmed.

M. H. Brennan, for appellant.

A sale under a void foreclosure of a mortgage, has the effect of assigning the mortgage to the purchaser at such sale, and a sale by him has also the effect of assigning the mortgage. *Salvage* v. *Haydock,* 44 Atl. 696, 68 N. H. 684; *Smithson Land Co.* v. *Brautigan,* 47 Pac. 434, 16 Wash. 174; *Anderson* v. *Minnesota Loan & Trust Co.,* 68 Minn. 491; 71 N. W. Rep. 665; *Stillman* v. *Rosenberg,* 78 N. W. Rep. 913; *Sawyer* v. *Baker,* 77 Ala. 461; *Johnson* v. *Sandhoff,* 14 N. W. Rep. 889, (Minn.); *Rogers* v. *Benton,* 38 N. W. Rep. 765 (Minn.); *Grosvenor* v. *Day,* 1st Clark Ch. 109 (N. Y.); *Hoffman* v. *Harrington,* 33 Mich. 392; *Slallings* v. *Thomas,* 18 S. W. Rep. 184 (Ark.)

The record of an unrecorded instrument, in the office of the register of deeds, is not evidence, when objected to, without proof first offered, that the instrument was not in possession of the party producing the record. Rev. Codes, 1899, section 5696; *Am. Mtg. Co. of Scotland* v. *Mouse River Live Stock Co. et al.*, 10 N. D. 290, 86 N. W. Rep. 965. The grantee in fee may deny that his grantor had any title. *Mitchell* v. *Chisholm*, 58 N. W. Rep. 873, (Minn.); *Wenzell* v. *Schultze*, 100 Cal. 250, 34 Pac. 696; *Roland* v. *Williams*, 23 Ore. 515, 32 Pac. 402. An instrument having no grantor, and nothing in the body thereof from which one can be inferred, is not effective as a conveyance. *Agricultural Bank of Miss.* v. *Rice*, 4 How. 225; *Batcheldor* v. *Brereton et al.*, 112 U. S. 396, 28 L. Ed. 748; *Allen* v. *Allen* (Minn.), 51 N. W. Rep. 470; Devlin on Deeds, section 196.

Newman, Spalding & Stambaugh, for respondent.

The note and mortgage in suit, were the property of the plaintiff, at the commencement of the action. Being the property of the insolvent corporation at the time of the appointment of a receiver, it passed to such receiver by virtue of such appointment, and the statute. Rev. Codes 1899, Sec. 5406; *Atty. Gen.* v. *Atlantic Mutual Ins. Co.*, 100 N. Y. 279, 3 N. E. Rep. 193; *Morgan* v. *R. R. Co.*, 10 Paige Ch. 290; *Atty. Gen.* v. *Ins. Co.*, 28 Hun. 360. Affirmed 93 N. Y. 630; Receivers of Corporations (Gluck & Becker) c. 1, section 5; *Osgood* v. *Maguire*, 61 N.Y. 524; High on Receivers, section 136. Upon the appointment and qualification of the successor of said receiver, the title in like manner passes to such successor. *Atty. Gen.* v. *Ins. Co.*, 28 Hun. 360 *supra*. The assignment of the note and mortgage from the receiver to the plaintiff was admissible in evidence without further proof. Ch. 145 of Laws of 1901. Exhibits 2, 3, 4, 5, and 6 are competent and admissible without further proof. Greenleaf on Ev. 501, 2, 3, and 7. State Bank of Minot was a proper party defendant on account of the imperfection of the assignment from it to Sherman of the note and mortgage in suit. *Holdridge* v. *Sweet*, 22 Ind. 118; Wiltsie on Mortgage Foreclosure, section 179. The making of the note and mortgage being admitted, their possession by plaintiff and production on the trial established the title in him. Abbott Trial Ev. 1. Ed. 389; *Chambers Co.* v. *Clews et al.*, 21 Wall. 317, 88 U. S. 17, 22 L. Ed. 517.

A judgment in a former action is conclusive only as to grounds covered by it. Bigelow on Estoppel, 122. Judgment in former action cannot be attacked collaterally. 1 Black on Judgments, sections

245, 246. Receiver of Corporation, Sec. 8. Nor can it be attacked on the ground that it was collusive and fraudulent, no fraud or collusion being pleaded. 1 Black on Judgments, Sec. 295.

YOUNG, C. J. This is an action to foreclose a mortgage upon 160 acres of land situated in Ramsey county. The mortgage was executed and delivered by Andrew Osthus to the Bank of Minot on January 25, 1888, and was given to secure his promissory note for $997, of even date therewith, payable to said bank, which said note, by its terms, became due on January 25, 1893. The plaintiff rests his claim of ownership of the note upon a purchase of all the assets of the Bank of Minot from the receiver. The complaint, in addition to the usual averments of a foreclosure complaint, avers that "the defendants, Andrew Osthus, Bank of Minot, A. B. Guptill as receiver of the Bank of Minot, Edgar Anderson, T. A. Luros, Hannah Luros, Ernest Anderson, Lorina Anderson and F. C. Sherman, have, or claim to have, some interest in or lien upon said mortgaged premises, or some part thereof, which interest or lien is subsequent and inferior to the interest or lien of plaintiff's said mortgage." The Bank of Minot, the original mortgagee, and F. C. Sherman, who appears to have owned the note in suit at one time, did not answer. It is alleged in the complaint, and admitted by the answers filed by the five contesting defendants, that no part of the principal or interest secured by the mortgage has been paid. The execution and delivery of the note and mortgage are also admitted. The contesting defendants deny that the plaintiff is the owner of the note, and claim that the title thereof, and of the mortgage securing it, passed from the Bank of Minot to Eliza V. Hoffman, and from her to the defendants, Annie Anderson and Hannah Luros, through an equitable assignment. The trial court gave judgment in favor of plaintiff, as prayed for in his complaint. The five contesting defendants, above named, have appealed from the judgment, and demand a trial *de novo* in this court.

With the exceptions to be hereafter noted, the facts upon which the case turns are not in dispute, and may be stated as follows: On January 25, 1888, Andrew Osthus, who was then the owner of the land in question, gave the mortgage in suit to the Bank of Minot, and the same was duly recorded in Book I, page 12, of Mortgage Records of Ramsey county. On November 8, 1888, the Bank of Minot transferred the note to F. C. Sherman, and at the same time executed and delivered to him a purported assignment of the mort-

gage, in which no assignor was named. On February 8, 1892, the said F. C. Sherman transferred the note back to the Bank of Minot, and executed and delivered to it a purported assignment, in which the mortgage attempted to be assigned was described as being recorded in Book K of Mortgages, p. 276, 277, instead of in Book I, at page 12. Thereafter the Bank of Minot attempted to foreclose the mortgage, under the power of sale contained therein, by advertisement; and at the sale on the 25th day of April, 1892, the land was struck off to said bank, and a sheriff's certificate issued to it, and on September 18, 1894, a sheriff's deed was issued on said sale to said bank. Subequent to the sale, and prior to the issuance of the sheriff's deed, towit, on June 7, 1893 the Bank of Minot became insolvent; and on the last named date R. S. Lewis was appointed receiver thereof by the district court of Cass county in an action pending in that court. In December of that year, Lewis was succeeded by A. B. Guptill, as receiver. In February, 1898, the district court of Cass county made an order authorizing the sale of the assets of the said insolvent bank, and on the 14th of that month all of the assets were sold to the plaintiff, and thereafter the sale was confirmed by the court. In September, 1898, the plaintiff in this action instituted an action in the district court of Ramsey county to recover the possession of the land covered by the mortgage, alleging that he was the owner thereof; resting his claim of title and right of possession upon a warranty deed executed and delivered to him by A. B. Guptill, the receiver. In that action Edgar Anderson, T. A. Luros, Hannah Luros and Annie Anderson, who are, with the exception of Andrew Osthus, the sole contesting defendants in this action, were made defendants. The trial court held that the foreclosure of the mortgage by the Bank of Minot was invalid, as well as the sheriff's certificate and sheriff's deed issued on said foreclosure sale, and that consequently the receiver of said bank had no title to the land to convey, and entered judgment dismissing the plaintiff's action. So far, therefore, as the four defendants who were parties to that action are concerned, the invalidity of that foreclosure is *res judicata*, and the mortgage must be held, as to them, to have had the status of an unforeclosed mortgage at the date when the Bank of Minot became insolvent and the receiver was appointed.

It is plaintiff's contention that the title and the right of possession of this note passed to the receiver from the bank upon his appointment, and that through the subsequent sale by the receiver to him he

became the owner thereof. The defendant's contention is that the note and mortgage were not owned by the bank at the date of its insolvency, but that said bank, through its president, had transferred the same to Eliza V. Hoffman, prior to the appointment of the receiver, and that thereafter the said Eliza V. Hoffman transferred the same to the defendants Annie Anderson and Hannah Luros. This contention of defendants rests upon the following facts: On April 22, 1893, which was prior to the appointment of a receiver, the bank of Minot, through its president, E. A. Mears, executed a warranty deed of the land in question, with the name of the grantee in blank. The evidence discloses that this deed thereafter came into the possession of Eliza V. Hoffman; that in 1897 she executed and delivered a quitclaim deed of the premises to the defendants Annie Anderson and Hannah Luros, for a consideration of $25, and at the same time the deed from the Bank of Minot, which had for some time prior thereto been in her possession, was also delivered to the defendants, and the name of Eliza V. Hoffman was inserted as grantee, and both deeds were placed of record.

It is undoubtedly true, as counsel for defendants contends, that a sale under a void foreclosure of a real estate mortgage has the effect of assigning the mortgage attempted to be foreclosed to the purchaser at the foreclosure sale. *Salvage* v. *Haydock,* 68 N. H. 484, 44 Atl. 696; *Smithson Land Co.* v. *Brautigan,* 16 Wash. 174, 47 Pac. 434; *Anderson* v. *Minnesota Loan & Trust Co.,* 68 Minn. 491, 71 N. W. 665; *Stillman* v. *Rosenberg* (Iowa), 78 N. W. 913; *Sawyers* v. *Baker,* 77 Ala. 461; *Johnson* v. *Sandhoff* (Minn.), 14 N. W. 889; *Rogers* v. *Benton* (Minn.), 38 N. W. 765; *Grosvenor* v. *Day,* 1 Clarke, Ch. 109; *Hoffman* v. *Harrington,* 33 Mich. 392; *Gilbert* v. *Cooley,* Walk. Ch. (Mich.) 494; *Stallings* v. *Thomas* (Ark.) 18 S. W. 184. It is also true that the execution and delivery of a deed by the purchaser at the void foreclosure sale to a third person, according to a number of cases, has the effect of assigning the mortgage to the grantee. Whether the doctrine goes further, and sustains the view that all subsequent grantees acquire the ownership of the mortgage successively by virtue of their deeds—and that is this case—we need not discuss or determine. In this case it is entirely clear, we think, that Eliza V. Hoffman never was the owner of the note and mortgage in suit, by virtue of an equitable assignment, purchase or otherwise. If she was not, then, of course her deed to the defendants could not, in any event, operate as an equitable assignment of

the note and mortgage. That she did not own the note and mortgage and that she never acquired them under the alleged deed from the Bank of Minot, is, we think, entirely clear. The entire contention that they passed to her is based upon the fact that E. A. Mears, as president of the Bank of Minot, on April 22, 1893, which was before the appointment of a receiver, and at a time when the officers of the bank had control of its assets, and when it still had the right to exercise its corporate functions, executed the warranty deed which was delivered to the defendants in 1897, and in which the name of Eliza V. Hoffman was then inserted as grantee. We have no hesitation in concluding, under the undisputed evidence in this case, that this deed never became operative for any purpose whatever, for the reason that it was not delivered by the grantor, the Bank of Minot, and therefore did not become effective. The only evidence as to the delivery of the deed is given by Eliza V. Hoffman, the alleged grantee. Her testimony is to the effect that the Mortgage Bank and Investment Company, a corporation operated by E. A. Mears, owed her the sum of $400. Prior to the insolvency of the Bank of Minot, W. B. Mears, who was connected with that corporation, delivered to her a number of crop contracts to secure said indebtedness. Her testimony is that this deed was not among the papers so delivered, and that it was not delivered to her prior to the appointment of the receiver; that, after the appointment of the receiver, E. A. Mears delivered to her a bundle of papers, which she deposited in the bank for safe-keeping; that this deed might have been among these papers. Her first positive knowledge that it was in her possession was in 1897, which was four years subsequent to the appointment of a receiver. Her testimony is positive that she did not receive it prior to the receivership. It should require no argument to show that the delivery of the deed to her by E. A. Mears subsequent to the appointment of a receiver was of no effect. The Bank of Minot, the grantor, was then in the hands of a receiver, and its officers were stripped of authority to make a delivery, and not only did the appointment of a receiver deprive the officers of the bank of the power to do any further acts which would affect the corporation or its property, but it had the further effect of transferring the title and right of possession of all the property of the bank to the receiver. The appointment of a receiver of an insolvent corporation operates as a suspension of its corporate functions, and of all authority over its property and effects. High on Receivers (3rd Ed.) section 290; *Linville* v. *Had-*

den (Md.) 41 Atl. 1097, 43 L. R. A. 222. Further, the title and right of possession of all property of the insolvent corporation, both real and personal, passed to the receiver, as the officer of the court appointing him, for the use and benefit of the creditors of the insolvent. Section 5406, Rev. Codes; *Atty. Gen.* v. *Ins. Co.,* 100 N. Y. 279, 3 N. E. 193; *Morgan* v *R. Co.,* 10 Paige, 290, 40 Am. Dec. 244; *Atty. Gen.* v. *Ins. Co.,* 28 Hun. 360, affirmed in 93 N. Y. 630; Receivers of Corporations (Gluck & Becker) c. 1, Section 5; *Osgood* v. *Maguire,* 61 N. Y. 624; High on Receivers, section 136. It follows from what we have said that the note and mortgage, which the evidence shows were owned by the Bank of Minot, were not transferred to Eliza V. Hoffman by the Mears deed, but that they in fact passed by operation of law to the receiver, Lewis, and that plaintiff became, and now is, the owner thereof, under his purchase from Guptill, Lewis' successor in the receivership.

The defendants also urge in this court that the plaintiff has not established the assignment of the mortgage to him by the receiver by competent proof. The original assignment was not introduced in evidence. The plaintiff relied entirely upon the record of the assignment, which was introduced over defendants' objection that it was not the best evidence, and that no foundation had been laid for its introduction. Whether secondary evidence was admissible, under chapter 145, p. 189, Laws 1901, we need not determine. The plaintiff established by competent evidence the purchase of all the assets of the bank from the receiver, and the approval of the sale by the court, and, as we have seen, this note constituted a part of the assets. The note was delivered by the plaintiff to his attorneys in 1899, and was offered in evidence by them. F. C. Sherman, who at one time owned the note, was made defendant, and made default; and this is true also of the Bank of Minot, the original payee. Its possession and production in evidence was *prima facie* evidence of the plaintiff's title and ownership. Section 812, Daniel on Neg. Instruments, and cases cited. No evidence whatever was offered to overcome this *prima facie* showing. It was entirely unnecessary to prove a formal written assignment of the mortgage. Plaintiff was entitled to maintain the present foreclosure action, even without a formal written assignment. The mortgage was merely an incident of the debt, and followed it. The rule stated by Wiltsie on Mortgage Foreclosure, at section 347, is that "in those states where the transfer of a note carries with it the security collateral thereto, in an action by

an assignee to foreclose the mortgage securing a note transferred to him, the defendant cannot set up as a defense the want of a formal assignment of the mortgage." *Jackson* v. *Blodget,* 5 Cow. 202, 205; *Jackson* v. *Willard,* 4 Johns, 41, 43; *Rice* v. *Cribb,* 12 Wis. 179.

It was suggested by defendant's counsel on oral argument that inasmuch as the defendant Andrew Osthus was not a party to the former action, in which the foreclosure by the Bank of Minot was adjudged void, he is not bound by that judgment, and that he can therefore insist in this action that the former foreclosure was valid, and that the note secured by this mortgage was in fact paid by that foreclosure. It must be admitted that the defendant is not concluded by that judgment, and that this defense was available to him, had he elected to interpose it. He has not done so, however. It is not pleaded. Neither has the defendant Osthus brought into the record any evidence from which we could, even if this defense were pleaded, judicially determine that the former foreclosure was valid. The pleadings do not present this issue. The complaint alleges that the former foreclosure sale was adjudged void. Osthus' answer specifically admits this allegation, and nowhere in his answer does he allege that the debt secured by the mortgage in suit was discharged by payment, foreclosure or otherwise. On the contrary, he rests his defense upon a denial of plaintiff's ownership of the note. There is therefore no foundation either in the pleadings or in the evidence upon which to rest defendants' contention that the former foreclosure was in fact valid and satisfied the note in suit.

The defendants also attack the plaintiff's ownership of the note, by claiming that the entire receivership proceedings through which the plaintiff obtained title to the note were void for the reason, as they allege, that the action wherein the receiver was appointed was collusive. This question is not before us. The jurisdiction of the court which appointed the receiver to make the appointment and to order and confirm the sale of the assets is not, and cannot be, challenged. The court had jurisdiction of the persons and the subject-matter, and the validity of its orders in the receivership proceedings, including the order appointing the receiver, authorizing the sale of the assets, and approval of the same, cannot be attacked in this collateral way. High on Rec. section 39a; 1 Black on Judg. sections 245-246, and cases cited.

The defendants T. A. Luros and Edgar Anderson also relied in the district court upon a tax deed issued to them by the county audi-

tor of Ramsey county on July 13, 1894. This deed was held void by the trial court, and the appellants do not contend in this court that the trial court erred in this particular, so that it need not be further referred to.

For the reasons stated, we have reached the conclusion that the judgment rendered and entered by the district court should in all things be affirmed, and it is so ordered. All concur.

(96 N. W. Rep. 261.)

A. E. CLENDENING, TRUSTEE IN BANKRUPTCY OF THOMAS KLEINOGEL, BANKRUPT, *v.* THE RED RIVER VALLEY NATIONAL BANK FARGO.

Opinion filed May 5, 1903.

Referees in Bankruptcy are Judicial Officers—Adjudication.

1. Under the national bankruptcy act of July 1, 1898, 30 Sta. 544, c. 541 (U. S. Comp. St. 1901, p. 3418), referees in bankruptcy are judicial officers, and their orders made in the course of bankruptcy proceedings, including adjudications upon the allowance or rejection of the claims of creditors, are entitled to the respect and credit due to officers who act judicially.

State Courts Will Not Review Referee's Decision—Conclusiveness.

2. Section 55b of the bankruptcy act, 30 Stat. 559 (U. S. Comp. St. 1901, p. 3442), makes it the duty of referees in bankruptcy to pass upon the claims of creditors, and either to allow or reject them. Section 57g of said act, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), provides that claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences.. It is *held*, in an action prosecuted by a trustee in bankruptcy to recover certain alleged preferences, that the order of the referee permitting the defendant to retain certain alleged preferences, and allowing the defendant's claim for the balance, was an adjudication that the items so permitted to be retained by the defendant were proper set-offs, and they did not constitute preferences. *Held*, further, that the state courts are without authority to review, revise, or reverse this adjudication of the referee. *Held*, further, that under the national bankruptcy act the remedy of the trustee to review said order of allowance lies in the bankruptcy court.

Referee's Decision Cannot be Impeached by Parol Evidence.

3. The rule is that, so far as the record shows what was adjudicated, it is to that extent conclusive, and cannot be contradicted by parol evidence. It is therefore *held*, in this case, that the testimony of the

referee to the effect that he did not undertake to adjudicate upon the question of the defendant's right to retain the two items in question was inadmissible for the reason that it directly contradicts the necessary legal effect of his written order allowing defendant's claim.

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

Action by A. E. Clendening, trustee of Thomas Kleinogel, bankrupt, against the Red River Valley National Bank of Fargo. Judgment for plaintiff. Defendant appeals.

Reversed.

David R. Pierce and *Newton & Smith*, for appellant.

A bank may require written authority from a customer for payment, or transfer of his account, certainly when "subject to check," before it is called upon to make a distribution of it. *Aetna National Bank* v. *Fourth National Bank*, 46 N. Y. 82, p. 88. A bank has a right to select its customers, and was under no obligation to open an account with the plaintiff on his demand. *Thatcher* v. *State Bank*, 15 Sandf. (N. Y.) 121. Payment must be demanded of a bank of deposit before it can be put in default. *Fowler* v. *Bowery Savings Bank*, 113 N. Y. 450, 21 N. E. Rep. 172, and cases cited. Had bank paid to a stranger the rule would be the same. *Davis et al.* v. *Smith*, 12 N. W. Rep. 531. When there is a deposit of money to be kept in specie, the rule is different. Such deposit is a bailment, and any use of it would justify an action for conversion without demand. But a general deposit creates the relation of debtor and creditor between the bank and its depositor, and the former's obligation is to pay only upon a written demand, or check. *Wray* v. *Tuskogee Ins. Co.*, 34 Ala. 58; *Brahm* v. *Adkins*, 77 Ill. 263; *State* v. *Tenn. Coal, etc.*, R. C. 29 S. W. Rep. 121; *Janin* v. *London, etc., Bank*, 92 Cal. 14, 27 Am. St. Rep. 82, 27 Pac. 1100; *Carr* v. *Nat'l Security Bank*, 107 Mass. 45, 9 Am. Rep. 6; *Perley* v. *Muskegon Co.*, 32 Mich. 132, 20 Am. Rep. 627; *Davis* v. *Smith*, 12 N. W. Rep. 531; *Chapman* v. *White*, 6 N. Y. 412, 57 Am. Dec. 464; *Curtis* v. *Levitt*, 15 N. Y. 52; *Aetna Nat'l Bank* v. *Fourth Nat'l Bank*, 74 N. Y. 464; *People* v. *Mechanics Savings Institute*, 92 N. Y. 7; *Fowler* v. *Bowers Savings Bank*, 113 N. Y. 450; *Shipman* v. *State Bank*, 126 N. Y. 318; *Bank* v. *Hughes*, 17 Wend. 100; *Henry* v. *Martin*, 88 Wis. 367, 60 N. W. Rep. 263. Banks of deposit do not undertake to pay without respect to place, but at its banking house when payment is called for. Morse

on Banks, 40; *Watson* v. *Phoenix Bank,* 8 Metc. 217; *Bank* v. *Bank,* 39 Pa. St. 92; *Downes* v. *Phoenix Bank,* 6 Hill. 297. The bank is not in default as a debtor until demand of payment is made. *Downes* v. *Bank,* 6 Hill 297, 16 N. Y. Com. Law, L. Ed. 365; *Payne* v. *Goodner,* 27 N. Y. 262; *Brown* v. *Brown,* 11 N. W. Rep. 64; *Branch* v. *Dawson,* 23 N. W. Rep. 552. Bringing suit is not such a demand, in cases where actual demand is necessary, as constitutes one element of a cause of action. *Downes* v. *Bank,* 6 Hill, 297, 16 N. Y. Com. Law, L. Ed. p. 365; *Payne* v. *Gardner,* 29 N. Y. 146; *Smiley* v. *Fry,* 10 N. Y. 262; *Brown* v. *Brown,* 11 N. W. Rep. 64; *Branch* v. *Dawson,* 23 N. W. Rep. 552. A banker has a lien, at common law, only for indebtedness past due. *Jordan Adm'r* v. *Bank,* 74 N. Y. 467; *Beckwith* v. *Bank,* 9 N. Y. 211; Morse on Banking, (2nd Ed.) 45; *Fourth National Bank of Chicago* v. *The City National Bank of Grand Rapids,* 68 Ill. 398; *Bank* v. *Bank,* 80 Ill. 212, 22 Am. Rep. 751; *National Bank of the Republic* v. *Millard,* 10 Wall, 152, 19 L. Ed. (U. S.) 897, and note. A bank has an equitable right, like stoppage *in transitu,* over credit given a borrower, who becomes insolvent, upon the proceeds of a note, which it has discounted for him. *Daugherty Bros.* v. *Central National Bank,* 13 Leg. Ns. 2, Pa. cited in Ball on National Banks, p. 109 note 4. The facts are sufficient in equity to warrant a set-off of the items upon the indebtedness evidenced by the notes even before maturity. *Jordan* v. *N. S. & L. Bank,* 74 N. Y. 467, and citations *infra; Clark* v. *Sullivan,* 2 N. D. 103, 55 N. W. Rep. 733; *Bathgate* v. *Hoskins,* 59 N. Y. 533; *Lindsey* v. *Jackson,* 2 Paige Ch. 581, 2 N. Y. Ch. Rep. L. Ed. 1038 and note; *Seligman* v. *Felton,* 43 N. Y. 419; *Smith* v. *Fox,* 48 N. Y. 674; *Cavilli* v. *Allen,* 57 N. Y. 508.

In proving claims against a bankrupt's estate under the Bankrupt Law of 1898, a counter claim shall not be allowed which is not provable against his estate, or was purchased by, or transferred to, him, after the filing of the petition, or within four months before such filing of the claim. Bankrupt Laws of 1898, section 68; Bush on Bankruptcy, 376; *L. Snyder Sons Co.* v. *Armstrong,* 37 Fed. Rep. 18; in re *Dillon,* 10 Fed. Rep. 627; *Rothschild* v. *Mack,* 115 N. Y. 1, 21 N. E. Rep. 726; *N. C. R. M. Co.* v. *St. L. O. & S. Co.,* 152 U. S. 596, 14 Sup. Ct. Rep. 710, 38 L. Ed. (U. S.) 655; *Scott* v. *Armstrong,* 146 U. S. 499, 13 Sup. Ct. Rep. 148, 36 L. Ed. 1059; in re *Meyer,* 107 Fed. Rep. 86; in re *Little,* 110 Fed. Rep. 621. Where the creditor has goods or choses in action, of the bankrupt, put

into his hands before bankruptcy by a valid contract, by the terms of which it will result in a debt, as if they are deposited for sale or collection, the case of mutual credit has arisen within the meaning of the bankrupt law. *Ex. parte Caylus, et al.*, v. *Lowell*, 5 Fed. Cases, 325; *Catlin* v. *Foster*, 3 B. R. 540, S. C. 1 Saw. 37; S. C. 1 L. T. B. 192; *Murray* v. *Riggs*, 15 Johns. 571. The claim may be set-off by the holder, although he has never proved it in bankruptcy, *Tucker* v. *Otley*, 5 Cranch 34, 3 L. Ed. 29 (U. S.); *Winslow* v. *Bliss*, 3 Lans. 220; *Harmonson* v. *Bain, et al.*, 1 Hughes 391, 11 Fed. Cases, 539; *Marks et al.* v. *Baker et al.*, 1 Wash. C. C. 178, S. C. 16, Fed. Cases, 765.

Turner & Lee, for respondent.

Claim of title in the defendant makes the demand useless and hence unnecessary. 9 Am. & Eng. Enc. of Law (2d Ed.) 209, and cases cited.

By the bankruptcy proceedings, title to the bank deposit and Lincoln account passed to the creditors of the bankrupt. The law of set-offs does not govern this case, but the law of preference does. *Pirie* v. *Trust Co.*, 182 U. S. 438, 45 L. Ed. 1171; in re *Stoge*, 8 Am. Bank Rep. 621, 116 Fed. Rep. 342; in re *Keller*, 6 Am. Bank Rep. 621, 110 Fed. Rep. 348, same title, 6 Am. Bank Rep. 487; *Swartz* v. *Bank*, 8 Am. Bank Rep. 673, 117 Fed. Rep. —; *Swartz* v. *Seigel*, 8 Am. Bank Rep. 689, 117 Fed. Rep. —; Kleinogel, the bankrupt, had done business up to the day on which he was adjudged bankrupt. His balance on that day, was a fund which the bank had no right to apply upon its unmatured notes. Had the bankrupt given a check upon his deposit to apply on his debt, to the bank, the trustee in bankruptcy could recover the amount in this suit. In re *Lyon*, 114 Fed. Rep. 326; *Traders Nat. Bank* v. *Campbell*, 6 N. B. Rep. 353, 14 Wall 87; in re *Warner*, 5 N. B. Rep. 414; in re *Meyer*, 115 Fed. Rep. 997; in re *Kellar*, 110 Fed. Rep. 348; *Adams* v. *Merchants' Nat. Bank*, 2 Fed. Rep. 174; in re *Black, et al.*, 3 Fed. Cases, 495; in re *Waterbury Fur Co.*, 114 Fed. Rep. 225.

The referee might refuse to allow the claim for any purpose; but it was also proper for him to allow it for the undisputed amount, and leave the trustee to recover the amount of any preference received by the creditor. Bankruptcy Act, section 60b; *Morgan et al.* v. *Mastick*, 17 Fed. Cases, 752; *Fox* v. *Gardner*, 21 Wall 475, 88 U. S. 456, 22 L. Ed. 685; *Forsyth* v. *Merrill et al.* 9 Fed. Cases 464. Lincoln

Bros.' agreement does not amount to a pledge. In re *Sheridan,* 98 Fed. Rep. 406; *Lucketts* v. *Townsend,* 49 Am. Dec. 723 and note.

YOUNG, C. J. The plaintiff is the trustee in bankruptcy of Thomas Kleinogel, who was adjudged a voluntary bankrupt by the United States District Court for the Southeastern District of North Dakota on January 2, 1901. This action was instituted in the district court of Cass county on March 28, 1901, to recover from the defendant bank the sum of $817.45, which the trustee claims was due to the bankrupt at the date of filing his petition. This sum consists of two items, which are set forth in the complaint as separate causes of action. The first consists of a balance of $158.43, which the bankrupt had on deposit with the defendant when his petition in bankruptcy was filed. The second cause of action is for the recovery of the sum of $659.02, which the complaint alleges the defendant had theretofore received from Lincoln Bros. for the use and benefit of the bankrupt, which sum the complaint alleges had been paid by said Lincoln Bros. to the defendant upon an account for goods purchased from the bankrupt prior to his insolvency. The complaint further alleges that the defendant is a creditor of the bankrupt, and that "at a meeting of the creditors of said Thomas Kleinogel, bankrupt, duly and regularly held, which said meeting was duly called and presided over by Guy L. Wallace, referee in bankruptcy, and at which said meeting the said defendant was duly represented as a creditor and there proved its claim against said bankrupt, which said claim was allowed by said referee, this plaintiff was duly elected by said creditors as the trustee in bankruptcy of said bankrupt." The defendant, by its answer, denies all indebtedness, and alleges that on the 2d day of January, 1901, Thomas Kleinogel was indebted to it in the sum of $3,000, evidenced by six promissory notes of $500 each; that on the 2d day of January, 1901, it indorsed and applied the deposit of $158.43 on said indebtedness. In answer to the plaintiff's second cause of action, the defendant alleges that it was agreed between it and the said bankrupt that, when the amount due from Lincoln Bros. on said account should be collected by it, the sum should be applied upon Kleinogel's indebtedness to it; that said sum has never been collected, and it has not now and never has had the sum of $659.02, or any other sum, belonging to Lincoln Bros., to pay said account. We may state here that the undisputed evidence shows that the defendant also indorsed the amount of the above account upon the bankrupt's notes at or about the time of making the

indorsement of the deposit, and that thereafter it took a note from Lincoln Bros. to it for said sum, which note has not been paid. The case was tried to the court without a jury. Judgment was entered in favor of the plaintiff for the full amount of its demand. Defendant has appealed from the judgment, and demands a trial *de novo* of the entire case in this court.

The plaintiff's contention is that the retention of these two items by the defendant constitutes a preference under section 60a of the national bankrupcty act of July 1, 1898, 30 Stat. 562, c. 541 (U. S. Comp. St. 1901, p. 3445), which reads as follows: "A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of his creditors of the same class;" and that the trustee may recover the same under subdivision "b" of said section, which is as follows: "If a bankrupt shall have given a preference within four months before the filing of a petition or after the filing of a petition and before the adjudication, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from such person." Further, that authority to maintain his action is also conferred by subdivision 2 of section 47, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), which makes it the duty of trustees to "collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest."

The defendant bank denies that the retention of these items by it constitutes a preference, within the meaning of section 60a, above quoted, and contends that the items which plaintiff seeks to recover and the bankrupt's debts evidenced by his notes, constituted mutual debts and credits, and that it was proper for it and also for the referee to set off these items against the bankrupt's notes, under section 68a of the bankruptcy act, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), which provides that "in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be

stated and one debt shall be set off against the other and the balance only shall be allowed or paid."

We find it unnecessary to decide or express an opinion upon the questions thus presented, for the reason that it appears from the record in this case that they have already been determined by a court of competent jurisdiction, towit, the bankruptcy court having jurisdiction of the estate. The evidence discloses that on the 14th day of January, 1901, and prior to the election of the trustee by the creditors at their first meeting, the defendant presented its proof of claim against the estate, duly verified, which proof, among other things, recited that "said Thomas Kleinogel, the person by whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said corporation in the sum of $2,182.55; that the consideration of said indebtedness is as follows: Money loaned to said bankrupt at various times during the year 1900, as evidenced by six promissory notes, which are hereto annexed, each for the sum of $500, on account of which affiant's said corporation has credited said bankrupt with a balance remaining to his credit on deposit with said corporation the sum of $158.43, and an account amounting to $659.02 for goods sold to W. H. & E. H. Lincoln, but which were charged to said banking corporation, both of which affiant's corporation asks to have declared set-offs to its said claim of $3,000, leaving a balance of $2,182.55 due and unpaid as aforesaid." The proof of claim was allowed by the referee over objections made by the attorney for the bankrupt, and after the examination of several witnesses. The proof of claim bears the following indorsement: "Filed and provisionally allowed at $2,182.55, January 14th, 1903, at 3 p. m. Guy L. Wallace, Referee." In our opinion, the record thus recited discloses an adjudication by the referee of the identical questions which we are asked to pass upon in this case. Under the present national bankruptcy act it is made the duty of the referee to pass upon the allowance and rejection of claims. Section 55b, 30 Stat. 559 (U. S. Comp. St. 1901, p. 3442). This defendant presented its claim, and, as we have seen, fully disclosed in its proof the indorsements thereon which it claimed a right to retain. Objection was made to the allowance of the claim because of these indorsements. If the retention of these items by the defendant gave it a preference, it was the duty of the referee to reject the claim. It could not be allowed. Subdivision "g," section 57, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), provides

that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." There was no surrender, although counsel for the bankrupt insisted before the referee that the items in question constituted preferences. In the face of these objections the referee allowed the claim, and thus necessarily held that the defendant's notes and these items were mutual debts and mutual credits, which should be set off one against the other, and were not preferences. In re *Fixen & Company,* 42 C. C. A. 354, 102 Fed. 295, 50 L. R. A. 605, the court referring to the duty of the referee, said: "Section 57g provides that the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences. There is no ambiguity in this provision, and no uncertainty as to its purpose. When a creditor presents a bona fide claim against the bankrupt estate, the question to be determined is, has the creditor received a preference in his dealing with the bankrupt? If he has, the claim cannot be allowed. If he has not, it must be allowed." In the case just referred to, it was determined that a claim could not be allowed where the creditor had received a preference, either innocently or knowingly, without a surrender of such preference. See in re *Forsyth,* 7 Nat. Bankr. Rep. 174, Fed. Cas. No. 4948; in re *Owings* (D. C.) 109 Fed. 623. In this case, as already stated, there was no surrender of any alleged preference. We are bound, therefore, to conclude that the referee, in allowing the claim, held that the defendant was entitled to retain the two items in question as proper offsets, and that they did not constitute a preference, for otherwise he was bound, under subdivision "g" of section 57, *supra,* to reject the claim.

The plaintiff offered the evidence of the referee and of the attorney for the bankrupt, and the same was received in the record over defendant's objection, for the purpose of showing that the referee did not in any way determine the question of the bank's right to retain the offset which it claimed in its proof; and to further show that the word "provisionally" was inserted in the order of allowance after it was made, to show that the referee did not pass upon the merits of the objection made by bankrupt's counsel to the set-offs; and, further, to show that the claim was allowed simply to permit the defendant to vote at the creditors' meeting. This testimony was clearly inadmissible. It is true that parol evidence is admissible to show what was litigated in cases where the record leaves it uncertain; but even then the parol evidence must be consistent with the record, and it can

never be admitted to contradict the record. See Bradner on Evidence (2d Ed.) Sec. 33, and cases cited. Freeman on Judgments, at section 275, says: "It is important that the evidence offered to explain a record should not contradict it, for it cannot be shown in opposition to the record that a question which appears by it to have been settled was not in fact decided, nor that, while a special cause of action was in issue, a different matter was in truth litigated. In other words, where it appears by the record that a particular issue was determined, all question of fact is excluded, and the court must, as a matter of law, declare such determination to exist and to be conclusive;" citing numerous authorities. In this case, as we have seen, there is no uncertainty upon the record itself as to what the referee determined. The defendant presented its proof of claim, describing the two items which the plaintiff now seeks to recover, and asked "to have them declared set-offs to its said claim of $3,000, leaving a balance of $2,182.55 due and unpaid." The claim was "allowed at $2,182.55" by the referee. The addition of the word "provisionally" in the order is without effect. The referee was bound to either reject it or to allow it. It is not claimed that the addition of the word "provisionally" was equivalent to a rejection. On the contrary, the plaintiff, in his complaint, alleges that the claim was allowed. The contention that the allowance was temporary, and merely to enable the defendant to vote at the creditors' meeting, likewise contradicts the legal effect of the order of allowance. Under section 56 of the bankruptcy act, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3442), only "creditors whose claims have been allowed" can vote at creditors' meetings. In re *Eagles* (D. C.) 99 Fed. 695; in re *Hill*, Fed. Cas. No. 6481. Necessarily, the claim was given the status of an allowed claim, even according to the oral testimony, and in making the allowance the referee necessarily determined that the retention of the two items which the plaintiff now seeks to recover did not constitute preferences. The order of allowance is conclusive on this point. If the bankrupt, or trustee, or any other creditor, was aggrieved by this adjudication, they had their remedy in the bankruptcy court. Under General Orders No. 27, 32 C. C. A. xxvii, 91 Fed. xxvii, all orders of the referee may be brought before the judge for review, and from the decisions of the latter, in cases where the amount of the claim amounts to more than $500, an appeal may be taken to the Circuit Court of Appeals. Section 25a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432). Instead of pursuing this course, the trustee has seen fit to

institute an independent action in the state courts. Under section 55b of the 1898 Bankruptcy Act, 30 Stat. 559 (U. S. Comp. St. 1901, p. 3442), referees are judicial officers clothed with power to adjudicate in the first instance over the allowance or disallowance of claims presented against the bankrupt's estate, and their findings are entitled to the respect and credit given to officers acting judicially. In re *Covington* (D. C.) 110 Fed. 143; in re *Eagles* (D. C.) 99 Fed. 695. It is unnecessary to say that we have no supervisory or appellate jurisdiction over referees in bankruptcy or over the decisions of courts of bankruptcy.

The question which the plaintiff seeks to have us determine has been judicially determined by a tribunal having jurisdiction, and is therefore binding upon us. *Smith* v. *Walker*, 77 Ga. 289, 3 S. E. 256. Whether the referee intended to decide these questions is not material. As we have seen, they were necessarily involved, and were in fact determined by his adjudication. Whether his decision was right or wrong we need not discuss. It is sufficient for the purpose of this case to say that the question has been adjudicated by the order of allowance made by the referee, and that the same has not been reconsidered by him or reversed by the judge upon a petition for review. If the trustee was dissatisfied with the adjudication made by the referee, he had a speedy remedy in the bankruptcy court upon a petition for review, and also by appeal from the order of the bankruptcy court if adverse to him. What was said by the court in *Wiswall et al.* v. *Campbell et al.*, 93 U. S. 347, 23 L. Ed. 923, in reference to the 1867 Act (Act March 2, 1867, 14 Stat. c. 176), is pertinent here: "Congress, in enacting the bankrupt law, had apparently in view (1) the discharge, under some circumstances, of an honest debtor from legal liability for debts he could not pay; and (2) an early pro rata distribution, according to equity, of his available assets among his several creditors. Prompt action is everywhere required by law. In *Bailey* v. *Glover*, 21 Wall. 346, 22 L. Ed. 638, we said, speaking through Mr. Justice Miller, that: 'It is obviously one of the purposes of the bankrupt law that there should be a speedy distribution of the bankrupt's assets. This is only second in importance to securing equality of distribution. The act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary delay.' * * * Every person submitting himself to the jurisdiction of the bankrupt court in the progress

of the case, for the purpose of having his rights in the estate determined, makes himself a party to the suit, and is bound by what is judicially determined in the legitimate course of the proceedings. A creditor who offers proof of his claim, and demands its allowance, subjects himself to the dominion of the court, and must abide the consequences. His remedies for the purpose of this proof are prescribed by the law."

It follows, therefore, that the judgment of the district court entered in this case must be reversed, and that court is directed to enter an order dismissing the action. All concur.

(94 N. W. Rep. 901.)

MARGARET ANN BROWN *v.* THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Opinion filed May 16, 1903.

Foreign Corporation—Service of Process.

1. The service of summons within the state upon a managing agent of a foreign corporation is sufficient service upon the corporation.

Carriers—Managing Agent.

2. A station agent for a railroad company, authorized to sell and collect for passenger tickets, and to receive and deliver freight and to collect for freight shipments, is sufficient of a managing agent, within the meaning of section 5252, Rev. Codes 1899, to make service of summons upon him, in a civil action against the railroad company, service upon such corporation.

Physical Examination—Power of Trial Court.

3. In an action to recover damages for personal injuries alleged to be permanent, the trial court has power to require the injured party to submit her person to an examination of physicians or surgeons designated by the defendant, when, in the exercise of a sound judgment, it appears to the court that the necessities of the case require such an examination.

Refusal, an Abuse of Discretion—Reversible Error.

4. To permit plaintiff and a physician of her selection, after examination of her person, to testify that her injury was permanent, and to deny the defendant the privilege of having the alleged injuries examined by competent surgeons to enable them to see from what, if any, injuries she suffered, their nature, extent, and probable duration, was an abuse of discretion, and reversible error.

Commencement of Action Implies Consent to Produce Best Evidence.

5. The plaintiff in a personal injury case, by the commencement of her action, impliedly consents to the doing of that measure of justice which she exacts. She cannot claim damages for injuries which she conceals from the reasonable inspection of witnesses when such inspection is necessary to equip them to testify on the trial concerning such injuries. She must, so far as in her power, enable the court, jury, and the adverse party to have the best evidence which can be produced in the case.

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

Action by Margaret Ann Brown against the Chicago, Milwaukee & St. Paul Railway Company to recover for personal injuries. Verdict and judgment for plaintiff, and defendant appeals.

Reversed.

H. H. Field and *Ball, Watson & Maclay,* for appellant.

Section 3263, and subdivisions 5 and 6, of section 5252, afford methods of serving process on a foreign corporation. If a foreign corporation has empowered the secretary of state to receive service, then process, if not served upon him, must be served on a managing agent. But the rule is relaxed as to corporations which have not complied with section 3263. If the cause of action arose in this state, service may be made on any person transacting the principal's business here. By the weight of authority in states, where service must be made upon the managing agent, service upon a station agent is not sufficient. *Doty* v. *Railroad,* 8 Abb. N. Y. 427; *Brewster* v. *Railroad,* 5 How. Pr. 183, 19 Enc. Pl. & Pr. 680, et seq; *Foster* v. *Charles Betcher Lumber Co.,* 58 N. W. Rep. 9; 6 R. & M. Ry. Digest, 1093, et seq; *Vitola* v. *Publishing Co.,* 73 N. Y. 273.

The right of one party to an action to compel another to submit to a physical examination presents a new question in this jurisdiction. The Federal Supreme Court, Justices Brewer and Brown dissenting, now stand alone in denial of the power. (*Union Pacific Ry. Co.* v. *Botsford,* 141 U. S. 258, 11 Cup. Ct. Rep. 1003, 35 L. Ed. 740). *City of South Bend* v. *Turner,* 60 N. E. Rep. 271. As pointed out in *City of South Bend* v. *Turner, supra,* the power to order an examination has been upheld in Alabama, Arkansas, Georgia, Kansas, Kentucky, Michigan, Missouri, Minnesota, Nebraska, Pennsylvania, Ohio, Texas, Wisconsin, Illinois and Washington. The following cases also support the rule: *Railroad* v. *Simpson,* 64 S. W. Rep. 733; *Lane* v. *Spokane Falls & N. Ry. Co.,* 57 Pac. Rep. 367; *Wanek* v.

Winona, 80 N. W. Rep. 851; *Contra. McGuigan* v. *Delaware L. & W. R. Co.,* 29 N. E. Rep. 235; *Galveston* v. *Railroad,* 67 S. W. Rep. 776; *Stack* v. *New York, N. H. & H. R. Co.,* 58 N. E. Rep. 686; *Mills* v. *Railroad,* 40 Atl. Rep. 1114.

Lee Combs, for respondent.

The provisions of the statute permitting service of process on the secretary of state, is not exclusive. Subdivision 5 of section 5252, de clares that service may be made on the secretary of state, "or upon the managing agent," of the corporation. This settles the controversy that, notwithstanding the appointment of the secretary of state service could be lawfully made upon such managing agent within the state. The defendant's ticket agent at Fargo, N. D. was a "managing agent." Cases cited by appellant in support of the claim, that a station agent is not a "managing agent" have been overruled by later and better considered cases in the same court. *Tuchband* v. *Chicago & Alton R. Co.,* 115 N. Y. 438, 22 N. E. 360. That the station agent of a railroad company is a "managing agent," is held in *Foster* v. *Charles Betcher Lumber Co.,* 58 N. W. Rep. (S. D.) 9; *Express Co.* v. *Johnson,* 17 Ohio St. 641; *McAllister* v. *Ins. Co.,* 28 Mo. 214; *White Lake Lbr. Co.* v. *Stone,* 27 N. W. Rep. 395. Sufficiency of service of process on defendant is set at rest by subsequent general appearance of the defendant; and his special, was subsequently converted into a general appearance, by his seeking affirmative relief. *Belknap* v. *Charlton et al.,* 25 Or. 41, 34 Pac. 758; *Coad* v. *Coad,* 41 Wis. 26; *Blackburn* v. *Sweet,* 38 Wis. 578; *Pry* v. *Hannibal, etc., R. Co.,* 35 W. Va. 438; *Handy* v. *Ins. Co.* 37 Ohio St. 366; *Bucklin et al.* v. *Strickler,* 32 Neb. 602, 49 N. W. Rep. 371; *Aultman* v. *Steinan,* 8 Neb. 109; *Burdette* v. *Corgan,* 26 Kan. 102; *Lowe* v. *Stringham,* 14 Wis. 241; see also *Lyon* v. *Miller,* 2 N. D. 1, 48 N. W. 314. The latter case is distinguishable from *Miner* v. *Francis,* 3 N. D. 549, 58 N. W. Rep. 343. If the court is asked to determine questions touching the merits, a special appearance will operate as a general appearance. *Gans* v. *Beasley et al.,* 4 N. D. 140, 59 N. W. Rep. 714; *Benoit* v. *Revoir,* 8 N. D. 226, 77 N. W. Rep. 605; *Yorke* v. *Yorke,* 3 N. D. 343, 55 N. W. Rep. 1095.

The court below did not err in denying appellant's motion to compel respondent to submit her person to a physical examination by defendant's physician, because it had no power to make such order. If it had such power it was a discretionary one, and there was no

abuse of discretion in denying the motion. *Parker* v. *Enslow,* 102 Ill. 272; *Pensylvania Co.* v. *Newmeyer,* 28 N. E. Rep. 860; *Philadelphia Ry.* v. *State,* 58 Md. 372; *Lloyd* v. *Hannibal, etc., R. Co.,* 53 Mo. 509; *McQuigan* v. *Delaware, etc., R. Co.,* 129 N. Y. 50; *Union Pac. R. Co.* v. *Botsford,* 141 U. S. 258, 11 Sup. Ct. Rep. 1003, 35 L. Ed. 740. Where the right exists, the application is addressed to the sound discretion of the court, and the exercise of such discretion will not be interfered with except in case of manifest abuse. *Gulf, etc., R. Co.* v. *Norfleet,* 78 Tex. 321; *O'Brien* v. *City of LaCrosse,* 75 N. W. Rep. 81; *St. Louis Bridge Co.* v. *Miller,* 28 N. E. Rep. 1091; *Richmond, etc.,* v. *Childress,* 82 Ga. 719; *Belt Electric Line Co.* v. *Allen* (Ky) 44 S. W. Rep. 89; *Strudgeon* v. *Village of Sand Beach,* 65 N. W. Rep. (Mich.) 616; *Hatfield* v. *St. P. & D. R. Co.,* 22 N. W. Rep. (Minn.) 176. Where the power exists, the application must be made with diligence, and when made upon trial, should be refused. *Atchinson, etc., R.* v. *Thul,* 29 Kas. 466; *Kinney* v. *Springfield,* 35 Mo. App. 97; *So. Kan. R. Co.* v. *Michaels,* 46 Pac. (Kas.) 938; *Terre Haute, etc., R. Co.* v. *Brunker,* 26 N. E. Rep. (Ind.) 178; *Bagley* v. *Mason,* 69 Vt. 175. Where the power exists it is one to be exercised in view of the peculiar features of each case. If the sense of delicacy of the party to be examined, may be offended, or where the testimony may be only cumulative, or where the necessities of the case do not require it, or where the health of the person examined may be endangered, it is no error for the court to deny the application, and the appellate court will not reverse its action. *Graves* v. *City of Battle Creek,* 54 N. W. Rep. 757; *Smith* v. *City of Spokane,* 47 Pac. 888; *Owens* v. *Kansas City R. R. Co.,* 33 Am. & Eng. R. R. Cases, 524, S. C. 6 Am. St. Rep. 39; Thompson on Trials, section 859.

COCHRANE, J. The defendant, a foreign corporation, appeared specially in this case, and moved to set aside the service of the summons and complaint because W. H. Gross, the person on whom the service was made, was not a managing agent within the meaning of the statute, and consequently, that service upon said Gross was not service upon the defendant corporation. In support of its motion, defendant presented the affidavit of one of its attorneys, setting forth that the only service of summons and complaint in this action was that made upon W. H. Gross, who, at the date of such service, was local station agent for defendant at the city of Fargo, in Cass county, N. D. That the defendant in January, 1896, pursuant to the require-

ments of section 3263, Rev. Codes, 1899, filed its irrevocable certificate in the office of the secretary of state appointing such secretary of state and his successors its true and lawful attorneys upon whom all process in any action or proceeding against it might be served, and stipulating therein that service of process upon its said attorney should be of the same force and validity as if served upon it personally in this state. That the defendant did not own any property or have any office in the county of Stutsman. That W. H. Gross, its station agent at Fargo, on whom service was made, had authority to act for it in the sale of passenger tickets for the carriage of passengers, and to collect pay for tickets so sold, to receive and deliver freight, and to collect unpaid charges for freight carried on said railway, with necessary incidental authority for the execution of the above powers, but with no other or further authority to represent it as agent.

This motion presents the question whether the station agent of a foreign railway corporation doing business within this state is a managing agent within the meaning of subdivision 5, section 5252, Rev. Codes 1899, which provides that the summons in a civil action may be served upon a foreign corporation by delivering a copy thereof to the secretary of state, or to the president, secretary, cashier, treasurer, a director, or managing agent thereof, if within the state, doing business for the defendant. We agree with the trial court that Mr. Gross was enough of a managing agent for defendant to sustain this service. He transacted freight and passenger business for it at its Fargo station or office. "The person who, as its agent, does that business, should be considered its managing agent; and more especially should that be so where the foreign corporation has an office or place of business in the state; and when that office is in charge of that person, and he there acts for the corporation, he is there doing business for it, and so manages its business." *Tuchband* v. *Ry. Co.*, 115 N. Y. 440, 22 N. E. 360. "An agent who is invested with the general conduct and control, at a particular place, of the business of a corporation, is a managing agent within the meaning of the Code, which authorizes service of summons on a managing agent of a foreign corporation." *Porter* v. *Ry. Co.*, 1 Neb. 14; *American Ex. Co.* v. *Johnson*, 17 Ohio St. 641; *Foster* v. *Lumber Co.*, 5 S. D. 57, 58 N. W. 9, 23 L. R. A. 490, 49 Am. St. Rep. 859. Every object of the service is attained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made. The statute is satisfied if he be

a managing agent to any extent. *Palmer* v. *Pennsylvania Co.*, 35 Hun. 369.

Plaintiff alleged, in her complaint, permanent injury to her uterus and bladder, also the fracture of the hip bone, through the negligence of defendant's servants in bumping cars together, in one of which she was a passenger.

Defendant, after service of the complaint upon it, demanded of plaintiff's counsel the privilege of having plaintiff's person examined by medical experts, with a view to qualifying them to testify upon the trial as to the nature and effect of her injuries. This request was refused; whereupon one of defendant's counsel made affidavit that defendant was without knowledge as to the nature or extent of plaintiff's injuries, if any, and was without means of obtaining knowledge as to plaintiff's condition; that an examination of plaintiff's person was necessary to a correct diagnosis of her case, without which examination defendant would be without witness as to her condition. To the end that justice should be done, defendant set out that an examination of her person by medical experts should be required and had, and moved the court, upon this showing, that plaintiff be required, before trial, to submit to an examination of medical experts as to the nature and effect of her injuries. This motion was denied.

Upon the cross examination of plaintiff she was asked to submit her person to an examination by a physician for the purpose of enabling him to testify touching her physical condition. The question was objected to by her counsel. He stated that she was unwilling to submit to such an examination. The objection was sustained. The trial court placed his ruling upon ground thus tersely stated in his charge to the jury, and to which instruction an exception was also reserved: "The court is of the opinion that it is without power to make or enforce such order; and if the court is in error on that point, and has such power in a proper case, yet in this case, in view of the plaintiff being a woman, and in view of the examination necessary under all the circumstances, still would the court decline to make the order, for the reason that it would in this case be an ordeal to which she ought not to be subjected." This instruction and the several rulings hereinbefore set out are assigned for error, and present, for the first time in this jurisdiction, the question as to the court's power to require the plaintiff in a proper case to submit her person to a physical examination. We are of opinion that the court

possessed the power in this case, and that it was an abuse of discretion to refuse to require plaintiff to submit herself to the examination of physicains under such reasonable restrictions as the court should prescribe.

Plaintiff asserts that her injuries are permanent, but to organs of the body which, whether sound or unsound, diseased or well, temporarily or permanently impaired in the performance of their functions, cannot be made to appear to the court but through her *ipse dixit,* or the opinion of experts, founded upon a personal examination of the parts. Where a plaintiff claims damages from another because, from its negligence, some bodily injury has been inflicted, or the functions of any organ of the body impaired, the fact of the injury or impairment of the function, its nature, extent and probable duration must be established by competent, and that the best, evidence of which the case is susceptible. The very nature of the injuries here complained of is such as to render it highly improbable that the plaintiff could testify as to their development, whether permanent or susceptible of immediate cure. The best evidence is that of medical experts, who, from experience and training, can testify as to the conditions, wherein abnormal, and the probable duration and effect of the injury. To enable them to so testify, a personal examination was necessary. Plaintiff should not claim damages for an injury of which she was unwilling to furnish the best evidence.

Plaintiff was injured on the 26th of March, 1902; was examined by a physician in St. Paul, who gave her a bottle of medicine. She, on the same day, took the train for Dazey, N. D. She stayed with her son-in-law from March 27th until May 9th. No physician saw her or made an examination of her during this time. On the 9th day of May, Dr. Lang, at the request of her counsel in this case, made an examination for the purpose of qualifying him to testify upon the trial. She did not ask him to prescribe for her, and he did not prescribe for her; and she did not take any medicine or remedies of any kind for the ailments of which she complained, save the bottle of medicine before mentioned. Dr. Lang testified that he made a physical examination of her internally and externally; that he took off her clothes, and spent an hour and a half in the examination; that he did not find any fracture. He describes conditions of soreness and a retroversion of the uterus, which might have resulted from the accident complained of. The weight to be given the testimony of Dr. Lang as to what he found on this examination depends largely upon

the value of plaintiff's unsworn statements to him, thus: He found tenderness near the great trochanter. She complained of great pain on the inner side. Found a tender point about one inch descending of the ramus and ischial tuberosities. This injury was very painful; it caused pain at every step, and painful abduction of the limb. The mouth of the womb was pressing against the bladder, which caused pain at micturition. She complained of pain in passing water, and difficulty in starting to pass water. It further appeared that Dr. Patton made a personal examination of plaintiff a few days before the trial, with a view to testifying in her behalf. That he was in Jamestown on the day of the trial and was not called as a witness. Dr. Lang's examination, on which he discovered no fracture, antedated the complaint in which a fractured hip is alleged as one result of the accident. If plaintiff suffered the pains testified to by her, the fact that no physician was consulted for nearly two months, and then only to secure his testimony in her contemplated suit; that a physician of her own employment, who had examined her to qualify him as her witness, was present in town at the time of the trial, and was not called as a witness; in connection with her constant refusals to submit to an examination by physicians not in her employ—subjects her to criticism of not having produced the best evidence of which the case was susceptible, but rather with the suspicion of having suppressed or held back something. If a court is powerless, in a case like this, to require a plaintiff to submit her injuries to the inspection of physicians, to the end that the exact truth as to their nature, effect, and possible duration may be ascertained, when she, by her suit, has made them the subject of judicial investigation, then the law would permit her to put forward just so much and such parts of the facts, as, in her judgment, would benefit her case, at the expense of her adversary, and to invoke the court's aid to compensate her for an injury, through a partial and one-sided investigation. The court, under such circumstances, would become a means of accomplishing the grossest injustice.

We subscribe to the rule, declared by the supreme court of Georgia and followed in many other states, that when a person appeals to the sovereign for justice he impliedly consents to the doing of justice to the other party, and impliedly agrees in advance to make any disclosure which is necessary to be made in order that justice may be done. *Richmond, etc., Ry. Co.* v. *Childress,* 82 Ga. 719, 9 S. E. 602, 14 Am. St. Rep. 189, 3 L. R. A. 808; *Graves* v. *City,* 95 Mich.

266, 19 L. R. A. 641, 54 N. W. 757, 35 Am. St. Rep. 561; *Lane* v. *Ry. Co.* (Wash.), 57 Pac. 367, 46 L. R. A. 153, 75 Am. St. Rep. 821. Plaintiff, under this rule, could not insist upon her case going on, when she obstructed the investigation by her adversary which was necessary to a full consideration and correct determination of the controversy. She could not, over the objection of her adversary, withhold the best obtainable evidence as to the nature and permanency of her alleged injuries, and insist upon a verdict in her favor upon evidence of less weight. *Graves* v. *City,* 95 Mich. 266, 54 N. W. 757, 19 L. R. A. 641, 35 Am. St. Rep. 561. If impartial justice is to be administered, we see no way of its attainment in all cases, if an important source of evidence is open to one, and closed to the other party. *City* v. *Turner* (Ind. Sup.) 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200.

The court had power to require her to submit to an examination, and it was an abuse of discretion in this case to refuse to exercise its power and require plaintiff to submit to such examination, or to submit to a dismissal of her case if she refused, because defendant was without evidence as to her condition, and without means of procuring it, excepting in so far as the plaintiff made disclosure. The great weight of modern authority is to this extent. The cases vindicating this position are fully cited in the following opinions: *City* v. *Turner* (Ind. Sup.) 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200; *Lane* v. *Ry. Co.* (Wash.) 57 Pac. 367, 46 L. R. A. 153, and note; *City* v. *Gilliland* (Kan.) 65 Pac. 252, 88 Am. St. Rep. 232; note to *Cleveland, etc., Railway Company* v. *Huddleston,* 68 Am. St. Rep. 238, (s. c., 36, L. R. A. 681, 151 Ind. 540); *Wanek* v. *Winona,* 80 N. W. 851, 46 L. R. A. 448, 79 Am. St. Rep. 354; *Louisville, etc., Ry. Co.* v. *Simpson* (Ky.) 64 S. W. 733; *Belt Line Co.* v. *Allen* (Ky.) 44 S. W. 89, 80 Am. St. Rep. 374; 16 Enc. Pl. & Pr. 483; 16 Enc. L. 810. The Supreme Courts of the United States, Massachusetts, Texas, and Delaware deny the power. *Union Pacific Ry. Co.* v. *Botsford,* 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734; *Stack* v. *Ry. Co.,* 177 Mass. 155, 58 N. E. 686, 52 L. R. A. 328, 83 Am. St. Rep. 269; *Mills* v. *Ry. Co.* (Del. Super.) 40 Atl. 1114; *Galveston* v. *Ry. Co.* (Tex. Civ. App.) 67 S. W. 776.

In so far as the majority opinion of the Supreme Court of the United States was influenced by the federal statute quoted in its opinion, the Botsford case cannot be considered an authority here. When

it is remembered that courts of the United States other than the Supreme Court possess no jurisdiction but what is given them by the congress which created them, and that no statute gives to these courts power to order a discovery, the argument of the majority of that court that the statute of the United States prescribes the mode of proof in the trial of actions at common law, and that it shall be by oral testimony and examination of witnesses in open court, except as in the statute provided, and that the only exception provided for is the one for taking depositions, and for compulsory production of books or writings in the possession of a party which contain evidence pertinent to the issue, and therefore that the statute inhibits any other form of examination or discovery, and removes from the courts the power to require it, we find this court is treating of limitations by statute that have no binding force upon state courts. There is no limitation, either in the Constitution or statutes of this state upon the power of the district court to order such a discovery as was demanded in this case, under the circumstances here set out. The courts of Massachusetts, Texas, and Delaware, in following the Supreme Court of the United States, did not notice the influence which the federal statute had upon the determination of the question by that court.

It was no answer to defendant's request for an examination that it would offend the modest and womanly instincts of the plaintiff to require her to submit to an examination of experts. She told a jury of twelve men of her pains; how and when they affected her. She submitted to a digital examination of her injured parts by two physicians of her own selection. It would have been no greater indignity to be examined by other doctors; but "when it becomes a question of possible violence to the refined and delicate feelings of a plaintiff, on one side, and possible injustice to the defendant on the other, the law cannot hesitate. It was essential to the ends of justice that plaintiff should submit to this examination." *Alabama, etc., Ry. Co.* v. *Hill*, 90 Ala. 71, 8 South. 90, 9 L. R. A. 442, 24 Am. St. Rep. 764; *City* v. *Turner* (Ind. Sup.) 60 N. E. 275, 82 Am. St. Rep. 481; *White* v. *Ry.* Co., 61 Wis. 536, 21 N. W. 524, 50 Am. Rep. 154: note to *Cleveland, etc., Ry. Co.* v. *Huddleston*, 68 Am. St. Rep. 247. Neither was it an answer that one physician had examined her and testified to what he found, and was cross-examined by the defendant. Surgeons of equal learning and honesty may not diagnose an injury in the same way. They may not be equally strong in perception, or

equally accurate in observation or in measurements, and thus form different judgments of the existing conditions, which, of necessity, must constitute the basis of their scientific opinions. If a defendant must make his defense against the expert opinions of the plaintiff's chosen surgeons, without the opportunity of testing the verity of the basis of such opinions, he may be placed at a disastrous disadvantage, such as the law cannot and does not sanction. *City* v. *Turner* (Ind. Sup.) 60 N. E. 275, 82 Am. St. Rep. 481. Defendant's right was, through an examination, to test the effect and reduce the weight of the evidence introduced by plaintiff. *Haynes* v. *Trenton,* 123 Mo. 326, 27 S. W. 622. The result of the investigation asked for should have put plaintiff's claim on impregnable ground, or have destroyed it altogether. In either case there would have been an assurance that justice had been done; an assurance which finds no secure anchorage in the present record. Alabama, etc., Co. v. *Hill,* 90 Ala. 71, 8 South. 90, 9 L. R. A. 442, 24 Am. St. Rep. 764.

The judgment appealed from is reversed. The district court will enter an order reversing its judgment, and directing such further proceedings as may be lawful in the premises. Appellant will recover costs. All concur.

(95 N. W. Rep. 153.)

W. E. MOHER *v.* NEILS RASMUSSON.

Opinion filed May 16, 1903.

Compliance with Statute Requisite to Lien.

1. A thresher's lien is purely of statutory creation, and one who would avail himself of it must comply with the requirements of the statute creating it. Courts are not at liberty to extend it by construction to cover cases not provided for in the statute.

Statement for Lien—Quantity of Grain Threshed Must Be Stated.

2. Section 4824, Rev. Codes 1899, requires a lien claimant, as a condition prerequisite to perpetuating his lien, to file a statement in the office of the register of deeds showing, among other things, "the amount and quantity of grain threshed." It is *held,* in an action to foreclose an alleged thresher's lien, that the omission of the lien claimant to set forth in the statement filed by him the quantity of grain threshed by him for defendant was fatal to his lien, and that the trial court erred in directing a foreclosure of the same.

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

Action by W. E. Moher against Neils Rasmusson. Judgment for plaintiff. Defendant appeals.

Modified.

Barnett & Reese, for appellant.

Turner & Lee, for respondent.

YOUNG, C. J. The plaintiff instituted this action to recover a balance of $160.44, which he alleges is due to him for threshing defendant's grain in the fall of 1900, and also to foreclose an alleged thresher's lien securing the same. The answer interposed by the defendant placed the allegations of the complaint in issue, and also set up a counterclaim. The trial was to the court, without a jury. Judgment was entered in favor of plaintiff for $121.97 and costs, and for the foreclosure of his lien. Defendant has appealed from the judgment, and demands a review of the entire case in this court.

We have reached the conclusion, after a careful examination of the evidence, that the finding of the trial court in plaintiff's favor that there is an unpaid balance due him of $121.97 is fully sustained by the evidence, and the judgment entered is therefore, to that extent, approved. We do not agree with the trial court, however, in his conclusion that the plaintiff has a thresher's lien. On the contrary, we think the record shows the reverse. A thresher's lien is purely of statutory origin, and one who claims such a lien must bring himself under the terms of the statute authorizing its creation; and in this case we are clear that the statement filed by the plaintiff for the purpose of perpetuating his lien was not such a statement as the statute requires shall be filed. The governing statute is embraced in sections 4823, 4824, Rev. Codes 1899. Section 4823 provides that "any owner or lessee of a threshing machine who threshes grain for another therewith shall, upon filing the statement provided for in the next section, have a lien upon such grain for the value of his services in threshing the same from the date of the commencement of the threshing." Section 4824 provides that "any person entitled to a lien under this chapter shall within thirty days after the threshing is completed, file in the office of the register of deeds of the county in which the grain was grown a statement in writing, verified by oath, showing the amount and quantity of grain threshed, the price agreed upon for threshing the same, the name of the person for whom the threshing was done and a description of the land

upon which the grain was grown. Unless the person entitled to the lien shall file such statement within the time aforesaid he shall be deemed to have waived his right thereto." It will be seen that the statement which the lien claimant must file shall show "the amount and quantity of grain threshed," as well as "the price agreed upon for threshing the same, the name of the person for whom the threshing was done and the description of the land upon which the grain was grown." The verified statement filed by the plaintiff in this case does not show "the amount and quantity of grain threshed." It merely recites that "affiant threshed for said Neils Rasmusson certain flax," etc., and nowhere does it purport to state the quantity of flax threshed. It might be one bushel or one thousand, so far as this statement is concerned. This is not the statement which the statute requires to be filed. It was only by the filing of the statement required by the statute that the plaintiff could perpetuate his lien. His failure to comply with the statute in this respect is fatal to his lien. In 1 Jones on Liens, sections 105, 106, it is said that "the character, operation, and extent of the lien must be ascertained by the terms of the statute creating and defining it; and the courts cannot extend the statute to meet cases for which the statute itself does not provide, though these may be of equal merit with those provided for. * * * A statutory lien can exist only when it has been perfected in the manner prescribed by the statute authorizing it." In other words, the courts are powerless to create the lien. It exists only under the statute. It has been repeatedly held by this court that the statute requiring the filing of this statement is imperative, and that the benefits of the statutory lien can be realized only by a compliance with the statute. *Martin* v. *Hawthorne,* 5 N. D. 66, 63 N. W. 895; *Martin* v. *Hawthorne,* 3 N. D. 412, 57 N. W. 87; *Parker* v. *Bank,* 3 N. D. 87, 54 N. W. 313; *Lavin* v. *Bradley,* 1 N. D. 291, 47 N. W. 384. In the two cases last cited, the failure to insert a description of the land in the lien statement was held fatal, and it was further held that the lien statement could not be reformed by inserting a correct description. As we have seen, the legislature has required the lien claimant to include in the statement filed a statement of the quantity of the grain threshed. The inclusion of this showing is made a prerequisite to the securing of the statutory lien, as much as the giving of the description of the land upon which the grain was threshed, or the insertion of the name of the person for whom the threshing was done, and the price agreed upon. Courts are not at liberty to say that any

of these requirements may be omitted by the lien claimant from his statement, and thus give him a lien upon conditions other than those prescribed by the statute under which he claims his lien.

Plaintiff, having failed to file a statement complying with the statute, cannot claim the benefits of the statutory lien, and the court was in error therefore, in finding that the balance due the plaintiff was secured by a lien, and awarding the foreclosure of the same.

The judgment, so far as it awards a recovery for $121.97, is approved, and will be affirmed. That part of the judgment, however, which awards a foreclosure of the alleged thresher's lien, is reversed. Neither party will recover costs upon this appeal.

All concur.

(95 N. W. Rep. 152.)

JOHNS *v.* RUFF.

Opinion filed May 27, 1903.

Judgment Notwithstanding the Verdict.

1. Under chapter 63, p. 74, Laws 1901, governing the practice on motions for judgment notwithstanding the verdict, such judgment cannot properly be ordered unless a motion for a directed verdict has been previously made and denied.

Appellate Court Sustains Only on Grounds Urged Below.

2. When such a motion has been made and granted in district court on the ground of the insufficiency of the evidence, without a previous motion for a directed verdict, the party making such motion will not, on appeal to this court from the judgment entered in such case, be allowed to sustain such judgment on grounds independent of, and not included in, the motion made in the district court.

Assignment of Errors in Brief—Dismissal of Appeal.

3. The absence of proper assignments of error, or the entire absence of such, in the brief, is not ground for the dismissal of an appeal in this court.

Reviewing Errors Not Assigned—Striking Brief from Files.

4. This court will refuse, in its discretion, to review errors not assigned, or may permit amendments allowing assignments of error to be incorporated therein upon terms, or may strike the brief from the files, upon motion.

Appeal from District Court, Wells County; *S. L. Glaspell,* J.

Action by John G. Johns against Chris. Ruff. Judgment for plaintiff. Defendant appeals.

Reversed.

Plinn H. Woodward, for appellant.

One desiring to challenge the sufficiency of evidence to support a verdict must either—

1. Request that a verdict be directed in his favor, or
2. Except to the charge of the court submitting questions of fact to the jury, or
3. Move for a new trial on the ground of the insufficiency of the evidence.

No other mode of raising the question of the sufficiency of the evidence is provided by law. *Henry* v. *Mayer,* 6 N. D. 143, 71 N. W. Rep. 127. Insufficiency of the evidence to sustain a verdict can only be raised by a specification of wherein it is insufficient. *Colby* v. *McDermont,* 6 N. D. Rep. 495, 71 N. W. Rep. 772; *Henry* v. *Mayer,* 6 N. D. Rep. 413, 71 N. W. Rep. 127, Rev. Codes, section 5474; *Mooney* v. *Donovan,* 9 N. D. Rep. 93, 81 N. W. Rep. 50. A verdict of a jury, to which neither party has objected, should not be vacated by the court on its own motion, unless there has been such a disregard of instruction on the evidence in the case, that the court is at once satisfied without mature reflection or the aid of argument, that such verdict is the result of passion or prejudice, or was rendered under a misapprehension of the court's instructions, and the order should be promptly made on the coming in and entry of the verdict. *Clement* v. *Barnes,* 8 S. D. Rep. 421, 61 N. W. Rep. 1126; *Gould* v. *Elevator Co.,* 2 N. D. 216, 50 N. W. Rep. 969; *Flugel* v. *Henschel,* 6 N. D. 205, 69 N. W. Rep. 195. If the court erred in not directing a verdict on its own motion and the jury rendered a general verdict, judgment must be entered on the verdict. *Kellogg, Johnson & Co.* v. *Gillman,* 3 N. D. 538, 58 N. W. Rep. 339. Motion at the close of testimony to direct a verdict in his favor, is a condition precedent to the right of a party to move for a judgment notwithstanding the verdict. *Hemstead* v. *Hall,* 66 N. W. Rep. 366; *Netzer* v. *Crookston,* 68 N. W. Rep. 1099; *Sayers* v. *Harris,* 87 N. W. Rep. 617, 11 Enc. Pl. & Pr. 920; *Crane v. Knauf et al.,* 68 N. W. Rep. 79. A party is not entitled to judgment notwithstanding verdict in either trial or appellate court unless he asks for that relief on mo-

tion for a new trial. *Kerman* v. *St. Paul City Ry. Co.*, 67 N. W. Rep. 71, and 68 N. W. Rep. 1099. Where motion after verdict is exclusively for judgment notwithstanding the verdict, and not in the alternative for that remedy or for a new trial, if the party is not entitled to a judgment as requested, he is not entitled, at least as a matter of right, to a new trial. *Cruikshank* v. *St. P. F. & M. Ins. Co.*, 77 N. W. Rep. 958; *Marquardt* v. *Hubner*, 80 N. W. Rep. 617; *Kraatz* v. *St. Cloud School District*, 81 N. W. Rep. 533; *Bragg* v. *Chicago, M. & St. P. R. Co.*, 83 N. W. Rep. 511. In case of irregular entry of judgment, motion is the proper remedy, whether it affects the jurisdiction or not. *Thomas* v. *Tanner*, 14 How. Pr. 426, 3 Wait's Pr. 668 and 4 Wait's Pr. 637; *Railroad Co.* v. *Murphy*, 19 Minn. 500; *Covert* v. *Clark*, 23 Minn. 539. When motion goes to the jurisdiction, motion will lie a year after the entry of judgment. *Lee* v. *O'Shaughnessy*, 20 Minn. 173. What may be done, may be undone, by motion *Clopton* v. *Clopton*, 88 N. W. Rep. 562, 15 Enc. Pl. & Pr. 356, 14 Enc. Pl. & Pr. 87, 14 Enc. Pl. & Pr. 81, 14 Enc. Pl. & Pr. 76 and 77. Unless a verdict is objected to, it should not be set aside by the court on its own motion, unless done at the incoming of the verdict. *Clement* v. *Barnes*, 61 N. W. Rep. 1126; *Gould* v. *Duluth & Dakota Elevator Co.*, 2 N. D. 216, 50 N. W. Rep. 970; *Flugel* v. *Henschel*, 6 N D. 205, 69 N. W. Rep. 195. Under chapter 63, Laws of 1901, the verdict cannot be set aside and judgment given notwithstanding the verdict, unless there was a motion by either party at the close of the testimony, for a directed verdict in favor of the party making the motion, and such motion denied. Such motion is a condition precedent. *Hemstead* v. *Hall*, 66 N. W. Rep. 366; *Netzer* v. *Crookston*, 68 N. W. Rep. 1099; *Sayers* v. *Harris*, 87 N. W. Rep. 617, 11 Enc. Pl. & Pr. 920. That there was no sufficient evidence in this case to sustain the verdict, that the jury disregarded, or did not understand the instructions, were not sufficiently challenged by plaintiff, and verdict could not be set aside in consequence. *Henry* v. *Maher*, 6 N. D. 413, 71 N. W. Rep. 127; *Colby* v. *McDermont*, 6 N. D. 495, 71 N. W. Rep. 772. Where an attorney is employed by a party and that attorney hires another, the client believing that the attorney is responsible for the fees of such associate, is not responsible for the latter's fees, although he knew he was performing services. *McCarthy* v. *Crump*, 67 Pac. Rep. 343. Paying one associate counsel does not estop denying the fees of another. *Evans* v. *Moher*, 153 Ill. 561, 42 Ill. App. 255, 3 Am. & Eng. Enc. of Law 441. The burden is on

the attorney employed as associate counsel to show ratification of such employment by client. *Hughes* v. *Zeigler,* 69 Ill. 38, 3 Am. & Eng. Enc. of Law (2d Ed.) 441.

Alfred E. Hawes, for respondent.

At common law, upon plaintiff's motion after verdict, the court would enter judgment for him, *non obstante,* only on plea in confession and avoidance, where confession was complete and matter pleaded in avoidance was no defense, and such right was tested only by the pleadings. *Cruikshank* v. *St. P. F. & M. Ins. Co.,* 77 N. W. 958. By chapter 63, Laws 1901, such verdict is given to the party entitled to it, upon the evidence, upon compliance with the practice prescribed. *Cruikshank* v. *St. P. F. & M. Ins. Co., supra.* The father is the natural guardian of his infant child, and chargeable with its support, and medical and surgical services bestowed upon it. 3 Addison on Contracts 497, 3 Waite's Actions and Defenses, 851, section 5, 1 Parsons on Contracts, 385. Liable even if services were voluntary. 2 Addison on Contracts, 847. Patient is liable to an assisting physician, upon implied *assumpsit,* where previous request and promise of payment were implied by law. *Garrey* v. *Stadler,* 30 N. W. Rep. 787. A pleading which affirms and denies an essential fact shows no cause of action. 9 Cal. 47, 6 Enc. Pl. & Pr. 270. Plea of new matter should confess, impliedly or directly, that but for such new matter of avoidance, the action could be maintained. *Morgan* v. *Hawkeye Ins. Co.,* 37 Ia. 357; *Abbott* v. *Sartori,* 11 N. W. Rep. 626. If judgment of court below is legally correct, its reasons therefor may be disregarded on review. *Knight et al.* v. *Barnes et al., County Commissioners,* 7 N. D. 599, 75 N. W. Rep. 904.

MORGAN, J. The complaint in this action sets forth a cause of action for services rendered the defendant's daughter by the plaintiff as a physician and surgeon at defendant's special instance and request. The answer admits the rendering of the services, but denies specially that such services were at defendant's special instance and request; and further alleges that such services were performed as an assistant to one Dr. Barr, and that said Barr agreed to pay said assistant out of the sum of $40, the agreed sum to be paid him for performing an operation on his infant daughter; and that the defendant never agreed to pay said plaintiff nor in any manner employed him. The defendant testified in support of his answer, and his testimony shows that the plaintiff was employed as an assistant at the sug-

gestion of Dr. Barr of the necessity of employing him as an assistant. He admitted that he was aware that the defendant was to assist in said operation, but denies that he agreed in any manner to pay him or that he employed him, and says it was agreed that said Dr. Barr was to pay said plaintiff. The defendant was not present at the operation. He had no conversation whatever with the plaintiff until after the services were performed. There was a verdict for the defendant in district court. That court ordered judgment for the plaintiff for $15, the undisputed value of his services, notwithstanding the verdict, and the defendant appeals from that judgment.

The plaintiff moves to dismiss the appeal and for an affirmance of the judgment, upon the grounds: "(1) That appellant's brief contains no true and concise statement of the facts material to the points of law to be argued with reference to pages or folios of the abstract; (2) that appellant's brief contains no assignment of error; (3) that the statement of the case as settled contains no specification of errors." We do not find that the record sustains the last contention. The statement of the case was amended in due time on notice, and a specification of errors incorporated therein by an order of the court. The brief contains no assignments specifically denominated as such. It does, however, point out the two grounds on which reliance is placed for a reversal of the judgment appealed from, and this is done in the following words: "So that from defendant's view there are practically two propositions presented by this appeal, viz.: Did the district court err in granting plaintiff's motion for judgment notwithstanding the verdict, and in denying defendant's of February 24 to set aside the order of January 23, 1902?" These two questions are the only ones argued in the brief, and the plaintiff has argued the correctness of these two rulings only in his brief. Although these matters are not properly assigned as errors, and the brief does not refer to the pages or folios of the abstract, as required by rule 14 (74 N. W. x), still the total absence of these requirements is not ground for the dismissal of the appeal. The appeal to this court was properly perfected, and cannot be dismissed for failure to comply with the rules of court relating to matters required to bring the case on for hearing and argument. The motion to dismiss the appeal is therefore denied. If the matter had been brought before us on a motion to strike out the briefs for the reasons alleged, we would undoubtedly have granted the motion, although an amendment might have been

permitted upon terms. The record in this case is very brief, and the irregularity is not such as to warrant us in disregarding the errors assigned without a proper motion. The rule requires no stated form in making assignments. We therefore hold that there is not a total absence of assignments of error in the brief. Strict compliance with the rules is not always exacted, as has been held in the following cases: *O'Brien* v. *Miller,* 4 N. D. 308, 60 N. W. 841; *Vidger* v. *Nolin,* 10 N. D. 353, 87 N. W. 593.

After the verdict of the jury was recorded on the minutes of the court, the plaintiff made a motion for judgment notwithstanding the verdict, upon these grounds: "First, that such verdict is not supported by any evidence introduced on the trial in said action; second, that said verdict was rendered by said jury in utter disregard of the evidence introduced upon the trial of said action; third, that said jury either disregarded or did not understand the charge of the court as to the law applicable to the facts appearing in evidence upon the trial of said action before the jury." This motion was granted, and in the order granting it the following language is found: "And it now appearing to the court that there was no evidence offered by either of the parties to said action to authorize or support the finding of the jury in favor of the defendant and against the plaintiff, and it appearing to the court that said jury either misunderstood or disregarded the charge of the court as to the law applicable to the facts in the case, and it appearing to the court from such evidence that said verdict is erroneous and against law, and that the plaintiff is entitled to judgment upon all the evidence introduced upon the trial." It is conceded that the plaintiff did not move for a directed verdict in his favor during the trial. The practice relating to motions for judgment notwithstanding the verdict is prescribed by chapter 63, p. 74, Laws 1901, which is as follows: "In all cases where, at the close of the testimony in the case tried, a motion is made by either party to the suit requesting the trial court to direct a verdict in favor of the party making such motion, which motion was denied, the trial court, on motion made that judgment be entered notwithstanding the verdict * * * shall order judgment to be entered," etc. It is apparent from the reading of this law that the making and denying of a motion for a directed verdict must precede any motion for judgment notwithstanding the verdict on grounds relating to lack of evidence. Such a motion for a directed verdict is a condition precedent to ordering judgment notwithstanding the verdict upon grounds

pertaining to the evidence. The plaintiff, not having followed the preliminary requirement of the statute that a directed verdict must be asked for before a motion for judgment notwithstanding the verdict can be granted, was not entitled to the judgment rendered in his favor on the grounds set forth in his motion. *Hemstead* v. *Hall,* 64 Minn. 136, 66 N. W. 366; *Sayer* v. *Harris* (Minn.) 87 N. W. 617; *Crane* v. *Knauf,* 65 Minn. 447, 68 N. W. 79.

It is contended, however, that plaintiff was and is entitled to the judgment rendered in his favor under the common-law practice, for the reason that defendant's answer failed to allege a good defense. Whether the answer did state a good defense we are not called upon to determine. This contention, so far as this case is concerned, is disposed of by the fact that no such motion was made. The defendant was not apprised of any such contention until raised in respondent's brief in this court. Defendant was called upon in the court below to meet the single proposition advanced that the evidence did not sustain the verdict, and he has not attempted to sustain the other contention on which respondent seeks to uphold the judgment in this court. Having specifically pointed out the ground of his motion in the court below, the plaintiff will not be permitted to urge a different ground in this court, not at all connected with or included in the motion made and granted in the district court. If the plaintiff had included in his motion the grounds now relied on to support the judgment, in addition to grounds stated in the motion, and the district court had granted the motion upon the latter ground, he would be in a position to urge in this court that the judgment was proper on other grounds than the one relied on as sufficient by the district court. Under such a state of fact, the case of *Tribune Co.* v. *Barnes,* 7 N. D. 599, 75 N. W. 904, relied on by counsel, would be in point, but it is not in point on the facts of this case.

The judgment is reversed, and the cause remanded, with directions to the district court to enter judgment in favor of the defendant upon the verdict of the jury. All concur.

(95 N. W. Rep. 440.)

EDWIN E. PREBLE *v.* OSCAR WICKLUND.

Opinion filed May 27, 1903.

Work and Labor—Evidence—Payment.

Upon a trial *de novo* of an action to recover wages, it is *held* that the judgment for plaintiff should be sustained.

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

Action by Edwin E. Preble against Oscar Wicklund. Judgment for plaintiff, and defendant appeals.

Affirmed.

Rourke & Kvello, for appellant.

W. S. Wickersham, for respondent.

YOUNG, C. J. Plaintiff sues to recover a balance of $69.40, which he alleges is due and unpaid for services rendered by him to the defendant as a farm laborer. The defendant answered, admitting the services and their value, but alleged that his indebtedness therefor was discharged, with plaintiff's consent, by the satisfaction of a certain judgment for $120 which defendant's father had against the plaintiff's father. The trial was to the court without a jury. The trial court found against the alleged settlement, and rendered judgment for the plaintiff for the amount of his claim. The defendant appeals from the judgment, and demands a trial *de novo* in this court.

The only question in controversy is one of fact, and relates to the alleged settlement. The conclusion of the trial court, in our opinion, was correct. An examination of the evidence discloses that the settlement pleaded in the answer was under consideration; further, that the defendant was desirous of paying the plaintiff through the medium of the judgment referred to. Defendant's father was equally anxious to have the settlement made, to the end that he might realize upon the judgment, which appears to have been utterly worthless. It appears, however, that the settlement was conditional, and depended upon the willingness of plaintiff's father to pay to plaintiff the sum of $69.40 which the defendant owed him. This his father was unwilling and declined to do. Plaintiff's assent to the proposed settlement was not given, and the defense of payment is not, therefore, sustained.

Judgment affirmed. All concur.

(95 N. W. Rep. 442.)

LUDWIG FRIESE ET AL., *v.* ALBERT FRIESE.

Opinion filed May 27, 1903.

Substitution of Parties.

Ludwig Friese and Wilhelmina Friese, his wife, made a contract with their son Albert whereby they sold to him all their real and personal property in consideration that he should make certain provisions for their support, pay all their existing debts, and pay them $1,000 in money in certain annual installments; the balance of this $1,000 after their death, to be paid to their sons Frank and Henry. The payment of this $1,000 was to be secured by mortgage on the land conveyed to Albert, but the mortgage was never given. The wife died, and Ludwig became dissatisfied with Albert's treatment of him, left Albert's home, and commenced a suit to enforce the contract. He died soon thereafter. In District Court the sons Frank and Henry were substituted as plaintiffs, as Ludwig's successor in interest. *Held*, that such substitution was without authority of law, for reasons recited in the opinion.

Appeal from District Court, Cass County. *Charles A. Pollock*, J.

Action by Ludwig Friese against Albert Friese. On suggestion of plaintiff's death, Frank Friese and another were substituted as plaintiffs. Judgment for defendant, and they appeal.

Modified.

J. W. Tilly, for appellants.

Agreement for the payment of money by grantee to grantor or to one for whose benefit the agreement is made, written into a deed executed and delivered, makes a charge and lien upon the land conveyed therein, to secure such payment. Rev. Codes, 4830. *Cunningham* v. *Moore*, 1 N. B. Eq. 116; *McLean* v. *Smith*, 108 Ala. 533; *Jones* v. *Wolfe*, 42 S. W. 216; *Harrison* v. *Schoff*, 101 Ia. 463, 70 N. W. Rep. 689; *Blackmore* v. *Parks*, 81 Fed. Rep. 899, 54 U. S. App. 123; *Bresco* v. *Consol Min. Co.*, 82 Fed. Rep. 952.

Benton, Lovell & Holt, for respondent.

To determine the meaning of an ambiguous contract courts will put themselves in the place of the parties, and construe it in the light of surrounding circumstances, at the time it was made. *Moran* v. *Prather*, 23 Wall. 501, 23 L. Ed. 121; *Fisk* v. *Fisk*, 20 Pick. 500; *Dwelly* v. *Dwelly*, 143 Mass. 509, 10 N. E. Rep. 468; *Norway Plains Savings Bank* v. *Moors*, 134 Mass. 129. The construction that the parties themselves put upon an ambiguous instrument is entitled to great, if not con-

trolling weight, in determining its proper construction. *Chicago* v. *Sheldon,* 9 Wall. 50, L. Ed. book 19, p. 594; *Vermont St. M. E. Church* v. *Bross,* 104 Ill. 206; *Janesville Cotton Mill* v. *Ford,* 52 N. W. Rep. 764; *Ellis* v. *Harrison,* 104 Mo. 270. Parties must express themselves in terms from which their meaning can be determined with a reasonable degree of certainty. *Thompson* v. *Gorton,* 21 At. 371; *Myers* v. *Forbes,* 24 Md. 598. The limits within which a stranger to a contract may sue upon it, are laid down in *Parlin* v. *Hall,* 2 N. D. 477, 52 N. W. Rep. 405. A stranger must be more than incidentally benefitted. Agreement must show that the parties intended to treat him as personally interested. *Austin* v. *Seligman,* 18 Fed. Rep. 522; *Simson* v. *Brown,* 68 N. Y. 355; *Lake Ontario & Shore R.R.* v. *Curtis,* 80 N. Y. 223. Until the beneficiary by such a contract notifies the obligor of his acceptance of the contract, or adopts it by word or act, no rights are vested in him. *Wheat* v. *Rice,* 97 N. Y. 296; *Talbert* v. *Berkshire Life Ins. Company,* 80 Ind. 434; *Brewer* v. *Maurer,* 38 Ohio St. 543; *Crowell* v. *Currie,* 27 N. J. Eq. 152; *Davis* v. *Calloway,* 30 Ind. 112. When the beneficiary did adopt the terms of the contract and so notified obligors, they took subject to equities existing between the principal parties thereto. *Trumble* v. *Strother,* 25 Ohio St. 378; *Miller & Co.* v. *Florer,* 15 Ohio St. 151; *Dunning* v. *Leavitt,* 85 N. Y. 30; *Ellis* v. *Harrison,* 104 Mo. 270. Substituted party takes up the case where original party dropped it, and is entitled to the same benefit and assumes all burdens. *Bowen* v. *National Life Association,* 63 Conn. 460, 27 Atl. 1059; *Brand* v. *Smith,* 99 Mich. 395, 58 N. W. Rep. 363; *National Bank* v. *Stanton,* 116 Mass. 435; *Wise* v. *Collins,* 121 Cal. 147, 53 Pac. Rep. 640; *Wichita, etc., Railroad* v. *Quum,* 57 Kas. 737. Substitution cannot prejudice case as it originally stood. *Fannon* v. *Robinson,* 10 Ia. 272; *Bowen* v. *National Life Association,* 27 Atl. 1059. Findings of lower court come before the appellate court like conclusions of law, and will not be disturbed unless clearly against preponderance of evidence. *Jasper* v. *Hazen,* 4 N. D. 1, 58 N. W. Rep. 454; *Christenson* v. *Farmers' Warehouse Ass'n.,* 5 N. D. 438, 67 N. W. Rep. 300.

MORGAN, J. In 1895 the defendant entered into a contract with his parents, Ludwig Friese and Wilhelmina Friese. Under such contract the parents conveyed to the defendant, Albert Friese, 160 acres of cultivated land, their homestead, and sold to him their personal property. The defendant, on his part, agreed to assume the

payment of all of the then existing debts of the parents, and to make certain provision for their support until their death, and to pay them, and the survivor after one of them died, $1,000, in specified annual sums, or as they or the survivor should need or demand it. When both parents should die, the balance remaining unpaid of the $1,000 should be paid to their sons, Frank and Henry, under the same terms as it was to be paid to the parents. This agreement as to support and other matters was incorporated in the deed of conveyance from the parents to Albert. This deed was never recorded. Subsequently to the giving of this deed, Albert desired to make a loan on the land to pay off a mortgage thereon, as agreed by him, which was about to become due. He could not make a loan, for the reason that the payment of the $1,000 was made a lien on the land. On his request the parents gave him a warranty deed, without mention of the agreement as to support or payment of the $1,000. At the giving of this warranty deed, Albert agreed to carry out the agreement as formerly made, and to give a second mortgage on the land for the faithful performance of his agreement. This warranty deed was recorded in the register of deeds' office, but this mortgage was never given, or requested to be given. The wife died. The contract was thereafter carried out between Albert and the father until the year 1899, when the father became dissatisfied, and left Albert's home, and lived with another son. Soon after leaving Albert the father commenced an action against him, alleging a violation of his part of the agreement, and demanded judgment against him "for the sum of $1,000 or that defendant be required, ordered, and directed to execute and deliver to plaintiff a mortgage on said described real estate for the security of the payment of said $1,000, in accordance with his said agreement." General relief was also prayed for. Two weeks after this suit was commenced, the plaintiff, Ludwig Friese, died. The suit came to trial, and plaintiff's attorney suggested the death of the plaintiff, and asked that the administrator of his esate be substituted as plaintiff. This request was objected to and denied. Plaintiff's attorney then asked that the sons Frank and Henry be substituted as plaintiffs, which was granted without objection. This action was tried on the merits, and judgment rendered in favor of the defendant. Plaintiffs appeal, and request a review of all the issues, under section 5630, Rev. Codes 1899.

It is now claimed that these plaintiffs, the sons to whom the residue of the $1,000 was to be paid, cannot maintain this action, and

that to substitute them as plaintiffs was without any authority in law. The ground of this contention is that the contract between the parents and Albert Friese did not vest in Frank and Henry Friese any independent interest in the contract, and that, at best, their interest therein was a contingent one, in the nature of a testamentary disposition, and subject to revocation. The $1,000, or the unpaid portion thereof, was at the time of the death of Ludwig Friese a debt due to him from the defendant. The cause of action set forth in the complaint was a cause of action in the father's favor for the recovery of the unpaid portion of that money by him, or for the execution and delivery to him of a mortgage to secure its payment. It was in the nature of an action to compel the specific performance of the contract in his favor. The cause of action so pleaded in the complaint was solely in favor of the plaintiff therein, Ludwig Friese. The cause of action was in reference to personal property—a debt due him from the defendant. The ownership and title of this debt were absolutely that of Ludwig Friese, and the sons Frank and Henry had no title or ownership or lien thereon. This money was an asset of an estate out of which debts and legacies would be payable. Conceding, for the purpose of this appeal only, that Frank and Henry are entitled to this money, because their father intended and willed that they should receive it, are the sons entitled to be substituted as plaintiffs in the suit instituted by their father? In this state, property not disposed of by will passes to the heirs of the intestate, subject to the control of the county court, and to the administrator appointed by that court for the purpose of administration. Section 3741, Rev. Codes 1899. Such property is to be distributed subject to the payment of the debts of the intestate. Section 3742, Id. Under these sections, the administrator or executor has the exclusive right to the personal property for purposes of administration. *Jahns* v. *Nolting,* 29 Cal. 508. "The whole matter of dealing with the estates of deceased persons is one of statutory regulation, and the policy and intent of our statute very clearly contemplate that property of decedents left undisposed of at death * * * shall, for the purposes of ascertaining and protecting the rights of creditors and heirs, and properly transmitting the title of record, be subjected to the process of administration in the probate court." *Estate of Strong,* 119 Cal. 663, 51 Pac. 1078. This indebtedness was the property of the deceased, Ludwig Friese, and the statute prescribes the course to be taken for its proper distribution. It is not permissible, therefore, for

these plaintiffs to disregard the due administration of the estate, and litigate their rights as heirs or legatees in the first instance in any court other than the county or probate court. The estate of Ludwig Friese must first be subjected to the claims of creditors, before any distribution of it can occur, and it is not the policy of the statute to permit any person claiming decedent's property to take possession of it until all debts are paid. *Pritchard* v. *Norwood* (Mass.), 30 N. E. 80; *Flynn* v. *Flynn* (Mass.), 67 N. E. 314. It was claimed in the argument that there are no debts due from the deceased, and that the order in the district court wherein these plaintiffs were substituted as plaintiffs in place of Ludwig Friese was consented to by all his heirs. There has been no judicial adjudication as to the existence of debts, or of such consent, and there can be none, except in pursuance of the modes prescribed by law. This cannot be determined as a collateral issue in a court having no original jurisdiction in settling estates of decedents. As said in Estate of Strong, *supra,* "Indeed there is no other method provided by the statute whereby the existence of creditors or heirs of decedents may be conclusively established." In *Murphy* v. *Hanrahan,* 50 Wis. 485, 7 N. W. 436, it was said: "The kind of proof offered to show that there were no debts against the estate was at least questionable for any purpose, and especially so for the purposes sought. Administration, with the proper notices, and no claims having been presented, would seem to constitute the only satisfactory evidence that there were no claims against the estate."

It is claimed by the plaintiffs' attorney that Frank and Henry Friese are the real parties in interest and therefore entitled to maintain the action under our statute. We have seen that heirs or devisees, as such, have no right to decedent's property until his debts are paid. The creditors are the first preferred parties in interest, and until satisfied, heirs or legatees have no enforceable interest. *Haynes* v. *Harris,* 33 Iowa 517.

It is further claimed that these plaintiffs are entitled to this property under the theory that the contract in question may be construed as the last will and testament of Ludwig Friese. Conceding that this was a will, for the purposes of this case, the same objection to the enforcement of their claimed rights in this suit is apparent as in cases of suits by the heirs as the parties in interest. The right of legatees to the property does not follow until creditors have been paid. A legatee cannot, under ordinary circumstances, enforce pay-

ment of a legacy by a suit against the debtor of the estate in case the debt has been bequeathed by will to such legatee. *Melms* v. *Pfister,* 59 Wis. 186, 18 N. W. 225; *Trotter* v. *Association,* 9 S. D. 596, 70 N. W. 843. There are exceptions to the above rule, but none of them exist in the present case.

It is urged that there has been a waiver by the defendant, and that he cannot now be heard to raise any objections to these plaintiffs suing as individuals for their individual or personal cause of action. This position is not tenable. Were the defendant the only person interested, there might be a waiver. There are other heirs of Ludwig Friese, as shown by the record, and the defendant's waiver could not affect the rights of other heirs or creditors.

It is also urged that the contract of Ludwig Friese and wife with the defendant was a contract made for the benefit of these substituted plaintiffs, and that they may enforce the contract as one made for their benefit. There is no evidence in this record that the contract was made primarily for the benefit of these two sons. That there was an ultimate though contingent benefit that they might derive therefrom is true, but it is not capable of substantiation at all that the contract was made primarily for their benefit. The case is not therefore, within the principles laid down in *Parlin* v. *Brandenburg,* 2 N. D. 477, 52 N. W. 405, and other like decisions.

It is claimed that this court should now permit the administrator to be substituted as plaintiff, and decide the case upon the merits from the record before us. The record is not in shape to justify such substitution, if it should be conceded that it is a proper case for such substitution, otherwise. The two sons, Frank and Henry, cannot legally maintain the action in its present form, and at its present stage. Whether their rights can be adjudicated in the first instance outside of the county court, we do not intimate any opinion. The district court determined the case on the merits, and gave judgment for the defendant on the merits, which was equivalent to a dismissal of the action, though there was no order of dismissal in terms.

The district court is directed to set aside its judgment, and to direct judgment of dismissal to be entered so far as these two plaintiffs are concerned, as they are not the proper parties to maintain the action in its present form. Such judgment shall be without prejudice to another action or proceeding, in any form or court, so far

as the merits are concerned, or otherwise. The defendant shall recover his costs in both courts. Modified. All concur.

(95 N. W. Rep. 446.)

LYMAN-ELIEL DRUG CO. *v.* COOKE.

Opinion filed May 27, 1903.

Postponement in Justice Court—Objections Specifically Stated.

1. On an appeal to the district court from a judgment of a justice of the peace, alleged to have been rendered without jurisdiction, a party will not be allowed to avail himself of a loss of jurisdiction by reason of the alleged insufficiency of an affidavit for a postponement unless such insufficiency was specifically pointed out to the justice in an objection to the postponement. A general objection to the postponement is not sufficient.

On Appeal, Failure to File Bond Must Be First Objected to in Justice Court.

2. On such an appeal, the party appealing cannot avail himself in the district court of the fact that no undertaking was furnished under section 6651, Rev. Codes 1899, when this fact was in no way brought to the attention of the justice.

Postponement Pending Trial.

3. A justice of the peace has authority, under section 6650, Rev. Codes 1899, to grant a postponement of the trial after it has commenced, upon a satisfactory showing of the necessity therefor, on account of matters arising or coming to the applicant's knowledge since the trial commenced.

Authority to Postpone Exists Only by Statute in Justice Court.

4. A justice of the peace has no jurisdiction or power to grant a continuance unless authority therefor is given him by statute, as a justice court is one of limited jurisdiction.

Appeal from District Court, Wells County; *S. L. Glaspell,* J.

Action by Lyman-Eliel Drug Company against W. E. Cooke. Judgment for plaintiff. Defendant appeals.

Affirmed.

Hanchett & Wartner, for appellant.

The court of a justice of the peace, being of limited jurisdiction, can acquire, and hold jurisdiction, only in the manner prescribed by statute. *Phelps* v. *McCollom,* 10 N. D. 536, 81 N. W. Rep. 292;

Sluga v. *Walker,* 9 N. D. 108, 81 N. W. Rep. 282; *May* v. *Grawert,* 90 N. W. Rep. 383; *Hagen* v. *Johnson,* 86 N. W. Rep. 143.

Otto Grethen, for respondent.

An objection must state the grounds thereof, and point them out specifically that they may be corrected. 8 Enc. Pl. & Pr. 163. Exceptions must be taken at the time of the ruling; if not so taken are waived. Ibid, 165, 166. Appellant failed to give specific reasons for his objections and exceptions in the justice court, and could not make good this defect, in his notice of appeal, or his specification of errors on appeal, in either the district or supreme court. "Appellant is very prodigal of his specification of errors since the case left the justice court. But he should have begun to specify earlier." Abbot's Trial Brief, 259, and cases cited. Failure to specify is fatal to review, and exception must be taken and noted at the time of the ruling. Ibid 271, 272, 8 Enc. Pl. & Pr. 165; *Parker* v. *Waycross & F. R. Co.,* 81 Ga. 387, 8 S. E. Rep. 871; *Jordan* v. *Kavanaugh,* 63 Iowa 152, 18 N. W. Rep. 151. Appellant hangs his case on a comma. "The punctuation marks in the published copies of an act are not allowed to control, enlarge or restrict the plain and evident meaning of the legislature as disclosed by the language employed." Black on Interpretation of Laws, 185. The court will punctuate, or disregard punctuation, as may be necessary. *Union Refrig. Transit Co.* v. *Lynch,* 18 Utah 378, 55 Pac. 639. Punctuation marks do not control the words of a contract, but are controlled by it. *Holmes* v. *Phoenix Ins. Co.,* 98 Fed. 240, 47 L. R. A. 308; *Lessee of Ewing* v. *Burnet,* 11 Pet. 41, 9 L. Ed. 624.

MORGAN, J. This action was commenced in justice's court. During the trial before the justice without a jury, and after depositions had been read as evidence, and after the defendant had been called by the plaintiff as a witness in its behalf, and during defendant's examination as such witness, the plaintiff moved for a continuance for the purpose of procuring further testimony which it deemed material. In support of the motion to postpone the trial, the affidavit of plaintiff's attorney was presented and read, and a continuance was granted from November 27th to December 18th. The defendant reserved an exception to this ruling. On December 18th, the date to which the trial was postponed, defendant appeared specially, and moved "to dismiss the action on the ground that by the continuance of this action heretofore the court has lost jurisdiction." This motion was denied. The defendant did not thereafter participate

in the trial. The plaintiff introduced further evidence, and moved for judgment, which was granted in plaintiff's favor, and against the defendant, for the sum of $155.66, damages and costs. The defendant appealed to the district court from the judgment on questions of law alone. In his notice of appeal to that court, he specifies the errors relied on for a reversal of the judgment appealed from, as follows: "(1) The justice erred to postpone said trial for more than twenty-four hours after the trial had begun, and a witness had been sworn and testified, upon the application of the plaintiff, and against the objection of the defendant, from November 27 to December 18, 1900. (2) The justice erred to deny defendant's motion to dismiss the action on December 18, 1900, under the special appearance, on the ground that the court lost jurisdiction by continuing said action for more than twenty-four hours after the trial commenced, against objection of defendant. (3) The justice erred in entering judgment on December 18, 1900, after having lost jurisdiction, in favor of plaintiff, and to which defendant excepted." The district court affirmed the judgment of the justice of the peace. The appeal to this court is from the judgment entered in the district court.

In this court appellant specifies the same errors specified on his appeal to the district court, and adds two specifications to the effect that the district court erred in entering a judgment affirming the judgment of the justice of the peace, for the reason that such judgment was void for want of jurisdiction, because the case was postponed by said justice from November 27th to December 18th without any proper showing, and without any bond having been given as security for costs. The specifications in this court are that the district court erred in affirming the judgment of the justice of the peace, because the justice of the peace lost jurisdiction of the case for the reasons, first, that he had in no event power to postpone the case from November 27th to December 18th; second, that the affidavit on which the continuance was granted was insufficient, in not showing diligence to procure the testimony desired; third, that such continuance was granted without the plaintiff furnishing the undertaking for costs provided for by section 6651, Rev. Codes 1899. Neither of the two last grounds of objection to the action of the justice was mentioned by the appellant, either in the notice of appeal, or before the justice at the trial. When the motion for the continuance was made in justice court, and the affidavit was produced

and read, the attorneys argued the motion. The justice denied the motion, and the justice's docket shows the following entry after the decision: "To which defendant excepts and objects." Until after this ruling, the docket does not show that any specific objections were made to the sufficiency of the affidavit to warrant a postponement, or that an undertaking was required by statute to be given on continuances or postponements granted for more than five days. The justice's attention was not called at any stage of the proceedings to the fact that the application could not, as claimed by the defendant, be allowed under any circumstances without an undertaking for costs, or to the fact that the affidavit was defective, as not showing due diligence in procuring the evidence desired before the trial commenced. Compliance with the requirement that an undertaking must be given could undoubtedly have been made, and the affidavit could have been amended or substituted by another so that the claimed defects would not exist. By not specifying these two alleged grounds of objection to the application when made, defendant must be deemed to have waived them. On appeals to the district court on questions of law alone, under section 6771a, Rev. Codes 1899, the appellant is required to specify in his notice of appeal the errors of law complained of, and such specifications must intelligibly refer to the ruling or proceeding complained of, and the district court shall "review and determine only such errors in law as are specified with reasonable certainty in the notice of appeal." The most that can be claimed under the specifications in the notice of appeal is that the justice lost jurisdiction by the adjournment from November 27th to December 18th. This is not a specification of any fact, except that jurisdiction was lost, and the reason why lost, viz., that an adjournment for more than twenty-four hours was allowed. It is true that the reasons for the objections specified on the notice of appeal need not be given, but this is mentioned as showing that, when the continuance was objected to after the ruling in justice court, the defendant did not have in his mind the making of the objection on any ground save the single one that no power was given to the justice under any circumstances to grant a postponement for more than twenty-four hours after a trial had commenced. The defendant not having raised the question of the insufficiency of the affidavit in justice court, and not having raised the question that no undertaking was furnished, we hold that such questions cannot be raised in the district court for the first time. Enc. Pl. & Pr. vol. 8, p. 163.

On the assumption that the defendant was entitled to raise the question of the jurisdiction of the justice to enter the judgment, as having been raised before the justice and in the district court by an objection such as was made after the ruling and the specification in the notice of appeal, we will consider the question whether the justice of the peace can legally, under any circumstances, postpone the trial for more than twenty-four hours after it has been commenced. This depends, in part, upon the construction to be given to section 6683, Rev. Codes 1899, which is as follows: "Subject to the provisions of article 2 of this chapter, the trial must commence as soon as the issues are joined or as soon as the jury is empaneled, and continue until concluded without an intermission for more than twenty-four hours at any one time. * * *" On the construction of this section, the appellant claims as follows: "We think from the reading of this section, and the position in which it is placed in the Code, as well as its punctuation, it is too clear to admit of doubt that its clause which provides that, when the trial has been commenced, it shall 'continue until concluded without an intermission for more than twenty-four hours at any one time,' is absolute, and is not modified or qualified in any respect by the first part of the first clause of the section, which relates to and qualifies only the provision as to the time of the commencement of the trial." In other words, the appellant disconnects the parts of the section providing when the trial shall commence and the parts providing that it shall continue until concluded, as absolutely as though these provisions were enacted in separate sentences, sections, or even chapters. From our reading and consideration of the section, in connection with other sections of the justices' code, we arrive at the opposite conclusion. The word "trial" has for its predicate the verbs "commence" and "continue," each in parts of the sentence claimed to be disconnected. We do not understand that this section provides that, after the trial has commenced, it must continue until concluded, without reference to the provision of article 2.

As section 6683, Rev. Codes 1899, does not prohibit a postponement of a trial, providing article 2 authorizes such postponement after the trial has commenced, it remains to be determined whether article 2 contains authority for such postponement after the trial has commenced. In our judgment, section 6650, Rev. Codes 1899, is authority for such postponement, upon cause shown, after the trial has commenced. This section, so far as material, reads as follows:

"The trial may be postponed upon the application of either party for a period not exceeding sixty days: (1) The party making the application must prove by his own oath or otherwise, that he cannot for want of material testimony, which he expects to procure, safely proceed to trial and must show in what respect the testimony expected is material and that he has used due diligence to procure it and has been unable to do so." Unless this section authorizes a postponement after the commencement of the trial, a justice has no authority to allow such postponement, as he has only such powers in reference to granting postponements as the statute confers upon him. It is clear from a reading of this section that the justice is given authority, in general terms, to postpone the trial of a cause for a period not exceeding sixty days. This language in no way indicates at what stage of the case such postponement may be granted. It does not specify that the application must be made before the trial commences, nor does it say that it may be made after the trial has commenced. The time when the application may be made is not specified in this section of the statute which authorizes the postponement. It is argued that it must necessarily refer to the time before the commencement of the action, for the reason that the subsequent part of this section, prescribing what the affidavit for the continuance must set forth, contains the sentence, "That he cannot * * * safely proceed to trial." The reasoning advanced by appellant is that, if it was intended to authorize a postponement after trial commenced, the language would have been, "proceed to" or "with the trial." We cannot concur in this contention. If a postponement is granted under section 6650 after the trial commences, the trial stops. All proceedings on the trial, except as to depositions taken or to be taken, go down. The trial is then a matter for the future. A postponement under section 6650 is to be distinguished in this respect from an intermission under section 6683. When considered in this light, the language of the statute in using the words "proceed to" is not inconsistent with the postponement in the middle of a trial. The trial is postponed, if done after the trial commences, in the same sense as if done before trial commences. The construction contended for seems to us too narrow and technical, and does violence to the general language of this section, authorizing a continuance of the trial. The object of authorizing a postponement is to enable parties to procure necessary evidence and prepare for the trial, in order that the court may do justice to

the parties after consideration of all the evidence. Such a reason for the postponement may occur in the midst of a trial, and be equally as meritorious and free from laches as in other cases justifying a continuance before the trial commences. If the application is founded on matters known to the applicant when the trial commenced, it should be denied because not made sooner. In such a case the application would come too late. A stricter scrutiny of the application would be required when made after the trial commences than when made before. We think that a fair construction of all of section 6650, taken together, must lead to the conclusion that it authorizes a postponement during the progress of the trial, upon good cause shown, upon grounds arising since the trial began, or coming to the applicant's knowledge since, and which could not, with diligence, have been ascertained before. No authorities are cited for or against this construction, upon similar statutes. We have examined the early cases in New York and New Jersey holding that a justice has no power to grant a continuance after the trial has commenced, but these cases throw no light on the subject. None of them is based upon similar statutes, and they are therefore not in point, as we expressly place our decision upon the ground that the statute confers power to postpone the cause after the trial has commenced. A case very nearly in point is the case of *Griffin* v. *Spaulding*, 6 Vt. 60. In that case the court says: "The statute confines the power to adjourn to no particular stage of the proceedings, and why should it? The reasons may be as cogent in the progress of the cause as at its commencement, as it is found in the higher courts, who often continue a cause after the jury are sworn, and sometimes when the testimony is nearly closed." The Vermont statute then in force is not in force now, but, from the reading of the opinion, it is evident that it authorized the justice to postpone a cause, and like ours, did not expressly state that it must be before the trial commenced, or that it could be done after the trial commenced. As further sustaining our construction of section 6683 and section 6650, Rev. Codes 1899, we consider that section 6666 upholds the construction given by us to these sections. That section provides that either party may be allowed to amend his pleadings at any time before the conclusion of the trial, if substantial justice will be promoted thereby, and that, if it appears to the satisfaction of the court that the amendment will necessitate a postponement, the amendment shall not be allowed, except on payment of costs by the applicant.

All of the above sections were enacted at the same time, and to hold that section 6683 forbids a continuance in all cases after the trial has commenced would be to construe it as repealing or nullifying section 6666 altogether. By construing these sections as we do, effect is given to each, without a conflict with the others. To hold that justices are not warranted in any case to grant continuances after the trial has commenced would undoubtedly often lead to abuses and hardships, and such must have been in the legislative mind when these sections of the justices' code were enacted.

The judgment of the district court is affirmed. All concur.

(94 N. W. Rep. 1041.)

CARL WEGNER *v.* DAVID LUBENOW, CARL KREISER AND MARTIN BENES.

Opinion filed May 28, 1903.

Gross Sum Paid for Life Lease of Agricultural Land, Not Rent.

1. Section 3310, Rev. Codes, which declares invalid all leases of agricultural lands which are made for a longer period than ten years, in which rent or service is reserved, construed, and *held* that the term "rent," as used in said section, is to be construed in its original and technical sense, as profit arising out of the land and payable periodically. Further, that a gross sum paid for a life lease of agricultural land is not "rent," within the meaning of said section, but is consideration for the conveyance of the life estate, and such a lease is not invalid under said section. Whether said section applies to life leases at all, or whether leases to which it does apply are entirely void, or void only as to the excess, is not determined.

Lease of Agricultural Land for Forty Years, or Life of Lessees, Conveys a Life Estate.

2. A certain lease of agricultural land "for the full term of forty years or during the full term of the natural life" of the lessees, for a cash consideration of $200, construed, and *held* to convey a life estate, and not an estate for years, and that the same is not within the condemnation of section 3310, Rev. Codes.

Where No Selection of Homestead from Large Body of Land is Made, Wife's Failure to Join in Lease Not Fatal Thereto.

3. It is *held*, on the facts set out in the opinion, from which it appears that the lessor had not selected his homestead, and that he still had 300 acres contiguous to the family residence from which to make a selection, that the failure of his wife to join in the lease in question did not render it invalid. *Foogman* v. *Patterson*, 83 N. W. 15, 9 N. D. 254, followed.

To Authorize Recovery of Treble Damages, the Entry Must Be Forcible.

4. To authorize a recovery of treble damages for a forcible ejectment from real property, under section 5007, Rev. Codes, it is necessary that the entry shall be forcible, but it is not necessary that the force shall be actually applied. It is enough if it is present and threatened, and is justly to be feared.

Verdict Justified by Evidence.

5. It is *held* in this case that there is evidence of a substantial nature fairly tending to sustain the verdict of the jury, and it cannot, therefore, be disturbed.

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

Action by Carl Wegner against David Lubenow and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Purcell & Bradley, for appellants.

The testimony did not bring the plaintiff within the provisions of section 5007, so as to entitle him to treble damages, as there was no forcible ejection under the testimony. Plaintiff testified that no force whatever was used; and that upon mere assertion of Sunderhauf, that plaintiff had no right to stay and would have to move, he voluntarily left the premises, Sunderhauf in no manner interfering with his person or property.

The lease on which plaintiff based his case is void under section 3310. Like provisions are found in section 717 Civil Code of Cal., and section 14, article 1, constitution of New York. In *Odell* v. *Durant,* 62 N. Y. 524, an action to recover rent on a seventeen year lease of agricultural land, the objection, the lease was void under above provision, held fatal to recovery. In *Clark* v. *Barnes,* 76 N. Y. 301, two leases, one for eight, and another for twelve years from expiration of first, it was held, that the two constituted one lease, and the same was held void *in toto.*

The lease is void under section 3608 relating to conveyance of homestead. Homestead can be conveyed only in the mode prescribed by law, and failure of wife to join in deed renders it void. *Houghton* v. *Lee,* 50 Cal. 101; *Hershy* v. *Dennis,* 50 Cal. 77; *Gagliardo* v. *Dumont,* 54 Cal. 496; *Maudlin* v. *Cox,* 7 Pac. Rep. 805.

The conveyance in question not signed by wife is void. *Flege* v. *Garvey,* 47 Cal. 371; *Wea Gas Coal & Oil Co.* v. *Franklin Land Co.,* 38 Pac. Rep. 790.

A. L. Parsons and *Redmon, Ink & Wallace,* for respondents.

The question of homestead is not in issue; it is not pleaded, and if it were, it could not avail, because no selection having been made, as provided by section 3606, Rev. Codes, there was no way to determine its limits, out of the half section in which it was embraced. *Foogman* v. *Patterson,* 9 N. D. 260, 83 N. W. Rep. 15.

The instrument in question is not a lease but a conveyance of a life interest. No rent was reserved, and that a life interest was intended is shown by the extensive improvement made by the grantees of the life interest. Full consideration was paid in advance. If the intention is not clear, circumstances surrounding the execution may be considered. *Warring* v. *Louisville R. Co.,* 19 Fed. Rep. 863; *Edwards* v. *McLean,* 122 N. Y. 302, 25 N. E. Rep. 483. Where there are written and printed clauses, if inconsistent, the written prevail. *Heiple* v. *Reinhart,* 100 Iowa 525, 69 N. W. Rep. 871; *Wilcox* v. *Montour Iron, etc., Co.,* 147 Pa. St. 540.

The cases of *O'Dell* v. *Durant,* 62 N. Y. 524, and *Clark* v. *Barnes,* 76 N. Y. 301, are not applicable. They were brought upon ordinary leases where rents were reserved, not upon grants of life interest for a specific sum.

YOUNG, C. J. Plaintiff commenced this action in the district court of Richland county to recover possession of twenty acres of agricultural land situated in that county, and for treble damages for the use of the same while it was witheld by the defendants. The trial was to a jury. A verdict was returned in favor of the plaintiff upon all the issues, and for $400 damages. Defendant moved for a new trial, his motion was overruled, and judgment was entered upon the verdict. This appeal is from the judgment.

The plaintiff bases his right to the possession of the premises in question upon a written contract or lease executed by the defendant Carl Krieser. The defendants claim that the lease is void. The facts essential to a determination of the questions involved are as follows: On June 13, 1892, Carl Krieser owned, and with his family resided upon, the west half of section 13, township 131, north of range 52 west. On the date above named, Krieser, his wife not joining him, gave a written lease of twenty acres of the above tract to the plaintiff and his wife. In preparing the instrument an ordinary blank form of lease was used, and such additions were made

in writing as were necessary to express their contract. So far as important, it is as follows:

"This indenture, made this 13th day of June, 1892, by and between Carl Krieser, party of the first part, lessor, and Carl Wegner and Wilhelmina Wegner, his wife, parties of the second part, lessees:

"Witnesseth: That the said party of the first part, in consideration of the rents and covenants hereinafter mentioned, does hereby demise, lease and let unto the said party of the second part, and the said parties of the second part do hereby hire and take from the said party of the first part, the following described premises situated in the county of Richland and state of North Dakota, to wit: The south half of the southwest quarter of the southwest quarter, in section 13, township 131 north of range 52 W.," containing twenty acres;

"To have and to hold the above-rented premises unto the said lessee *and their* heirs and assigns for and during the full term of *forty years* from and after the *13th* day of *June, 1892, or during the full term of his natural life or during the term of his wife's natural life or both.* And the said lessee agreed to and with the said lessor to pay as rent for the above mentioned premises the sum of *two hundred* dollars *paid cash in hand, receipt whereof is hereby acknowledged; in consideration of such payment they are to have full and absolute possession of aforesaid premises during the full term of their natural lives without any dictation on the part of said lessor.* * * * "

The lease was signed by the plaintiff and his wife and by the lessor, and was duly acknowledged and recorded. The portions in italics are in writing. The remaining portions are printed. The plaintiff paid to Krieser $200 in cash for the interest conveyed by the lease, and immediately took possession of the premises, built a house and barn thereon at a cost of $740, and occupied the premises as his home until April 24, 1900, when he was ejected by the defendant's agent. In 1895 Krieser and his wife deeded the northwest quarter to David Lubenow, and in the following year they also deeded the southwest quarter to him. In 1889 Lubenow entered into a contract to convey both quarter sections to the defendant Benes. In none of these instruments was the twenty acre tract in question excepted. All of the defendants had notice, however, of plaintiff's interest in the premises.

All of the twenty errors assigned by appellants' counsel relate to three propositions which are urged as reasons for reversing the judgment.

It is contended in the first place that the lease is void under section 3310, Rev. Codes, which provides that "no lease or grant of agricultural land for a longer period than ten years, in which shall be reserved any rent or service of any kind, shall be valid." This section has never been construed in this jurisdiction. Substantially the same provision is found in California. Section 717, Civ. Code. So far as we can learn, it has not been before the courts of that state. This provision, as we find it in our Code, and also in California, no doubt, had its origin in section 14 of article 1 of the Constitution of New York of 1846, which is as follows: "No lease or grant of agricultural land for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid." Counsel for appellants rely upon the decisions of the courts of New York to sustain their contention that this lease is void. There is an absence of harmony of construction of this provision, as well as of its application, in the New York cases. Counsel rely upon *Odell* v. *Durant,* 62 N. Y. 524, and *Clark* v. *Barnes,* 76 N. Y. 301, 32 Am. Rep. 306. In the case first referred to, the action was to recover the annual rent reserved in a lease of agricultural land for a term of seventeen years. It was held that the lease was void, under the constitutional provision referred to. In the next case one Clark executed two leases to Barnes—one for eight years and the second for twelve years—the last one to take effect at the expiration of the first. Barnes occupied the premises and paid the rent due under the first lease until its expiration, at which time Clark brought suit to recover possession, claiming that the lease for twelve years was void. The court construed the two leases as one, and sustained the contention. After quoting the constitutional provision, the court said: "This provision condemns all leases for a longer period than twelve years. A lease for a longer period than that would not be valid for twelve years, but the lease itself would be void *in toto.* It is not provided that no lease shall be valid for a longer term than twelve years, but the provision is that the kind of lease described shall be invalid." Other cases held the reverse, and are to the effect that such leases are invalid as to the excess only. In *Hart* v. *Hart,* 22 Barb. 606, it was held that "a lease of agricultural land for twelve years, with a covenant of renewal for twelve

years longer if the lessor shall live, and a further covenant to continue the renewal every twelve years so long as the lessor shall live, is good for the first twelve years; but the covenants for renewal are void, as being in contravention of the constitution." So, in the late case of *Parish* v. *Rogers,* 20 App. Div. 279, 46 N. Y. Supp. 1058, decided in 1897, it was doubted whether the provision in question had any reference whatever to estates for life. The case involved a lease for the natural life of the lessor and his wife, in which annual rent was reserved. It was held that the lease was not rendered invalid by the provision of the Constitution of that state, "certainly until the expiration of the twelve-year limit fixed by the said provision of the constitution." The court, in discussing the question as to whether the provision was applicable to life estates, said: "A particular prohibition upon the free alienation of property cannot be extended or enlarged beyond the terms in which the restriction is expressed by the application of any rule of liberal interpretation. On the contrary, the provision must be made to bear a restrictive interpretation, and be limited in its operation and effect by the language employed. If we hold that an estate for life is *per se* an estate exceeding twelve years in duration, and therefore void, it follows that such estates in agricultural lands, with a reservation of rent, are entirely abrogated, and the owner of property is prohibited from creating such an estate, either for his own life or that of another. * * * It will be observed that there is no declaration of intent to abrogate grants of life estates in agricultural lands in which rent or service of any kind shall be reserved; and since the creation of such estates is not prohibited, either in express terms or by necessary implication, it ill becomes the judiciary to declare such prohibition upon a mere presumption of intention nowhere indicated in the constitution. The purpose of the enactment was not to interdict the creation of such estates, but to limit the period of time beyond which they shall not extend. Where the term is specified in the lease, and exceeds the limitation, it is void *per se*; but where it is left indefinite, and its termination depends upon the contingency of death, which may happen within the period of limitation, it cannot be said to be void *ipso facto,* as being made for a period longer than twelve years. *Non constat* but that the estate will terminate within the period. It does not appear, therefore, from the terms of the grant, that it will last longer than twelve years. In respect to whether the grant is void upon its face, the words 'longer period'

should be construed as meaning a definite period, and as not applicable to estates whose duration is wholly indefinite and uncertain in its duration. This grant is not, by its terms, a lease 'for a longer period than twelve years,' but for an indefinite time, which can only be made definite or fixed by the happening of a contingency, viz., death, which may occur within the limitation. The instrument cannot, therefore, be said to create a term for a longer period than twelve years, within the meaning of the provision." The Supreme Court of Alabama has taken the same view. Section 1836, Code Ala. 1886, provides that "no leasehold estate can be created for a longer term than twenty years." In *Robinson* v. *Hayes,* 83 Ala. 290, 3 South. 674, it was held that "the lease, being void only because of the limitation upon the general authority, is void only as to the excess." We find it unnecessary to a proper decision of this case, however, to determine whether section 3310, Rev. Codes, applies to life leases, or only to leases for definite terms, or whether a lease which violates said section is entirely void or is void only as to the excess (see sections 3369, 3449, Rev. Codes), for the reason that, in our opinion, the lease involved in this case is not, in any event, such a lease as comes within the condemnation of said section. It is only leases "in which shall be reserved any rent or service" that are made invalid, and, in our opinion, this lease reserves no rent or service. There is a marked difference between a consideration paid for a life estate and "rent reserved," as that term is used in this section. This distinction was considered in the early case of *Stephens* v. *Reynolds,* 6 N. Y. 454, decided shortly after the adoption of the constitutional provision in New York. The plaintiff in that case had executed an instrument whereby the plaintiff did "lease, sell, and convey" to the defendant, "for and during the natural life" of the plaintiff, "the whole and entire use and benefit of all the real estate described," and also agreed to devise the same to defendant. The defendant agreed to support the plaintiff for her life. This lease was held to be valid. The court, in its opinion, said: "The leases or grants of land prohibited by the Constitution were such as were held by the tenants upon a reservation of an annual or periodical rent or service to be paid as a compensation for the use of the lands, in contradistinction from a consideration paid for the estate granted. It is still competent to make a grant for life or lives, upon a given consideration, to be paid for the estate. This consideration may be payable all at once, or by installments, or in services, so that it be not

by way of rent. By the constitution, there must be a reservation of rent or service. A reservation is defined to be a keeping aside or providing; as where a man lets or parts with his land, but reserves or provides himself a rent out of it for his own livelihood. Jacob's Law Dict. tit. 'Rent.' And a rent is said to be a sum of money or other consideration, issuing yearly out of lands or tenements. Plowden, 132, 138, 141. Blackstone defines rent or reditus as a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance. And it is defined to be a yearly profit issuing out of lands. It must be a profit, but it is not necessary that it should be in money, for spurs, capons, horses, corn, and other matters are frequently rendered for rent. This profit must be certain, or capable of being reduced to a certainty. It must also issue yearly. 2 Bl. Com. 41; Jacob's Law Dict. tit. 'Rent.' Now, the consideration agreed to be rendered for the use of the lands in question, though it was to consist in services, cannot be characterized as rent, or service rendered, within the meaning of the constitution. It was a continuing consideration, and not rent. * * * The services were not reserved as rent, but were to be in consideration for the conveyance of the estate, and for the executory agreement of the appellant to devise the farm. It was, from its very nature, a continuing consideration." In a concurring opinion, Johnson, J., said: "The covenant needs only to be looked at, to see that it does not reserve rent or service, in the technical sense of those terms, but only imposes personal obligations binding on the covenantor. Rent is a certain yearly profit, in money, provisions, chattels, or labor, issuing out of land and tenements, in retribution for their use. 3 Kent's Com. 460. It is a certain and periodical return. The covenant in this case is for nothing certain in amount, nor periodical in time of performance." This case was followed in the case of *Parsell* v. *Stryker,* 41 N. Y. 480, and the above language was quoted with approval. The lease was for life. The court said: "The consideration provided by the instrument in question, for the occupation of the farm specified therein, was not rent or services, within the intent of the clause of the constitution above cited. That clause of the constitution, as all know, was not aimed at agreements like this, but against manorial leases." It was held that, to bring a lease within the prohibition of the constitution, "it must reserve rent, as rent, payable at stated periods, and that a grant or lease of land for life or for a long term of years, for a

specified consideration, whether payable in installments or at one time is not such a lease." The case last cited was followed in *Rutheford* v. *Graham*, 4 Hun. 796, in which the plaintiff "leased and farm let agricultural lands to the defendant from April 1, 1868, to April 1, 1874," on an agreement that, if the plaintiff was living at the expiration of that time, the lease was to be extended for the term of her natural life. The defendant agreed to pay $500 for the fixed period, and $400 in case of an extension. It was held that this instrument did not violate the constitution.

It is quite clear that the lease under consideration in this case conveyed a life estate, and not an estate for years. The period of enjoyment is not limited by its terms to forty years, or any other fixed period, as will appear from an examination of its provisions. It will be seen that, if the plaintiff and his wife should die before the expiration of 40 years, the lease would terminate at their death, and, further, that if they survived the forty year period it would not end when the forty years had elapsed, but would end only at their death; so that it is limited by death, whether that event should occur either before or after the lapse of the forty years. After reciting the receipt of the cash consideration, the lease recites that "in consideration of such payment they are to have full and absolute possession of the aforesaid premises during the full term of their natural lives without any dictation on the part of said lessor." The previous clause, reciting that the lessees are to hold the premises "for and during the full term of forty years * * * or during the full term of his natural life or during the term of his wife's natural life, or both," does not conflict with this construction, for even the language of that clause makes the lives of the plaintiff and his wife govern the period covered by the lease. As a life lease it may or may not be for a longer period than ten years, depending wholly upon the contingency of the death of the lessees. Whether, as a life lease, it is under the ban of section 3310, *supra*, in whole or in part, we do not decide, for the reason that, if it be conceded that life leases are included and are prohibited, yet it is clear that not all life leases, or all leases for years are prohibited. It is only those in which rent or service is reserved. And no rent is reserved by this lease, within the meaning of section 3310, Rev. Codes, as the provision has been construed in the cases above cited. The lease provides for the payment of no annual or periodical payments whatever. The $200 cash payment which was made at the execution

of the lease was not profit issuing out of the land, and in no sense comes within the meaning of the term "rent," as used in the above section. On the contrary it was merely a cash consideration for the transfer of the life estate in the land in question to the plaintiff and his wife. As has been seen, it is competent to make a grant of a life estate in agricultural lands. It is only leases of agricultural lands wherein rent or service is reserved which are declared invalid by section 3310, Rev. Codes. This lease reserved no rent or service, and therefore is not affected by the provisions of that section.

Counsel's next contention is that the lease is void because the lessor's wife did not join in its execution. This, they claim, was essential to its validity under section 3608, Rev. Codes, which provides that " a homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledeged by both husband and wife." This contention cannot be sustained. It is true, the twenty acre tract included in the lease was a part of the governmental subdivision of 160 acres upon which the lessor and his family resided, but no homestead was selected or homestead declaration filed prior to or after the execution of the lease. The lessor's residence was not upon the twenty acres, and after the execution of the lease the lessor still had 300 acres from which to select the homestead. In *Foogman* v. *Patterson,* 9 N. D. 254, 83 N. W. 15, we held that, "where no homestead has been selected or homestead declaration filed for record as provided by law, * * * no presumption of law arises that the debtor claims as his homestead the particular governmental quarter section upon which his dwelling house stands;" further, that the portions selected must be contiguous and must include the dwelling. By leasing the twenty acre tract the lessor declared, in effect, that the homestead thereafter to be selected should be carved out of the remaining 300 acres. This we think he had a right to do.

Finally it is claimed that "the damages given by the jury by their verdict were in excess of any damages which could have been found, based upon competent evidence." This contention cannot be sustained. We have no means of knowing whether the $400 allowed by the jury was for actual damages or for treble damages, but, in either event, the verdict has substantial support in the evidence, and cannot, therefore, be disturbed. Counsel contend that there is no evidence tending to show that the plaintiff was forcibly ejected, within

the meaning of section 5007, Rev. Codes, which provides that "for forcibly ejecting or excluding a person from the possession of real property the measure of damages is three times such a sum as would compensate for the detriment caused to him by the act complained of." We think otherwise. It is true, there is no evidence that plaintiff was put out of the premises by the actual application of physical force, but there was a show of force and threats, which accomplished the same purpose. It appears that the defendants employed one E. A. Sunderhauf to get possession of the premises for them; that the latter came to the plaintiff's house and represented that he was a deputy sheriff, and, after producing papers purporting to be of an official nature, threatened to put the plaintiff out of possession. Sunderhauf was not a deputy sheriff, and in fact no action had been instituted to recover possession. The plaintiff yielded possession under the direction of the supposed officer, and under circumstances from which the jury might properly find that the plaintiff had reason to believe that he would be put out by the application of physical force if he did not obey the commands of the supposed officer. It is not necessary that force be actually applied. "Force either actually applied or justly to be feared from the conduct of the defendant" is sufficient to constitute a forcible entry. *Frazier* v. *Hanlon,* 5 Cal. 156. "It will be sufficient if one submit upon or in consequence of apparent inability to resist the force arrayed against him, without its being shown or inferred that he was under fear of personal injury." *Berry* v. *Williams,* 21 N. J. Law, 423; *Hendrikson* v. *Hendrikson,* 12 N. J. Law 202. As was said by the court in *Dickinson* v. *Maguire,* 9 Cal. 46, in reference to a forcible detainer: "If, when the possession of the premises is demanded of the party, he, by word or act, look or gesture, gives reasonable ground to apprehend the use of force to prevent the rightful claimant from obtaining peaceable possession, this will be sufficient. It is not necessary for the claimant to wait until actual violence is resorted to." *Wylie* v. *Waddell,* 52 Mo. App. 226; *Oakes* v. *Aldridge,* 46 Mo. App. 11. In *Seitz* v. *Miles,* 16 Mich. 470, an entry by a sheriff under a void writ of restitution, which was made without physical force, was held to have been a forcible entry. The court said: "The complainant had the right to act upon the circumstances as they then appeared. * * * The course of the defendant clearly indicated a design to exert, if necessary, all the power conferred by the writ, and the complainant yielded to

such display of force." The evidence in this case, in our opinion, is sufficient to sustain a finding that the entry was forcible, within the principle of the cases above cited.

Finding no errer in the record, the judgment will be affirmed. All concur.

(95 N. W. Rep. 442.)

SOPHIA OLSON AND OLAF OLSON *v.* JOHN C. SHIRLEY.

Opinion filed May 28, 1903.

Appeals on Law Alone, Regularly Taken, Not Dismissed for Errors in Justice Court.

1. It is not error for the district court to deny a motion to dismiss an appeal from justice court taken upon questions of law only, when the appeal has been regularly taken and perfected, and the only grounds of the motion relate to alleged irregularities in the proceedings in justice court, which do not affect the jurisdiction of the district court over the appeal.

Demurrer Lies for Defect, Not Excess, of Parties.

2. A demurrer for defect of parties is proper when the pleadings show there is a deficiency of parties, but it is not a proper method of attack for an excess of parties. Accordingly, *held,* that, where the only claim is that too many parties have been joined, a demurrer upon this ground was properly overruled.

Under Sec. 6771a, Rev. Codes, Where Justice's Judgment is Reversed, District Court Retains the Action.

3. Under section 6771a, Rev. Codes 1899, which regulates appeals from justice court taken upon questions of law only, and provides that when the decision of the district court reopens the case for trial, the trial shall be had in the district court, it is *held* that the effect of a reversal of the justice's judgment dismissing plaintiff's action was to reopen the case, and that the district court did not err in hearing the case and rendering judgment upon the merits.

Appeal from District Court, Ward County; *John F. Cowan,* J.

Action by Sophia Olson and another against John C. Shirley and wife. Judgment for plaintiffs, and defendants appeal.

Affirmed.

LeSuer & Bradford, for appellants.

The appeal, as to Mrs. Shirley, from justice court, should have been dismissed by the district court, since she was not served with

summons, nor appeared, and objection to jurisdiction was seasonably and properly made. *Vidger et al.* v. *Nolin,* 10 N. D. 353, 87 N. W. Rep. 593; *Leonosio* v. *Bartilino* (S. D.) 63 N. W. Rep. 543. Under section 6677 Rev. Codes, notice to quit must be served, returned, and filed with the justice before he has jurisdiction to issue summons. *Northwestern Loan & Banking Co.* v. *Jonasen et al.,* 82 N. W. Rep. 94. Justice cannot grant a motion for continuance to enable counsel to look up law, and granting such motion, divests him of jurisdiction. *Bonoit* v. *Revoir,* 8 N. D. 226, 77 N. W. Rep. 605. The appeal was upon law alone. The district court upon its refusal to dismiss the appeal, should have remanded the case to the justice court for further proceedings in conformity to its order, and not proceeded to a final determination of the case. *Coughran* v. *Wilson,* (S. D.) 63 N. W. Rep. 774; *Lindskog* v. *Schouweiler,* 80 N. W. Rep. 190. Justice's record, showing the filing of the notice to quit, on return day of summons, cannot be impeached collaterally by affidavit. *Mouser* v. *Palmer* (S. D.) 50 N. W. Rep. 967.

James Johnson, for respondents.

By appearing on return day and asking continuance for the purpose of correcting the returns, defendants gave jurisdiction to the court, even if service was defective. *William Deering* v. *Joseph Venne,* 7 N. D. 576, 75 N. W. Rep. 584. Justice did not lose jurisdiction by granting such continuance. *Benoit* v. *Revoir,* 8 N. D. 226, 77 N. W. Rep. 605.

YOUNG, C. J. This case is before us on the defendants' appeal from a judgment entered against them by the district court of Ward county. The action was brought in justice court to recover the possession of certain rooms in a dwelling house situated in the city of Minot, and for $75 delinquent rent. Two continuances were granted by the justice upon plaintiffs' motion and over defendants' objection. At the date of the hearing fixed at the last adjournment the justice, on defendants' motion, entered judgment dismissing the action upon the ground that he had lost jurisdiction by the adjournment. In due time the plaintiffs appealed to the district court upon questions of law only. When the case was reached in the district court, the defendants made a motion to dismiss the appeal upon five grounds, all of which related to certain alleged jurisdictional defects in the proceedings in justice court. It was not alleged that the appeal

had not been properly taken and perfected, or that the record had not been transmitted by the justice, nor did it state any other ground affecting the right of the district court to hear and determine the questions of law presented by the plaintiffs' appeal. The motion was denied. Thereafter the defendants interposed a demurrer to the complaint upon the ground that there is a defect of parties plaintiff and defendant. The further proceedings are recorded in the abstract as follows: "The demurrer overruled, and defendants moved for leave to answer, which motion was granted, after which defendants filed their answer, and to the counterclaim pleaded in said answer plaintiffs demurred. The defendants asked leave to withdraw said answer, and said leave to withdraw was granted. Defendants being in default, plaintiffs offered proof before the court in support of their claim." Thereafter judgment was entered for plaintiffs for the possession of the premises in question and the amount demanded for rent, as prayed for in their complaint, from which judgment this appeal is taken.

It is urged by counsel for defendants that the district court erred in denying their motion to dismiss the appeal. In this ruling, in our opinion, no error was committed. All of the several grounds upon which the motion was based went to the proceedings in the justice court, and none of them affected the jurisdiction of the district court to hear and determine the plaintiff's appeal, which, concededly, was regularly taken and perfected. This being true, it would have been error to have granted the motion, and thus deprive plaintiffs of the right to have the action of the justice in dismissing their case reviewed in the district court. It is further urged that the court erred in overruling the defendants' demurrer. No error was committed in this ruling. The demurrer was on the ground that there is a defect of parties. There is, in fact, no defect in parties, and it is not claimed that there is. The defendant's contention is that there are too many parties. That question is not reached by this demurrer. "A defect of parties for which a demurrer is allowed is a deficiency, not an excess, of parties." Bliss on Code Pleading (2d Ed.) section 411. "That is, the defendant cannot demur upon the ground that there are too many plaintiffs or defendants, but may do so if the petition shows that others should be joined. It must be a defect, and not a misjoinder." Maxwell on Code Pl. section 372. See also, *Lewis* v. *Williams,* 3 Minn. 151 (Gil. 95); *Nichols* v. *Randall,* 5 Minn. 304 (Gil. 240).

It is also urged that the district court, upon reversing the judgment of dismissal of the justice court, should have remanded the case to the justice for further proceedings, and that the entry of judgment by the district court was, therefore, erroneous. *Coughran* v. *Wilson* (S. D.) 63 N. W. Rep. 774, and *Lindskog* v. *Schouweiler,* (S. D.) 80 N. W. Rep. 190, are cited as sustaining this view The cases are not in point. These cases were decided under section 6136, Comp. Laws Dakota, which requires that the district court shall, upon an appeal from the justice court upon questions of law only, "when necessary and proper, order a new trial." The statute referred to does not, in express language, state where the new trial is to occur, whether in justice or in district court; and, by construction, it was held to require the trial to be in the justice court. The section under which this appeal is taken (section 6771a, Rev. Codes 1899) is altogether different and leaves no room for construction. It provides that: "When the decision of the district court reopens the case for the trial of an issue of fact, the decision shall direct that the action be retained and placed on the calendar of the court for trial accordingly as in other cases." The necessary effect of the decision of the district court upon plaintiffs' appeal in reversing the judgment of dismissal was to reopen the case for trial upon the merits, and the plain language of the statute requires the trial to be in the district court, instead of being remanded to the justice court. See *Grovenor* v. *Signor,* 10 N. D. 503, 88 N. W. Rep. 278.

Error is not assigned upon the court's order reversing the judgment of dismissal and reopening the case. We must assume, therefore, that it was proper. The only errors presented are those which we have considered.

It follows that the judgment must be affirmed, and it is so ordered. All concur.

(96 N. W. Rep. 297.)

AETNA INDEMNITY COMPANY *v.* FRED SCHROEDER, ET AL.

Opinion filed May 29, 1903.

Principal and Agent.

1. The plaintiff became surety for Clemens, a local agent of the Great Western Elevator Company at Leonard, N. D., and became responsible for losses by the elevator company caused by his fraud or dishonesty in his capacity as agent. The plaintiff was about to relieve itself from such suretyship or risk on account of unfavorable reports as to Clemens' drinking and gambling habits, but concluded not to withdraw the bond if Clemens would furnish it an indemnity bond. The plaintiff wrote to Mitchell, the general superintendent of the Great Western Elevator Company, concerning the matter, and asked Mitchell to have Clemens execute a bond with sureties. Mitchell communicated these facts to Clemens, who procured the defendants to sign his indemnity bond. This bond was sent to Mitchell, who sent it to the plaintiff. *Held,* on these and other facts recited in the opinion, that Mitchell was not the agent of the plaintiff to the extent that any knowledge which he might have had as to Clemens' acts of dishonesty or fraudulent acts as agent would be imputed to, and become chargeable to, the plaintiff.

Notice to Agent.

2. The knowledge of an agent will not be imputable to his principal when the agent is a nominal agent merely, or acting as to ministerial matters merely, nor when the agent has knowledge of facts in relation to the matter in which he is acting when his interests, or the interests of another for whom he is acting, are adverse to those of the principal. In such cases the law will not presume that the agent communicated the facts within his knowledge to his principal, and the principal does not become chargeable with such knowledge.

Liability of Principal—Indemnity Bond.

3. If Mitchell had knowledge of the gambling or drinking habits of Clemens, or of other vices not connected with his duties as elevator agent, his failure to disclose such facts to the defendant sureties would not relieve them from liability on the bond.

Release of Sureties.

4. Whenever the duty arises to disclose facts to one about to become surety for an agent, it is only as to facts affecting the risk in respect to the subject-matter of the agency that the duty arises to disclose such facts and subject to this rule, the duty does not arise to disclose facts known as to the personal habits of the agent.

Judgment Notwithstanding Verdict.

5. A motion for judgment notwithstanding the verdict will not be granted under chapter 63, p. 74, Laws 1901, unless it clearly appears from the evidence that the party making the motion is entitled to it as a matter of law, upon the merits. If it appears probable from the record that a different showing can in good faith be made on another trial, the motion should be denied.

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

Action by the Aetna Indemnity Company against Fred Schroeder and Jacob Biewer. Verdict for defendants. Motions for a judgment notwithstanding the verdict and for a new trial were denied, and plaintiff appeals.

Reversed.

Ball, Watson & Maclay, for appellant.

Knowledge possessed by Mitchell not imputed to plaintiff for two reasons:

1st. In procuring the bond, he was not doing the things which ordinarily raise the relationship of agency. If agent at all, he was Clemens' agent. He was the mere channel through whom Clemens was informed that he must give a bond, and through whom such bond was forwarded to plaintiff. This did not create the relation of agency between plaintiff and Mitchell. 2 Pom. Eq. section 668; *Wyllie* v. *Pollen*, 3 De Gex, J. & S. 596, 601.

2d. The plaintiff had concluded to cancel its bond given to the Elevator Company for Clemens' fidelity. But as the Elevator Company desired to keep Clemens, and to enable it to do so, plaintiff consented to accept a counter bond from Clemens. In reality it was given that the Elevator Company might retain Clemens; and in that sense it was for the benefit of the Elevator Company and Clemens, and the case therefore falls under the well defined exception to the rule imputing the knowledge of the agent to the principal, that where the agent is personally interested in procuring the act to be done, it will not be presumed that he will disclose to his principal, information which might result in preventing the performance of the act. Mechem on Agency, section 723; *American Surety Co. of New York* v. *Pauly*, 170 U. S. 133, 155, 18 Sup. Ct. Rep. 552, 42 L. Ed. 977; *Fidelity Co.* v. *Courtney*, 22 Sup. Ct. Rep. 834, 841. The court erred in admitting proof of conversation between Comrie, agent of the Elevator Company, and one Leisen, where the former said that "the

bond was required of Clemens because of his shortage." This was a mere narration of past events, not made as a part of such agent's duty to his principal, and not binding upon the latter, *a fortiori,* not binding upon plaintiff. *Short* v. *Northern Pacific Elevator Company,* 1 N. D. 159, 45 N. W. Rep. 706. The court erred in admitting testimony as to Clemens' use of intoxicants to get trade, and keeping such liquors at the elevator; also in its instruction to the jury that "if Clemens was engaged in an unlawful traffic of intoxicating liquors in and about the elevator," and if the plaintiff knew about it, the defendants were not liable upon the counter bond. The court further erred in charging that if Clemens had been "guilty of acts involving moral turpitude," to Mitchell's knowledge, the plaintiff could not recover. This is a matter said to have occurred three years before the counter bond was given, was not pleaded, nor involved in the issues, and plaintiff was unprepared to meet it. It was not contended that plaintiff ever heard of these transactions, yet the court virtually charged the jury to find for defendants. If Clemens used and gave away intoxicating liquors, or was guilty of acts of moral turpitude, not involving dishonesty, it would not release defendants from their obligation upon the bond. *Bank* v. *Brownell,* 9 R. I. 168, 11 Am. Rep. 231; *LaRose* v. *Logansport Nat. Bank,* 1 N. E. Rep, 805; *Bostwick* v. *VanVoorhis,* 91 N. Y. 353.

The court erred in denying plaintiff's motion for a directed verdict, and for judgment notwithstanding the verdict. The defense was based upon the theory that Clemens was proved criminally dishonest, having been found short 409 bushels on a settlement in April, 1900; that plaintiff knew this, when it took the counter bond, and having failed to notify the sureties of the shortage, the latter were released. Plaintiff's answer to this contention was, that there was no embezzlement or dishonesty in this transaction; that plaintiff did not know of the shortage, and as the sureties made no inquiry of plaintiff, it violated no duty to defendant. Sureties are liable "when the shortage or failure to pay over money received within the scope of their duties arises from neglectful habits, carelessness or mistake of the agent, not accompanied by a conversion of moneys of his principal to the use or benefit of the agent, and without any intent on his part to deprive his principal of it, and where there is no moral turpitude, but only moral delinquency on the part of the agent." *Wells-Fargo Express Co.* v. *Walker et al.,* 50 Pac. 353; *Tel. Co.* v. *Barnes,* 64 N. Y. 385; *Lancashire Ins. Co.* v. *Callahan,* 71 N. W. Rep, 261;

Howe v. *Farrington,* 82 N. Y. 121; *Bostwick* v. *VanVoorhis,* 91 N. Y. 353. Under the circumstances disclosed in the record, plaintiff was not bound to communicate to defendants, the fact that Clemens had been short 409 bushels of wheat, even if it knew it. *Magee* v. *Manhattan Life Ins. Co.,* 92 U. S. 93, 23 L. Ed. 699; *Aetna Life Ins. Co.* v. *Mabbett et al.,* 18 Wis. 667; *Home Ins. Co.* v. *Holway,* 55 Iowa, 571, 8 N. W. Rep. 457; *Railway* v. *Ling,* 18 S. C. 116; *Roper* v. *Trustees,* 91 Ill. 518; *Lake* v. *Thomas,* 36 Atl. Rep. 437; *Railway* v. *Gow,* 59 Ga. 685; *Warren* v. *Branch,* 15 W. Va. 21; *Cawley* v. *People,* 95 Ill. 249; *Company* v. *Jackson,* 83 Tenn. 418.

Benton, Lovell & Holt, for respondents.

From a *resume* of the evidence, there was abundant proof to warrant the jury in finding that the counter bond was required by plaintiff on account of defalcations by Clemens to the Elevator Company, and this finding together with the strenuous attempts of Cromwell, plaintiff's general manager, and Mitchell, general manager of the Elevator Company, to conceal such shortages after Clemens' death, and other misrepresentation of the reason for obtaining the counter bond, support the conclusion that Mitchell knew and believed Clemens' shortage to be dishonest. Mitchell and Cromwell were acting in collusion throughout the proceedings relating to the counter bond. Whether they were or not, the knowledge of Mitchell was imputable to Cromwell and binding on plaintiff. Mechem on Agency, section 718; *Union Life Ins. Co.* v. *Smith et al.,* 63 N. W. Rep. 438.

While appellant's counsel contend that Clemens' previous shortages were due to carelessness or neglect, respondent submits that they involve dishonesty, and Mitchell knew it. Respondent concedes the rule stated in *Bostwick* v. *VanVoorhis,* 91 N. Y. 353, and *Wells-Fargo, etc.,* v. *Walker,* 50 Pac. Rep. 353, cited by appellant. The following authorities sustain this position: *Dinsmore* v. *Tidball,* 34 Ohio St. 418; *Smith* v. *Josslyn,* 40 Ohio St. 409; *Franklin Bank* v. *Cooper,* 36 Me. 195; *Taylor* v. *Lohman,* 74 Ind. 418; *Roberts* v. *Donovan,* 70 Cal. 108; *Rapp* v. *Phoenix Ins. Co.,* 113 Ill. 390; *Connecticut, etc.,* v. *Scott,* 81 Ky. 540.

MORGAN, J. In the year 1900, and prior to that year, one William Clemens was the local agent of the Great Western Elevator Company at Leonard, N. D. Said Clemens and other employes of said elevator company were required to furnish bonds to it for the faithful discharge of their duties. The plaintiff gave the elevator

company a bond indemnifying it against all losses occasioned by the fraud or dishonesty of Clemens in connection with his duties as such elevator agent. On May 12, 1900, while said bond was in force, the plaintiff wrote to one Mitchell, general superintendent of the Great Western Elevator Company, that it was unwilling to carry the risk on the Clemens bond any longer, for the reason that unfavorable reports had come to it regarding the drinking and gambling habits of Clemens. On May 22, 1900, the plaintiff again wrote Mitchell that it was unwilling to carry the Clemens risk. In the last letter it stated that it would carry the Clemens risk if Clemens would furnish a counter bond indemnifying the plaintiff if loss should occur under the bond it had given on behalf of Clemens. This letter closed with the following: "We fully appreciate that you do not care to make a change at this season of the year and have therefore decided to help you out to the extent of remaining on the risk if we can be secured. I think Clemens will agree to furnish a counter bond; therefore I enclose a blank form. Please have him execute the same with sureties who are worth double the amount of the bond, which, when fully completed, kindly forward to us and oblige." Upon receiving this last letter, Mitchell telegraphed Clemens to meet him in Fargo, and they met there soon thereafter. At Fargo, Mitchell told Clemens that the plaintiff company would not further carry his risk, on account of his habits, unless he furnished it with a counter bond. Clemens replied that he could furnish a counter bond without trouble, and on June 11th he sent the counter bond, duly executed by two sureties, to Mitchell, the general superintendent of the elevator company. Mitchell sent the bond and the Clemens letter to him to the plaintiff company, at Minneapolis. The conditions on the counter bond were as follows: "Now, therefore, the parties of the first part * * * do hereby jointly and severally covenant and agree to and with the company * * * that they will reimburse, indemnify and keep harmless the said company to the extent of fifteen hundred dollars ($1,500.00) for, from and against all loss, damage, costs, charges and expenses that it shall or may at any time sustain, incur, or be put to, and will pay to the company all moneys that it shall at any time pay or become liable to pay, for, by reason or in consequence of the company having become such surety," etc. This counter bond was retained by the plaintiff, and Clemens continued in the employ of the Great Western Elevator Company until November 3, 1900, when he died. Upon an investigation of his accounts with the elevator

company, he was found to be a defaulter in a sum exceeding $4,000. The plaintiff reimbursed the elevator company to the extent of its liability under its bond; that is, in the sum of $1,500. This action is brought by the plaintiff against the sureties on the counter bond to recover the sum of $1,500 from them on account of the payments made by it to the Great Western Elevator Company pursuant to its liability to that company under its bond. The complaint states the giving of the indemnity bond to the elevator company, and the giving of the counter bond by Clemens to the plaintiff, and both bonds are made a part of the complaint. The defalcations of Clemens, and payment of $1,500 by it to the elevator company on account of such defalcations, are alleged, and judgment is demanded against the defendants for the sum of $1,500. The sureties answer and deny any liability for the reasons: (1) That Clemens was a defaulter in a sum exceeding $1,500 on June 11, 1900, when the counter bond was given; that plaintiff's liability under the bond of indemnity given to the elevator company had accrued and become fixed, to the extent of $1,500, before the counter bond was given; and that the liability of the plaintiff was not increased, enlarged, or added to since the giving of the counter bond. (2) That the plaintiff knew that said Clemens was an embezzler of the elevator company's funds and property when the defendants executed the bond in suit, and failed to disclose that fact to them; that plaintiff and said elevator company fraudulently conspired together to conceal such fact from these defendants, and that they were thereby induced to sign said bond, which they would not have signed, had the facts been truly disclosed to them. There was a trial to a jury, and a verdict for the defendants. Plaintiff moved for a judgment notwithstanding the verdict and for a new trial. A statement of the case was settled and the motions denied. The plaintiff appeals to this court. Error is claimed upon the admission of testimony, and upon instructions given to the jury.

The record shows, in addition to the facts already narrated as to Mitchell's agency in procuring the counter bond, that Mitchell did not know or see or in any way communicate with the defendants before they signed the bond, or thereafter, until November or December following. He did not know until the bond was sent to him who the sureties were to be. He and Clemens had no conversation as to who the sureties were to be. During the conversation at Fargo, Clemens told Mitchell nothing about his relations with the elevator

company that were not known to Mitchell before. Mitchell told him there that if he continued in the elevator company's employ, he would have to procure a counter bond, as the Aetna Indemnity Company would not carry him without this bond. Mitchell's connection with getting this bond consisted in informing Clemens that the Aetna Indemnity Company demanded it, and in turning over to him the blank form of bond furnished him by the plaintiff, and in forwarding to the plaintiff company the bond sent to him by Clemens after it had been executed by the sureties, he was invested with no discretion in the matter. His duties on behalf of the plaintiff were limited and ministerial, simply. It is claimed by the defendants that these facts constituted Mitchell the agent of the plaintiff, to the extent that whatever knowledge Mitchell had of Clemens' conduct while agent for the elevator company is imputable to plaintiff, by reason of such agency. This contention is not conceded by the appellant. The general principle that knowledge of all facts gained by an agent while in the employ of the principal as agent in a transaction is imputed to the principal, and becomes chargeable to him, is conceded, but it is insisted that the facts of this case bring it within the exceptions to that general rule. The exception is that, in cases where the agent is nominally acting for another in ministerial matters, he will not be presumed to disclose to his nominal principal matters within his knowledge, when he is in reality acting for himself or for another as principal, and his or his real principal's interests are adverse to those of the nominal principal. In this case Mitchell was acting in the interests of his company, and for its benefit. The letter from the plaintiff to Mitchell distinctly states that the privilege of giving the counter bond was accorded to Clemens in order that the elevator company might continue to have his services during the remainder of the year. The case falls within the exception to the general rule. By virtue of Mitchell's antagonistic interest, the law will not presume that he would disclose to the plaintiff company any information he might have possessed that would tend to injure the business of his principal, the elevator company. "A principal is not bound where the character or circumstances of the agent's knowledge are such as to make it intrinsically improbable that he will inform his principal." Bigelow on Fraud, section 239. See also, Mechem on Agency, section 623; *Wickersham* v. *Chicago Zinc Co.*, 18 Kan. 481, 26 Am. Rep. 784; *First National Bank* v. *Gifford*, 47 Iowa, 582; *American Surety Co.* v. *Paully*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L.

Ed. 977; *Benton* v. *Minneapolis Tailoring & Mfg. Co.* (Minn.), 76 N. W. Rep. 265; *Fidelity Co.* v. *Courtney,* 22 Sup. Ct. 834, 47 L. Ed. —. If it should be admitted, therefore, that Mitchell was the agent of the plaintiff company, and procured the bond at its request and for its benefit, nevertheless he would not be presumed to have disclosed any knowledge of Clemens' dishonesty while employed by the elevator company, whose interests were adverse to disclosing such knowledge. From the facts stated, it seems clear, however, that he was not such an agent of the plaintiff company that his knowledge acquired before he performed any service to it, and while in the employ of another, would be imputed to the plaintiff company. His service was more that of a mere messenger, and of purely ministerial character. "The employment of an agent or attorney to do a merely ministerial act for his principal does not constitute him such an agent that the rule as to constructive notice will apply." Pomeroy on Eq. Jur. vol. 2, section 668. Also *Wyllie* v. *Pollen,* 3 De Gex, J. & S. 595; *Anketel* v. *Converse,* 17 Ohio St. 11, 91 Am. Dec. 115; *Hoppock* v. *Johnson,* 14 Wis. 303.

The court, in its charge, gave to the jury the following instruction, which was duly excepted to: "You are further instructed that, for the purpose of obtaining the bond in suit, the plaintiff indemnity company constituted and appointed Mr. Mitchell, as manager of the Great Western Elevator Company, plaintiff's agent, and that, during the time Mr. Mitchell was acting for and in conjunction with the manager of the plaintiff indemnity company in obtaining the bond in suit, any knowledge possessed by Mr. Mitchell as to the character or habits or previous defalcations of William Clemens was imputable to the plaintiff indemnity company; and if Mr. Mitchell, while acting as agent for the plaintiff for the purpose of obtaining the bond in suit, knew that William Clemens had previously been guilty of criminal defalcations while acting as the local agent at Leonard for the Great Western Elevator Company, or if Mr. Mitchell, while acting for the plaintiff indemnity company, as aforesaid, knew that William Clemens had previously been guilty of acts involving moral turpitude while acting as the local agent for the Great Western Elevator Company at Leonard as aforesaid, or if Mr. Mitchell, while acting for the plaintiff indemnity company in obtaining the bond in suit as aforesaid, knew that William Clemens had previously embezzled the money or property of his employer, the Great Western Elevator Company, then I instruct you that such

knowledge of Mr. Mitchell was imputable to the plaintiff indemnity company, and that the plaintiff is chargeable with and bound by such knowledge of Mr. Mitchell; and you are instructed that if the plaintiff indemnity company, knowing through Mr. Mitchell as aforesaid, of previous dishonesty or embezzlement or other criminal conduct on the part of William Clemens while the local agent of the Great Western Elevator Company at Leonard, had the opportunity, but failed to disclose to the defendants the aforesaid previous dishonesty or criminal defalcations or embezzlement of said Clemens at the time of or previous to accepting from the defendants the counter bond in suit, then, as a matter of law, the defendants are not liable to the plaintiff in this action, and you must bring in a verdict for the defendants."

In this instruction the trial court told the jury that Mitchell was the agent of the Aetna Indemnity Company, and that his knowledge of Clemens' embezzlement or criminal misconduct as agent was imputable to, and became the knowledge of, the plaintiff. This was said without qualification, and, under the cases cited, was prejudicial error. In this instruction the jury was told that, if Mitchell had knowledge that Clemens was guilty of criminal conduct while acting as agent for the elevator company, then plaintiff was bound to disclose such knowledge to the defendant bondsmen, and, failing to do so, the defendants would not be liable on the bond given. The court also instructed the jury that if Clemens violated any law of the state in connection with his business as agent of the elevator company at Leonard, and the elevator company knew such fact, before the counter bond was given, and the defendants did not know it, Mitchell should have advised the defendants, and, failing to do so, defendants would not be liable. The evidence on this point showed that, three years prior to giving the counter bond, Clemens had kept beer in the elevator, and given it to customers to induce further trade. The evidence does not show that Mitchell had notice of it at the time or later, or that any of the agents of the elevator company knew of such conduct on the part of Clemens at the time of the giving of the bond. Conceding that Mitchell knew that Clemens had kept beer at the elevator contrary to law, even, and conceding further that the plaintiff company had notice of that fact, it does not follow that the plaintiff company must disclose this fact to the defendants, and, if it failed to do so, that they would be released from responsibility on the bond. It must be remembered that the plaintiff company was not

asked by the bondsmen as to the habits of Clemens in this or any other particular. Neither was Mitchell asked as to these matters. Neither Mitchell nor the plaintiff company had any communication with the bondsmen, and did not request them to become sureties for Clemens. The counter bond recites that the plaintiff company became surety for Clemens at the request of the defendants and of Clemens, and it nowhere appears that defendants were requested by the plaintiff or the elevator company to become such surety. It is only as to matters affecting the risk as to Clemens' fraud or dishonesty in acting as agent prior to the giving of the counter bond that the duty fell upon the company to inform these defendants, if it had known of such misconduct. There must be a concealment or withholding of information material for the sureties to know in respect to dishonest transactions as agent prior to the giving of the bond. It must be such a concealment of known facts as to amount to a fraud upon the sureties. As said by the supreme court of Rhode Island: "It is not alleged here that the directors withheld any information inquired for, or said or did anything that could have a tendency to mislead the surety. If there had been an actual default, or an attempt by the directors to cover it up or reimburse themselves at the expense of the surety, the case would be different. Moreover, the cases which we have referred to are cases in which the information held or not disclosed related in some way to the business which was the subject of the suretyship. In this case the undisclosed information related, not to the business which was the subject of the suretyship, and not to the conduct of the cashier as cashier, but to his general character." *Atlas Bank* v. *Brownell,* 9 R. I. 168, 11 Am. Rep. 231. In that case a bank cashier was known by the bank directors to be addicted to gambling. In consequence of this fact, the directors required the cashier to give a larger bond, with an additional surety. The additional surety was not informed of the cashier's gambling habits, and attempted to be released from liability because he was not informed. His attempted defense failed. The supreme court of Indiana lays down the rule as follows: "The misconduct of which the employer has knowledge, and which will release the guarantor if concealed, must, however, relate to the service in which the person whose conduct is guaranteed is engaged, and must be something more than mere moral delinqency, having no relation to or connection with the subject matter of the guaranty." *La Rose* v. *Logansport National Bank,* 102 Ind. 332, 1 N. E. 805. See also,

Franklin Bank v. *Stevens,* 39 Me. 552; *Bostwick* v. *VanVoorhis,* 91 N. Y. 353.

For the reasons given, the giving of these instructions was erroneous, and would have been erroneous even if Mitchell had been the agent of the plaintiff.

Plaintiff moved for a directed verdict in his favor at the close of the testimony, and, after verdict, asked for judgment notwithstanding the verdict or for a new trial. It is now urged that judgment notwithstanding the verdict should be directed by this court, under the provisions of chapter 63, p. 74, Laws 1901. That law was originally enacted in Minnesota in 1895, and the construction placed upon it by the Supreme Court of Minnesota is deemed to have been adopted by its enactment in this state. The practice is well settled in that state that a motion for judgment notwithstanding the verdict will only be granted in those cases where it is clear, as a matter of law, upon consideration of all the evidence, that the cause of action or defense has not been shown in point of substance. If it appears probable from the evidence produced at the trial that proof can be supplied on another trial to cure the defect, such motion will be denied. *Marquardt* v. *Hubner* (Minn.), 80 N. W. Rep. 617; *Cruikshank* v. *Insurance Co.* (Minn.), 77 N. W. Rep. 958; *Richmire* v. *Andrews & Gage Elev. Co.,* 11 N. D. 453, 92 N. W. Rep. 819. In other words, such motion for judgment will not be granted in case of conflict of evidence, although such conflict is such that the trial court will be justified, in its discretion, in granting a new trial notwithstanding it. The party making such a motion must base it upon a state of facts that will warrant the court in granting it, without trespassing upon the province of the jury to be the judges of all questions of fact in the case. Under this rule, it remains to be determined whether the trial court should have granted the motion, or whether this court should do so now, under the facts shown by the record. The evidence shows that the agent, Clemens, was short in his accounts in April to the extent of about $400. Whether such shortage was a dishonest one or not is a disputed question, and a finding by the jury either way would probably not be disturbed. This shortage was settled by Clemens soon thereafter. Whether it was settled before or after giving the counter bond is not clearly shown. The counter bond was given on June 11th, and the shortage was settled, as testified to, in May or June. Another matter of evidence pertaining to Clemens' and the defendants' liability under the

counter bond that is controlling upon the question whether the court should now grant the motion for judgment notwithstanding the verdict is that Clemens took into the elevator large amounts of wheat from January to August, 1900, without issuing any tickets therefor, and without reporting it to the elevator company at the time, and he did so under an express agreement with the farmers depositing it in the elevator that no storage was to be charged therefor, and this was done contrary to instructions. The inference is strong that this unreported wheat was used by Clemens in making the April accounting to his company when an agent was sent there to check up his accounts. If Clemens was actually and dishonestly short in his wheat accounts—that is, if he was dishonestly using unpaid for and unreported wheat in settlements with his company—before June 11th, then he was a defaulter before June 11th. If he was a defaulter in a sum exceeding $1,500 before June 11th, then no liability ever attached under the counter bond on which this suit is based. The full sum of plaintiff's liability had become fixed by Clemens' defalcation before the counter bond was given, and no additional liability could attach to the plaintiff by his defalcations after it was already liable to the full penalty of its bond. The counter bond was given to indemnify the plaintiff for any liability it might incur by reason of continuing as surety for Clemens as agent of the elevator company. The counter bond covered no accrued or past liabilities. It indemnified the plaintiff as to Clemens' defalcations after June 11th only. The condition of Clemens' account with the company on June 11th is therefore a material question in determining whether defendants are liable on the counter bond, and, if liable, to what extent liable. These are questions for a jury on another trial.

The judgment is reversed, a new trial granted, and the cause remanded for further proceedings according to law. All concur.

(95 N. W. Rep. 436.)

JOHN SATTERLUND *v.* ORLANDO H. BEAL.

Opinion filed June 5, 1903.

Burden of Proof to Establish Payment.

1. The burden of proof to establish payment is upon the party alleging it.

Defense of Statute of Limitations Waived, if not Pleaded.

2. The defense of the statute of limitations can only be taken advantage of by answer, and is waived if not so pleaded. Section 5184, Rev. Codes 1899.

Must Aver Facts, Not Conclusions of Law, to Sustain Such Defense.

3. In pleading the statute of limitations a mere averment of the pleader's conclusion of law will not answer, but the facts constituting the bar must be set out.

Amended Pleading Must be Rewritten.

4. The mode of amending pleadings recognized by the practice of this state is by rewriting the pleading, leaving out such allegations, and inserting such other allegations, as may be desired, so that all parts of the pleading shall be in one instrument, complete in itself—following *Caledonia, etc., Co.* v. *Noonan,* 14 N. W. 46, 3 Dak. 189.

Amendment Deemed Abandoned, Unless Leave to Amend is Acted Upon.

5. The mere granting of leave to amend a pleading does not amend it. Unless the leave is acted upon and the pleading redrawn, including tne desired change, the amendment is deemed abandoned.

Application to Amend—When Court Shall Decide Thereon.

6. In cases tried to the court without a jury, under section 5630, Rev. Codes 1899, the trial court is not relieved of the duty of deciding, at the time the request is made, whether a desired amendment to the pleadings shall or shall not be allowed. The parties have a right to know at every stage of the trial the exact condition of the pleadings, so as to conform their proofs and methods of proof to the known issues.

Judgment Supported by Pleadings.

7. A judgment must be warranted by the pleadings of the party in whose favor it is entered. When not supported by the pleadings, it is as fatally defective as if not supported by findings.

Mortgage Foreclosure When Debt is Barred.

8. Because the debt secured by mortgage is barred by the statute of limitations in six years after it becomes due, it does not follow that

the right to foreclose the mortgage is gone. The statute fixes the period within which foreclosure may be had at ten years.

Appeal from the District Court, McLean County; *Winchester,* J.

Action by John Satterlund against Orlando H. Beal. Judgment for plaintiff. Defendant appeals.

Reversed.

Newton & Smith, for appellant.

(1) Plea of payment admits plaintiff's right of action, and denies defendant's liability by reason of matter in avoidance, *i. e.,* discharge by payment. 16 Enc. of Pl. & Pr. 167, 18 Am. & Eng. Enc. of Law 556. Reply must not set forth facts inconsistent with those alleged in the complaint. Rev. Codes, 5277. At common law such pleading is called departure, Gould's Pleading (3d Ed.) 453. Under the Codes it is inhibited. 18 Enc. Pl. & Pr. 462, Test 2. 6 Enc. Pl. & Pr. 462, Test 2. Max. Code Pleading 561.

Pleading statutes of limitation by the language, "that the claim set out in the counterclaim of the defendant's answer was barred by the statute of limitations," states no issuable fact, but a conclusion of law. 13 Enc. Pl. & Pr. 214 and cases cited.

(2) Where payment is alleged in the complaint and denied in the answer burden of proof is on plaintiff. *Farmers' Loan & Trust Co.* v. *Siefke,* 144 N. Y. 354, 39 N. E. 358, and cases cited, 18 Am. & Eng. Enc. of Law 171; *Curtis* v. *Perry,* 50 N. W. Rep. 426. Payment must be in money or something accepted in its stead. *People ex rel., Port Chester Sav. Bank* v. *Cromwell, Treas.,* 102 N. Y. 477-485, 7 N. E. Rep. 413, 2 Gr. on Ev. section 519, (9th Ed.), 18 Am. & Eng. Enc. of Law 150, 11, also p. 139. A cross demand cannot be treated as payment except by agreement, 18 Am. & Eng. Enc. of Law 152, and cases cited. Under plea of payment, proof of other security taken and obligation surrendered is inadmissible. *Bank* v. *Chilson,* 63 N. W. Rep. 362. Payment in fact must be proved. *Lawrence* v. *Bill,* 14 N. Y. 477. Bar of statute of limitation is not payment. 16 Enc. of Pl. & Pr. 213; *Austin* v. *Wilson,* 46 Ia. 362.

Action to remove a cloud on title is an equitable one; it is, therefore, subject to the maxim, "he who seeks equity must do equity." 17 Enc. Pl. & Pr. 370, par. 8a. Where a mortgagor of land seeks to quiet title against a mortgage, he must first pay the mortgage debt, notwithstanding it is outlawed; unless he does so within the

time fixed by the court, his action will be dismissed, and relief denied him. 17 Enc. Pl. & Pr. 370, note 4, citing *Boyce* v. *Fisk,* 110 Cal. 107, 42 Pac. Rep. 473; *DeCazara* v. *Ornena,* 80 Cal. 132, 22 Pac. Rep. 74; *Brandt* v. *Thompson,* 91 Cal. 458, 27 Pac. Rep. 763; *Booth* v. *Hoskins,* 75 Cal. 271, 17 Pac. Rep. 225; *Johnson* v. *San Francisco Saving Union,* 75 Cal. 134, 16 Pac. Rep. 753; *Tripp* v. *Duane,* 74 Cal. 85, 15 Pac. Rep. 439; *Otis* v. *Gregory,* 111 Ind. 504, 13 N. E. Rep. 39; *Hall* v. *Hooper,* 47 Neb. 111, 66 N. W. Rep. 33; *Brewer* v. *Merrick County,* 15 Neb. 180, 18 N. W. Rep. 43; *New York Nat. Bldg. Ass'n.* v. *Cannon,* 99 Tenn. 344; *Merriam* v. *Goodlett,* 54 N. W. Rep. 686; *Loney* v. *Courtney,* 39 N. W. Rep. 616.

The rule will be applied, whenever the adverse equity grows out of the transaction before the court, or such circumstances as the record shows to be a part of its history, or when it is disclosed in the pleading or proof, with full opportunity by the adverse party to explain, or reply to the charge. *Comstock* v. *Johnson,* 46 N. Y. 615; *Tripp* v. *Cook,* 26 Wend. 143; *McDonald* v. *Neilson,* 2d Cow. 139; *Casler* v. *Shipman,* 35 N. Y. 333; *Finch* v. *Finch,* 10 Ohio St. 501; *Hanson* v. *Keating,* 4 Hare 1-5, 6; *Whitaker* v. *Hall,* 1 Glyn. & J. 213; *Colvin* v. *Hartwell,* 5 Clark & F. 484.

Boucher, Philbrick & Cochrane, for respondents.
F. H. Register, on oral argument.

Payment may be made by any lawful method agreed upon between the parties. 2d Gr. on Ev. 526 and cases cited. Communication to attorney, in presence of both parties and communication by an attorney to the opposite party, are not privileged. *Wm. H. Hughes, Ex'r.* v. *S. P. Boone,* 102 N. C. 137; *Thayer* v. *McEwen et al.,* 4 Ill. App. 416; *Carr* v. *Weld, et al.,* 19 N. J. Equity 319; *Whiting* v. *Barney et al.,* 30 N. Y. 330, 14 Enc. of Law 139.

Note was in possession of defendant, and mortgage does not show when it was due, nor did defendant's answer show. Plaintiff could not plead statute before trial, because not possessed of the facts. Under the circumstances of this case, form of amendment to reply was sufficient; it apprised defendant that plaintiff relied on the statute. 13 Enc. Pl. & Pr. 217 and cases cited.

COCHRANE, J. This case was tried to the court without a jury, and is here for trial anew upon all the evidence, pursuant to section 5630 Rev. Codes 1899. The defendant, Beal, indorsed two notes for plaintiff in 1882. May 6, 1886, a judgment was duly obtained

and docketed, in favor of William Deering, the payee in these notes, and against this plaintiff as maker and this defendant as indorser thereof. To secure and indemnify Beal against loss through the enforcement of this judgment against him, the plaintiff, Satterlund, on January 8, 1887, made his promissory note for $500, due two years after its date, and bearing 10 per cent interest, and payable to defendant, Beal; also a mortgage securing the note upon a large number of town lots in the village of Washburn, McLean County, N. D. This mortgage plaintiff had recorded, and then delivered it, with the note it secured, to defendant. Defendant, Beal, did not consider this note and mortgage sufficient security, and, as a conclusion to some conversation between them, plaintiff paid to the Deering attorneys $100, which was applied as payment on this judgment, under date of March 1, 1887, thereby reducing defendant's liability to this extent; and plaintiff executed and delivered to the defendant a contract or bill of sale of certain hay to be grown during the season of 1887 upon Burnt Creek bottom. Beal paid the balance of the Deering judgment, $393.85 and some costs, on January 18, 1889.

The first point in controversy, toward the elucidation of which counsel on either side expended some time, is whether the bill of sale of the hay, when delivered to and accepted by the defendant, was an absolute payment of the $500 note and mortgage, entitling the plaintiff to a surrender and release thereof; or, on the other hand, was it intended only as an additional security to defendant against liability for plaintiff's debt? Plaintiff's complaint, and his own evidence in support of it, narrow the inquiry upon this point within a small compass. Plaintiff alleged the making of the $500 note, and the mortgage securing it; also the recording of the mortgage, and delivery of the note and mortgage to defendant. He then avers that the note, with interest, has for a long time been paid in full, but that the mortgage has not been satisfied, but remains unsatisfied of record and a cloud upon plaintiff's title. He then prays judgment that the defendant give up the mortgage to be canceled, and that the same be satisfied of record. Defendant admits the averments of the complaint, excepting the averment of payment, and denies the payment of the debt secured by this mortgage. This fixes the burden of proof upon plaintiff to show that the debt was paid. *Farmers' L. & T. Co.* v. *Siefke,* 144 N. Y. 354, 39 N. E. Rep. 358; *Curtis* v. *Perry* (Neb.), 50 N. W. Rep. 426. To sustain this burden, plaintiff testified that when he made the contract of sale of the hay in Burnt

Creek bottom it was agreed that the proceeds of the hay when sold should be paid on the note. In cross-examination he testified as follows: "Q. He was to account on the note for the proceeds of the hay? A. Yes. Q. You don't know whether it was paid by the proceeds or not, do you? A. No; I could not state that." Plaintiff produced no evidence to show that the hay did pay the note, or as to what was realized from the hay. He wholly failed to sustain the burden he assumed. But the proofs upon this point do not stop with plaintiff's evidence quoted. The uncontradicted evidence of defendant Beal shows that in the cutting, preserving, hauling and disposing of the hay in Burnt Creek bottom he incurred a loss; that the cost was more than the amount realized from the hay.

The second finding of fact of the trial court, to the effect that "said note, together with the interest thereon, was, in the year 1887 paid in full by a transaction between the plaintiff and the defendant relating to the hay grown on the land owned by the plaintiff, and cut and disposed of by the defendant," is not only without support in the evidence, but is directly contrary to the evidence on this point. The defendant by way of counterclaim, alleged the execution and delivery to him by plaintiff of the note and mortgage of January, 1887, for $500; and his counterclaim contains all the averments necessary in a foreclosure action. He asks an affirmative judgment against the plaintiff for the amount of this note, with interest thereon from January 8, 1887, and for costs, and for the usual decree of foreclosure. The answer was served on the 6th day of February, 1900. The plaintiff in due time served a reply to this counterclaim, alleging that in the year 1887 he paid the defendant, in full, the demand set forth in the counterclaim. The case was tried upon the issue thus formed. At the conclusion of the evidence, counsel for plaintiff stated: "I wish to amend the reply, and add to the reply, in addition to the allegation of payment, that the claim set forth in the counterclaim of defendant's answer was barred by the statute of limitations." This was objected to by defendant's counsel as a technical defense not going to the merits. No ruling was made by the trial court upon plaintiff's request at the time, but the court made a finding of fact that the note set out in defendant's answer as a basis for a second defense was, by its terms, due and payable on the 8th day of January, 1889, and, as its conclusion of law, found that the defendant's action upon his counterclaim was, at the time the answer was served, barred by the statute of limitations. The plaintiff did not in fact prepare

and serve any amended reply setting up the bar of the statute of limitations, and no attempt was made by plaintiff to take advantage of the statute, save as indicated in the request made.

The trial judge attached to the statement of the case a certificate reciting "that it was understood by the court that the case was being tried under the so-called 'Newman law,' and that rulings on all motions and objections were to be reserved until the final hearing and determination of the case; that the fifth finding of fact and the third conclusion of law show that the court intended to allow the plaintiff's motion to amend his reply by adding that the claim set out in the counterclaim of defendant's answer was barred by the statute of limitations, and the same was allowed by the court by such finding and conclusion." This practice is without precedent, and without authority of law. Had the court promptly ruled upon plaintiff's request to amend, granting the request, it remained for counsel to prepare his amended pleading, to have it verified (section 5280, Rev. Codes 1899) and served upon opposing counsel. *Caledonia, etc., Co.* v. *Noonan,* 3 Dak. 189, 14 N. W. Rep. 426; *Lohrfink* v. *Still,* 10 Md. 530. The mere order permitting an amendment of a pleading is of no effect unless and until it is complied with. *Kimball* v. *Gearhart,* 12 Cal. 28-47; *Briggs* v. *Bruce,* 9 Col. 282, 11 Pac. Rep. 204; Hayne on New Trial, 169, section 57. By not making the amendment asked plaintiff must be treated as having abandoned it. But the amendment which the judge certifies he intended to allow is wholly insufficient as a pleading to entitle plaintiff to invoke the bar of the statute of limitations. This language, at best, is a mere conclusion of law. *Scroggin* v. *National Lumber Co.* (Neb.), 59 N. W. Rep. 548; *Barnes* v. *McMurtry* (Neb.) 45 N. W. Rep. 285; *Walker* v. *Larrey* (S. C.) 3 S. E. Rep. 63; *Gull River Lumber Co.* v. *Keefe,* 6 Dak. 160, 41 N. W. Rep. 743. The facts constituting the bar are not set out. 13 Enc. Pl. & Pr. 214, and cases cited in note. The court was wrong in his assumption that, under the Newman law (section 5630, Rev. Codes 1899), all rulings on motions could be reserved until the final hearing and determination of the case. There is no warrant in the language of this statute for any such assumption.

Where, in the course of a trial, an amendment of the pleadings becomes necessary to warrant the reception of offered proofs, and permission is asked to make such amendment, the parties are equally entitled to an immediate ruling, either granting or refusing the request. It is no answer to this rule that, because all evidence offered

must be received, no prejudice can follow upon the court's reserving its ruling upon the requested amendment. The party asking for the amendment should not cumber the record by offering evidence for which he has laid no foundation in the pleading. On the other hand, opposing counsel must note his objections to evidence as offered, or be bound by it. Evidence to support the averments sought to be embraced in the requested amendment of the pleading, would be entirely irrelevant until the amendment was made. *Marshman* v. *Conklin,* 21 N. J. Eq. 546. Counsel could not fully protect his client's rights upon the trial when in the dark as to the exact condition of the pleadings. The parties have a right to know at every stage of the trial the exact condition of the pleadings, and can only be so advised by securing an immediate ruling upon a request to amend. Counsel for defendant was justified in treating the plaintiff's request as denied when the court failed to notice the request by allowing or refusing it, or by announcing an intention to reserve his ruling thereon; and, when counsel making the request failed to press his demand to a ruling, his opponent was justified in considering the request abandoned. Had the amendment been allowed and in fact made, or ruling reserved, defendant could have offered evidence of facts tending to take the case out of the operation of the statute, if there were any such facts, but under the circumstances he was wholly without justification in incumbering the record with such foreign matter. It is plain that the loose practice of counsel in making his request for permission to amend his reply has led to the confusion of the record, has misled the court, and has resulted in an erroneous judgment.

"The claim set out in the counterclaim of defendant's answer" was twofold. The time within which an action could be commenced upon the debt was six years after it accrued. Section 5201, Rev. Codes 1899. But a ten-year limitation applies to the foreclosure of the mortgage. Section 5200, Id. The fact that the debt secured by the mortgage is barred by a statute of limitations does not extinguish the right to foreclose the mortgage lien. Jones on Mortgages, section 1204; Wiltsie on Mort. Foreclosure, sections 62, 67; *Wiswell* v. *Baxter,* 20 Wis. 680; *Edgerton* v. *Schneider,* 26 Wis. 385; *Henry* v. *Mine Company,* 1 Nev. 619; *Read* v. *Edward,* 2 Nev. 262. Had counsel for plaintiff pursued the line of action which correct practice requires, his proposed amended reply would have been reduced to writing, specifically pleading the facts upon which he intended to

rely as bringing the case within the bar of the statute; thereby advising the court and opposing counsel whether he invoked the bar of the statute against the debt or against the mortgage lien. It is to be presumed that the findings of fact and conclusions of law as made by the court were prepared by counsel for the prevailing party. The finding of fact, therefore, that the note set out in the answer became due on the 8th day of January, 1889, and the conclusion therefrom that defendant's action upon his counterclaim was barred, indicates that the request of plaintiff's counsel to amend so as to plead the statute of limitations was understood both by said counsel and the trial court to apply only to the debt secured, and did not embrace any claim of right to plead the ten-year limitation against the mortgage. The court could not amend the pleadings by findings of fact or conclusions of law. It is not the function of the court to make amendments of pleadings; that is the duty of counsel. The court may allow or disallow them when prepared and presented by counsel in proper time and leave is asked to serve or file the same. This power rests in the sound legal discretion of the trial court, to be exercised in furtherance of justice and upon such terms as may be just. Section 5297, Rev. Codes 1899. But the court should not allow an amendment which is insufficient, tested by the rules of pleading, to let in proof of the matters desired. 1 Enc. Pl & Pr. 523. There is no finding of fact in this case to show when the statute of limitations commenced to run as against the mortgage, and the amendment in the language requested, as applied to the mortgage, is wholly insufficient to sustain a judgment; it is bad even if the amendment were treated as made. A judgment must be warranted by the pleadings of the party in whose favor it is rendered. When not supported by the pleadings it is as fatally defective as if not supported by a verdict or findings. 1 Black on Judgments, section 183; *Frevert* v. *Henry,* 14 Nev. 191; *Bachman* v. *Sepulveda,* 39 Cal. 688; *Marshman* y. *Conklin,* 21 N. J. Eq. 546. The statute of limitations can only be taken advantage of by answer or reply. Section 5184, Rev. Codes 1899; *Clinton* v. *Eddy,* 54 Barb. 54, 37 How. Prac. 23. The evidence discloses that the balance of the liability against which defendant was indemnified by the $500 note and mortgage in question was paid by the defendant on the 18th day of January, 1889, being $393.85 and some costs. The burden of proof was on Beal to show what costs he paid upon the Deering judgment, in addition to the sum mentioned. He produced no satisfactory evidence thereof,

so they cannot be included in the judgment. This sum, with interest at the statutory rate of 7 per cent from January 18, 1889, is the principal obligation secured. We find that the allegations of defendant's counterclaim are proven, and they are found to be the facts herein, excepting the averment that there is due the full sum of the $500 note, with 10 per cent interest from January 8, 1887. But we find the amount due to be $393.85, with interest at 7 per cent from January 18, 1889.

We conclude that the judgment of the district court must be and the same is in all things reversed. That court is directed to reverse and set aside its judgment and to dismiss plaintiff's case, and to order and cause to be entered a judgment in favor of the defendant, Orlando H. Beal, and against the plaintiff, John Satterlund, for the sum of $393.85, with interest thereon at the rate of 7 per cent from the 18th day of January, 1889, to the date of such entry, together with the costs and disbursements of the action, to be taxed and entered in the judgment upon notice pursuant to law. A decree of foreclosure in the usual form will be entered directing a sale of the mortgaged premises. Appellant will recover his costs on this appeal. All concur.

(95 N. W. Rep. 518.)

PETER NELSON *v.* OLAF L. GRONDAHL.

Opinion filed June 5, 1903.

Deceit and Injury Must Concur.

1. Unless it is shown that injury or damages resulted or must result from the making of fraudulent representations which induced the making of a contract, such representations do not constitute a defense to such contract.

Allegation of Fraud Not Sustained.

2. Evidence examined, and found not sufficient to sustain the allegations of fraud as a matter of fact.

Where There Is an Issue for the Jury, Judgment Non Obstante Will Not be Sustained.

3. A motion for judgment notwithstanding the verdict will not be sustained in a case where there is an issue for the jury to pass upon under the evidence.

Motion for New Trial Need Not Be United With One for Judgment Non Obstante.

4. By failing to unite a motion for a new trial with a motion for judgment notwithstanding the verdict, the right thereafter to make a motion for a new trial in the usual statutory way is not waived.

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

Action by Peter Nelson against Olaf L. Grondahl. Judgment for defendant, and plaintiff appeals.

Reversed.

Turner & Lee, for appellant.

Benton, Lovell & Holt, for respondent.

MORGAN, J. This action is brought by the plaintiff, as owner of a note for $250 made by one Paul Steffes to the defendant, and by him indorsed to the plaintiff. Two defenses are interposed: (1) That the indorsement and delivery of the note to the plaintiff were procured through the false and fraudulent representations of the plaintiff to the defendant; (2) that no notice of the dishonor and nonpayment of the note by the maker was ever given to the defendant. The jury found a verdict in favor of the defendant. Plaintiff moved for a new trial in due time upon a settled statement of the case. This motion was denied, and this appeal is from the order denying such motion. The errors assigned are four in number: (1) In refusing to grant a new trial; (2) in submitting to the jury the question of the dishonor of the note; (3) in submitting to the jury the question of fraud; (4) in refusing to grant plaintiff's motion for judgment notwithstanding the verdict.

It was an error to submit the question of fraud to the jury under the evidence. It is claimed by defendant that Nelson represented to him at the time of the indorsement of the note that Steffes had more money and would be willing to pay that note before it was due, providing Grondahl would let Nelson have it; he said he would go and collect it from Steffes. Such is Grondahl's testimony as to the transaction. It is claimed by the defendant that this constitutes the transaction a fraudulent one; that he made a promise during the negotiations without any intention of performing it, making it a fraudulent contract under the provisions of section 3848, Rev. Codes 1899. Every representation of a fact made by Nelson during these negotiations is shown by the evidence to be true. It is claimed that because Nelson said that he would get or collect the money from

Steffes, and did not, this constituted a fraud within the meaning of that section, as Nelson did not intend to get it from him. The record contradicts this contention. It shows that the plaintiff did try to collect it from Steffes, but failed. He would naturally be supposed to attempt its collection. There was $200 due him from Grondahl, tied up in the note, for commissions due on the sale of his land to Steffes, besides the $50 that he gave Grondahl when the note was transferred to him. This sum was paid as the difference between the face of the note and the amount coming to him from Grondahl for commissions. This $50 was tendered back to Nelson during the trial, and acceptance thereof refused. If this so-called "promise" could possibly be held to be within the statute, it is very clearly shown that it was not made without any intention of fulfilling it. No injury was occasioned to Grondahl through it in any event. When that indorsement was made it was understood and considered by the parties that Nelson had earned $200 as commissions by selling Grondahl's land. When that sum became due is a matter of conflicting evidence between them. Grondahl claims that no commissions were to be paid by him until he had been paid $500 in cash. In effect he says that the commissions were to be paid him out of the money paid by Steffes after the $500 was paid, which must all go to Grondahl; and, he never having been paid $500 in cash on the sale, no commissions ever became payable to Nelson. Conceding that such was the bargain, we cannot reach this conclusion. True, $500 in cash was never paid by Steffes. Only $350 was paid. But the evidence does not show that the payment of the whole price could not have been enforced by Grondahl had he wished to do so. In the place of doing so, he consented that Steffes should cancel the contract and receive back his notes. He surrendered all of Steffes' notes to him, and received back his contract to deed the land to Steffes. He then conveyed the land to his wife and she sold it soon after. The defendant cannot now be heard to say that he never received $500 in cash, as he received the equivalent of that sum, and made a new contract with Steffes by which Steffes was relieved from paying the notes turned back to Grondahl. In view of the fact that the commission was justly payable, it is not apparent how he is injured by having to pay the note which he turned over to Nelson as a recognition that the sum of $200 was or would be due from him as commission.

The mere fact that misrepresentations were made with intent to defraud defendant would not be sufficient and would not be ground on which alone to avoid the contract. Mere intent to defraud is not alone ground on which to base an action for fraud. Damage or injury must be shown, either accrued or to accrue. There must be a showing that the party has been placed at a disadvantage, to his damage. As said in *Alden* v. *Wright* (Minn.) 49 N. W. Rep. 767: "He must have acted on the faith of the false representations, to his damage. A party cannot sustain an action of this character where no harm has come to him. Deceit and injury must concur." The same principle is declared in the following cases: *London & L. Fire Ins. Co.* v. *Liebes,* 105 Cal. 203, 38 Pac. Rep. 691; *Marsh* v. *Cook,* 32 N. J. Eq. 262; *Bartlett* v. *Blaine,* 83 Ill. 25, 25 Am. Rep. 346; *Danforth* v. *Cushing,* 77 Me. 182; *Hale* v. *Philbrick,* 47 Iowa 217; *Stetson* v. *Riggs,* 37 Neb. 797, 56 N. W. Rep. 628; *Bodkin* v. *Merit,* 102 Ind. 293, 1 N. E. Rep. 625. See also Bigelow on Fraud, p. 541. We think that the attempt to establish the claim that the indorsement was obtained through fraudulent representations has failed entirely.

The next assignment of error is upon submitting to the jury the question whether notice of the dishonor of the note was given to Grondahl. On the part of the plaintiff there is the positive evidence of Nelson that he told Grondahl that Steffes refused to pay the note, and that he would look to him for its payment. This conversation is not specifically denied by Grondahl, nor was he asked specifically as to this conversation. He details a conversation had with Nelson, and says that he had no others with him in reference to the note. This was in effect equivalent to denying that Nelson had notified him of the dishonor of the note by Steffes. It raised an issue for the jury to pass upon on that question. This disposes of the motion for judgment notwithstanding the verdict, as that motion will never be granted under chapter 63, p. 74, Laws 1901, when there is an issue for the jury to pass upon. *Bragg* v. *R. Co.* (Minn.) 83 N. W. Rep. 511; *Richmire* v. *Andrews & Gage Elevator Co.,* 11 N. D. 453, 92 N. W. Rep. 819.

The respondent contends that the appellant is not entitled to a new trial for the reason that he did not ask for one in connection with his motion for judgment notwithstanding the verdict, made when the verdict was returned into court, and, in consequence of his failure to do so, has waived his right thereafter to move for a new trial based on a settled statement of the case. We do not think that

chapter 63, p. 74, Laws 1901, is subject to such construction. That law permits a motion for judgment notwithstanding the verdict to be made either separately or in connection with a motion for a new trial. Nothing in the law indicates that they must be joined, nor that the right to move for a new trial in the usual way is waived if a new trial was not asked in connection with the motion for judgment notwithstanding the verdict. It is true, as repeatedly held in the Minnesota cases, under a law the same as the one under consideration, that a new trial will not be granted by the Supreme Court on review of an order granting or denying a motion for judgment notwithsanding the verdict, unless such motion includes within it a motion for a new trial. It is held in such cases that, by failing to unite a motion for a new trial with the motion for judgment notwithstanding the verdict, the right to a new trial is waived. This is all that *Bragg* v. *Ry. Co.,* (Minn.) 83 N. W. Rep. 511, relied on by counsel, decides, as we understand it. In that case no motion for a new trial was made at all in the district court, and for that reason it was held that the right thereto had been waived. This is the extent of the Minnesota decision. In no case is it held that the failure of the moving party to unite a motion for a new trial with his motion for judgment deprives him of his statutory right to move thereafter for a new trial in the usual way. In this case the facts are different. A new trial is asked, based on a settled statement specifying the insufficiency of the evidence to justify the verdict, as the grounds thereof. The right to make such a motion is given by section 5473, Rev. Codes 1899, independently of any proceedings or motions under chapter 63, p. 74, Laws 1901.

For the error in submitting the question of fraud to the jury on the evidence in the record, the judgment is reversed, a new trial granted, and the cause remanded for further proceedings. All concur.

(96 N. W. Rep. 299.)

MAYNARD CRANE *v.* JOHN T. ODEGARD.

Opinion filed June 23, 1903.

Same Costs and Disbursements Upon Reargument as Upon the Argument.

1. Under subdivision 5, section 5575, Rev. Codes 1899, the party prevailing in this court is entitled to recover, as part of his costs and disbursements in case of a reargument, the same amount for the argument on the rehearing as is allowed for the original argument.

Costs of Printing Briefs Served Out of Time Upon Leave, Allowed.

2. The fact that briefs have been served and filed out of time, when done by leave of court, does not defeat the right of the prevailing party to have the cost of printing the same taxed as part of his costs and disbursements.

Allowance of Costs on Motion, Abuse of Discretion.

3. Section 5589, Rev. Codes 1899, gives to district courts power to award motion costs in their discretion in a sum not to exceed $25. The allowance in this case of $15 upon a denial of appellant's motion to retax costs was not an abuse of discretion.

Appeal from District Court, Griggs County; *S. L. Glaspell,* J.

Action by Maynard Crane against John T. Odegard. From an order affirming the taxation of costs on a remittitur from the Supreme Court after an unsuccessful appeal by plaintiff, he again appeals. Affirmed.

J. E. Robinson, for appellant.

There is no cost allowed for reargument. *Kirby* v. *Western Union Telegraph Co.,* 8 S. D. 54, 65 N. W. Rep. 482. Cost is dependent on statute. Courts have no inherent power to award costs to a litigant. *Wallace* v. *Sheldon,* 76 N. W. Rep. 419; *Atwater* v. *Russell,* 52 N. W. Rep. 26, 5 Enc. Pl. & Pr. 196; *Swartwont* v. *Evans,* 37 Ill. 442.

District court erred in allowing costs on motion. Costs may be denied on motion where question of practice is involved or fairly open to question. *Culver* v. *McKeown,* 43 Mich. 322, 5 N. W. Rep. 422; *Price* v. *Price et al.,* 46 Mich. 68, 8 N. W. Rep. 622; *Myer* v. *Hart,* 40 Mich. 517.

Newman, Spalding & Stambaugh, for respondents.

Statutory costs of $15 for argument on rehearing was properly allowed. Our statute, chapter 11, Laws of 1883, was adopted

from New York. Costs on reargument were allowed in that state. *Babcock* v. *Libbey,* 53 How. Pr. 255; *Guckenheimer* v. *Angevine,* 16 Hun. 453; see also *Kirby* v. *Western Union Telegraph Co.,* 65 N. W. Rep. 482; *Brown* v. *Edmonds,* 66 N. W. Rep. 310. Illinois has no statute allowing costs, and cases cited from there are not in point.

Allowance of $15, motion costs, was in discretion of the district court and is not reviewable. 5589 Rev. Codes.

YOUNG, C. J. Plaintiff appeals from an order of the district court of Griggs county affirming the taxation of costs in this case by the clerk of that court upon a remittitur from this court. The controversy is over costs which accrued in this court. The case was argued twice. At the first argument three motions were made by counsel for respondent, one of which was to strike out the appellant's statement of case and affirm the judgment of the lower court. The motion was sustained. Plaintiff petitioned for a rehearing. The petition was granted and the case was fully reargued at the September, 1902, term, resulting in a dismissal of plaintiff's appeal and affirmance of the judgment. See *Crane* v. *Odegard,* 11 N. D. 342, 91 N. W. Rep. 962.

The items of cost which are objected to are $15, attorneys' fee allowed for the reargument, and $27.75 for a printed brief filed by respondent at the rehearing upon the motions. Both items, in our opinion, were properly allowed.

The allowance of $15 attorneys' fee for the original argument, and $15 for the argument upon the rehearing, was proper under section 5575, Rev. Codes 1899. This section was adopted in this jurisdiction from New York, and, under a well established rule of construction, we are deemed to have taken it with the construction theretofore placed upon it by the courts of that state. Prior to its adoption here, it had been construed as authorizing an allowance of the statutory attorneys' fee upon a reargument as well as upon the original argument. *Sweet* v. *Chapman,* 53 How. Prac. 253 (decided in 1877); *Guckenheimer et al.* v. *Angevine,* 16 Hun. 453. The same statute is in force in South Dakota, and has been held to authorize the prevailing party to recover, as a part of his costs and disbursements for argument on rehearing, a sum equal to the amount allowed for the original argument. *Kirby* v. *Western Union Telegraph Company* (S. D.) 65 N. W. Rep. 482; *Brown* v. *Edmonds* (S. D.) 66 N. W. Rep. 310, 59 Am. St. Rep. 762. It must be conceded

that the statute is not plain, and its meaning can be ascertained only by construction. It merely provides: "* * * for argument, $15. * * * " The allowance of an attorneys' fee for the argument upon a rehearing is altogether just, and does no violence to the language of the statute. We will not, therefore, depart from the construction placed upon it by the courts of New York and of our sister state.

The item for printing the brief submitted by respondent upon the motions was also a proper allowance. The brief was served and filed by leave of court, and was such a brief as was required to be printed by rule 18 of the Revised Rules of this court. 74 N. W. Rep. x. The fact that it was not served and filed twenty-five days before the term does not remove it from the class of briefs which are required to be printed, or render the costs of printing the same an improper item of costs. It is always in the power of the court to permit the service and filing of briefs out of time.

The trial court, in overruling the appellant's motion to retax the costs, allowed the respondent $15 for motion costs, and this is assigned as error. The assignment is without merit. Section 5589, Rev. Codes 1899, provides that: "Upon a motion in an action or proceeding costs may be awarded, not to exceed twenty-five dollars, either absolutely or to abide the event of the action, to any party in the discretion of the court." The amount allowed was within the statutory limit. There was no abuse of discretion.

Order affirmed. All concur.

(96 N. W. Rep. 326.)

C. B. MAY, J. M. TUSTEN, M. H. PAYNE, J. L. STILL, A. S. HERMAN, E. E. MAY, A. F. ERICKSON AND R. A. ERICKSON *v.* CASS COUNTY, O. J. OLSON, COUNTY AUDITOR, D. C. ROSS, COUNTY TREASURER, AND CLOSE BROTHERS & COMPANY.

Opinion filed June 24, 1903.

Rights Vested by Statute Not Affected by Its Repeal.

1. Rights which have become vested under a contract resting for its validity upon a statute cannot be impaired or annulled by a repeal of such statute.

Effect of Subsequent Amendment of Statute.

2. The county commissioners of Cass county, pursuant to authority conferred by section 1474, Rev. Codes 1899, resolved to issue twenty-year drainage bonds to pay the cost of constructing a certain drain which had theretofore been regularly established and constructed under the provisions of the drainage law, and entered into a contract to sell said bonds. The bonds were thereafter executed and delivered to the purchaser according to his contract of purchase, and the full amount of the purchase price paid. Before they were actually signed and delivered, however, section 1474, Rev. Codes 1899, was amended to the effect that bonds issued thereunder should mature in not less than three nor more than seven years. It is *held,* in an action to cancel and declare void the bonds so issued and delivered, that the amendment was wholly ineffectual to destroy the rights of the purchaser of said bonds, or to abrogate the authority of the board of county commissioners to issue and deliver them according to contract.

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

Action by C. B. May and others against Cass County and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

J. E. Robinson, for appellants.

Powers derived wholly from a statute are extinguished by its repeal. If a proceeding is in progress when the statute is repealed, and the powers it confers cease, it fails, for it cannot be pursued. Sutherland on Statutory Construction, section 165 and cases cited. *Veats* v. *Danbury,* 37 Conn. 412; *Gilleland* v. *Schuyler,* 9 Kan. 569; *New London Northern R. R. Co.* v. *Boston,* 102 Mass. 389; *Petition of Fenelon,* 7 Pa. St. 173; *Hampton* v. *Commonwealth,* 19 Pa. St. 329; *Pott* v. *Supervisors,* 25 Wis. 506.

The statute is not constitutional. County commissioners represent only their own county, and hence not authorized to issue bonds against another county, township or drainage district. *People* v. *Hurlbut,* 24 Mich. 44; *Board of Park Commissioners* v. *City of Detroit,* 28 Mich 228.

Emerson H. Smith, and *Morrill & Engerud,* for respondents.

Appellant's three propositions, viz., that section 1474 is repealed; that the matter of issuing bonds was *in fieri* at the time of the repeal; that the repeal extinguished the power to issue bonds and all that had been done under it, are unsound.

Chapter 39, Laws of 1901, only amended section 1474. The only change was in length of time bonds had to run, and permitting assessments to be paid before bonding.

The effect of chapter 39, Laws of 1901, is to continue in force section 1474. *City of Fargo* v. *Ross,* 11 N. D. 369, 92 N. W. Rep. 449.

The improvements in question can only be undertaken at the instance of a majority of those affected. The petitioners assume the burden on their part, and seek to impose it on their neighbors, according to the law in force at the time.

The old law remained in force, but the new law engrafted on to the old two new provisions. This is not repeal.

As far as the rights of all parties are concerned, the transaction was no longer *in fieri.* The delay in signing the bonds did not leave them so. *Butler* v. *Palmer,* 1 Hill. 324; *Town* v. *R. R. Co.,* 34 N. J. L. 193; *Creighton* v. *Pragg,* 21 Cal. 115; *James* v. *Dubois,* 16 N. J. L. 285; Cooley on Cons. Lim. (4th Ed.) 445.

YOUNG, C. J. The plaintiffs instituted this action in the district court of Cass county for the purpose of canceling certain twenty-year drainage bonds issued by the county commissioners of that county to defray the cost of constructing Argusville drain No. 13 and to enjoin the officers of that county from making assessments to pay the same. The alleged illegality of the bonds in question is based upon the fact that prior to their execution and delivery, and on July 1, 1901, the law authorizing the issuance of twenty-year bonds (section 1474, Rev. Codes 1899) was amended, and the time for which such bonds might be issued was reduced from twenty years to seven years. The question involved is one of power, and arises upon the plaintiffs' demurrer to the defendants' answer. The answer alleges, in substance, that the drain in question was duly established and completed; that the board of drain commissioners on October 4, 1900, filed their written report showing that all proceedings with reference to its construction and completion had been duly and regularly had and taken, and that the total cost of the same was $40,996.97; that on said date the board of county commissioners adopted a resolution to the effect that it was for the best interests of all persons liable for the cost of said drain that bonds should be issued under and pursuant to the provisions of section 1474, Rev. Codes 1899, for the purpose of paying the expense of constructing and completing said drain, and resolved that bonds

in said sum should be issued under and by virtue of said section for the purpose mentioned, and further directed the county auditor to advertise for bids for such bonds; that the county auditor, in compliance with said resolution, did advertise for bids for the purchase of said bonds; that the bid of Close Bros. & Co. was the highest and best bid, and the same was accepted on October 22, 1900: that their bid was to the effect that they would purchase all of said bonds at a premium of $275, and pay the cost of preparing the bonds; that on the same day the county commissioners duly passed and adopted a resolution that bonds should be issued under the provisions of section 1474, Rev. Codes 1899, for the total sum of $40,996.97, to said Close Brothers & Co., and payable to them or order, dated November 1, 1900—one-third of the principal of said bonds to be payable ten years from their date, one-third payable fifteen years from their date, and the remaining twenty years from their date—and further directed the county auditor of Cass county to extend upon the tax lists against the lands liable for the cost of said drain an assessment one-twentieth of the principal of said bonds each year; that assessments have been made and extended in pursuance of said resolution; that, thereafter, and before the said bonds could be prepared, signed, and issued, an action was commenced by the plaintiffs in this action for the purpose of declaring the proceedings for the construction of said drain illegal and void, and to enjoin the levying of assessments against their lands to defray the cost of constructing the same, and to enjoin the issuance of drainage bonds; that in said action an order was obtained and served enjoining and restraining the county commissioners and county auditor from proceeding with the issuance of said bonds and with the enforcement of the assessments, which said temporary injunctional order remained in force and effect from the 5th day of January, 1901, until July 29, 1901, on which last named date it was dissolved by a final judgment dismissing the action upon the merits; that thereafter, and on the 1st day of November, 1901, bonds were duly executed and delivered by the proper officers to Close Bros. & Co. in the amount and form as provided by the resolution of the board of county commissioners made on October 22, 1900; that the said Close Bros. & Co., on receipt of said bonds, paid to the treasurer of Cass county the full amount of said bonds and $275 in addition thereto, in accordance with their bid as accepted by the board of county commissioners. The plaintiffs demurred to the answer upon the ground that "it

does not state facts sufficient to constitute a defense, and it shows affirmatively that the bonds mentioned in said answer were issued without any authority of law." The demurrer was overruled. Plaintiffs stood upon their demurrer, and judgment was entered dismissing the action. The appeal is from the judgment, and error is assigned upon the ruling upon the demurrer.

The demurrer was properly overruled. The validity of chapter 51, p. 65, of the Laws of 1895 (sections 1444-1474, incl., Rev. Codes 1899), known as the "Drainage Law," and under which the drain in question was constructed and the bonds involved in this action were issued, was challenged by these plaintiffs in a former action, and was sustained by this court. *Erickson* v. *Cass County,* 11 N. D. 494, 92 N. W. Rep. 841. The question now presented relates to the effect of chapter 39, p. 49, of the Laws of 1901, which amended section 1474, Rev. Codes 1899. Prior to its amendment, section 1474 authorized county commissioners to issue drainage bonds maturing in their discretion in "not exceeding twenty years from the date thereof." The section as amended on July 1, 1901, provides that bonds issued thereunder "shall be payable in not less than three and not more than seven years from the date thereof." The answer in this case shows that the board of county commissioners decided to issue twenty-year bonds to pay the cost of constructing the drain in question; that it advertised for bids for such bonds, and that on October 22, 1900, the bid of Close Bros. & Co. for all of said bonds was duly accepted. All of these acts took place before the amendatory act, chapter 39, p. 49, of the Laws of 1901, took effect, and at a time when the board had lawful authority to issue and sell twenty-year bonds. The bonds were not signed and delivered, however, until November 1, 1901, which was after the amendment had taken effect. The contention of plaintiffs' counsel is that the power of the board to issue twenty-year bonds was entirely revoked by the amendment, and that, as these bonds were not actually signed and delivered until November 1, 1901, their issuance and delivery was without authority, and that they are, therefore, void. We cannot agree to this conclusion. It is not necessary to a decision of this case to determine whether chapter 39, p. 49, of the Laws of 1901, was intended to operate prospectively only, and thus apply merely to drains thereafter established, as counsel for defendants contend; or whether, as counsel for plaintiffs contends, the legislature intended by the amendatory act also to deprive the county commissioners of authority

to issue twenty-year bonds to pay the cost of constructing drains theretofore established and completed. We will assume for the purpose of this case that it was the legislative intent to entirely abrogate the authority of the county commissioners to issue twenty-year bonds. Still we are compelled to hold that the bonds involved in this action are valid, for the reason that prior to the taking effect of the amendment rights had become vested under the law as it then existed, which the legislature could not destroy. The owners of the land liable for the cost of the drain had caused its construction in reliance upon the law as it was prior to the amendment, and under which the county commissioners were authorized, in their discretion, to extend their assessments over a twenty-year period. Contracts for the construction of the drain had been let and performed, involving heavy financial obligations, which could only be discharged under the terms of the law then in force. Furthermore, the county commissioners had entered into a valid contract for the sale of the bonds to Close Bros. & Co.; a contract which was mutually binding upon both parties. It bound the officers of the county to sign and deliver the bonds, and also to levy assessments necessary to pay them. Close Bros. & Co. were bound by their bid and its acceptance to take the bonds, and pay for them in accordance with their bid. The duty of the county commissioners to issue and deliver the bonds to Close Bros. & Co. arose upon the acceptance of their bid. And under such circumstances the purchasers had a right to compel the performance of the ministerial duty of signing and delivering the bonds by mandamus. *Smith* v. *Bourbon County*, 127 U. S. 105, 8 Sup. Ct. 1043, 32 L. Ed. 73; *Page* v. *Hardin*, 8 B. Mon. 648; *Douglas* v. *Town of Chatham*, 41 Conn. 211; *New Haven, M. & N. Ry. Co.* v. *Town of Chatham*, 42 Conn. 465; *Shelby County* v. *C. & O. Ry. Co.*, 8 Bush. 209; *Flag* v. *The Mayor*, 33 Mo. 440; *Justices* v. *P. W. & K. R. Co.*, 11 B. Mon. 143; *Roberts* v. *City of Paducah* (C. C.) 95 Fed. 62. When the bid of Close Bros. & Co. was accepted, the board of county commissioners had the undoubted authority to issue and sell twenty-year bonds, and that power included the right to make a contract to sell and deliver them. The subsequent signing and delivery of the bonds was merely the performance of this contract. The law in force at that time authorized the contract which was made, and was a part of it. It was such a contract as could not be impaired or annulled by subsequent legislation. *Moultrie County* v. *Savings Bank*, 92 U. S. 631, 23 L. Ed. 631.

In the matter of the *Protestant Episcopal School, etc.,* 58 Barb. 161; *Coffin et al.* v. *Indianapolis* (C. C.) 59 Fed. 221; *Smith* v. *City of New York,* 10 N. Y. 504; 1 Dillon on Munic. Corporations (4th Ed.) section 470; *McCauley* v. *Brooks,* 16 Cal. 11; *Creighton* v. *Pragg,* 21 Cal. 117; *James* v. *Dubois,* 16 N. J. Law, 285; *Town of Belvidere* v. *Warren R. R. Co.,* 34 N. J. Law, 193; *Western Saving Fund Society* v. *Philadelphia,* 31 Pa. 185; Cooley on Const. Lim. (5th Ed.) 331; *Smith* v. *Board,* 127 U. S. 105, 8 Sup. Ct. 1043, 32 L. Ed. 73; Sutherland on Stat. Const. section 480. See also, *Fisher* v. *Betts* (decided at the present term) 96 N. W. Rep. 132, and cases cited. It is possible that the amendatory act should be construed as prospective, and as having no reference whatever to rights and liabilities existing when it took effect. The courts have adopted this rule of construction in many cases with the evident purpose of relieving lawmakers from the charge of attempting an unconstitutional invasion of vested rights. "The rule is that a statute affecting rights and liabilities should not be construed so as to act upon those already existing. And it is the result of the decisions that, although the words of a statute are so general and broad in their literal extent as to comprehend existing cases, they must yet be so construed as to be applicable only to such as may thereafter arise, unless the intention to embrace all is clearly expressed."

In the matter of the Protestant Episcopal School, etc., 58 Barb. 161, and cases cited; Sutherland on Stat. Const. section 481; Endlich on Inter. of Stat. section 271. In this case we have assumed that it was the legislative purpose to absolutely repeal the authority of the county commissioners to issue twenty-year bonds. Nevertheless, we conclude that the attempted repeal was without effect as to the bonds in suit, as the purchaser's right thereto had become vested before the amendment took effect, and could not be impaired by subsequent legislative action. Counsel for appellants also claims that "the statute (section 1474, Rev. Codes 1899) is not constitutional." He contends that county commissioners cannot be authorized to issue bonds against a drainage district. We know of no constitutional restriction upon the power of the legislature which would prevent that body from conferring upon county commissioners the authority given by this act. No such provision is pointed out or suggested by counsel. Judgment affirmed. All concur.

(96 N. W. Rep. 292.)

STATE *v.* ROONEY.

Opinion filed June 24, 1903.

Chapter 99, Laws 1903, Not Ex Post Facto.

1. Chapter 99, Laws 1903, substituting the penitentiary for the county jail as the place of confinement pending execution, and directing that executions should thereafter take place within the penitentiary walls, does not operate to increase the punishment of one convicted of murder in the first degree, with the death penalty affixed; nor is it a change of the punishment to the disadvantage of the prisoner, or a change of punishment at all. Such statute is not *ex post facto* as applied to one who was convicted before its passage.

Such Law Relates to Penal Administration Only, and Does Not Increase Penalty.

2. The 1903 statute was passed after appellant had been convicted of murder, and the death penalty prescribed in the verdict. This act required the execution to be fixed on a day not less than six or more than nine months after the entry of judgment, and within the walls of the penitentiary. The former statute required the execution to be had in the county jail in not less than three or more than six months after judgment. Appellant was sentenced under the 1903 statute. The changes effected by the new law relate solely to penal administration, and it was within the power of the legislature to make them applicable to past as to future cases. The extension of the time within which execution may take place after sentence is a mitigation, and not an increase of punishment, is to the advantage of the convict, and does not render the act *ex post facto* as to him. The change of place of confinement, pending execution, from the county jail to the state penitentiary, can add no disgrace or infamy to a condemned murderer, and such changes do not render the act *ex post facto* as applied to appellant.

"Close Confinement" Not "Solitary Confinement."

3. The words "close confinement," in chapter 99, Laws 1903, are used in the sense of safe, secure confinement, and work no change in the rigor of imprisonment from that imposed in the former statute. These words are not used in this context as synonymous with "solitary confinement."

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

John Rooney was convicted of murder in the first degree, and his punishment fixed at death. He appeals from the judgment. Affirmed.

W. S. Stambaugh, for appellant.

The court erred in sentencing appellant on March 31, 1903, as the law in force, when the crime was committed, was repealed by a statute taking effect March 9, 1903. Section 5142, Rev. Codes 1899, is a general saving clause, to be read into statutes repealing punishments for crime, unless a different purpose is plainly expressed by the legislature. The statute is a copy of section 13, U. S. statutes at large. See 1 Gould and Tucker, Notes on U. S. Statutes 13.

Section 8305, Rev. Codes 1899, is amended and re-enacted by the law of 1903, and all acts in conflict are repealed. Laws of 1903, chapter 99. The defendant cannot be punished under the repealed law. *Hartung* v. *People,* 22 N. Y. 95; *Kring* v. *State of Mo.,* 107 U. S. 221, 27 L. Ed. 506; *Ex parte Medley,* 134 U. S. 106, 33 L. Ed. 835; *People* v. *McNulty,* 28 Pac. Rep. 816.

The law in force at the time of the offense, of which defendant was convicted, provided as punishment, confinement in jail not less than three nor more than six months and hanging by the sheriff of the county. The law of 1903 provides close confinement in the state penitentiary not less than six nor more than nine months, and execution by its warden.

The law of 1903 is *ex post facto* and void because it "changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed." Imprisonment in the penitentiary is greater punishment than imprisonment in the county jail. *Ex parte Medley, supra; People* v. *McNulty, supra.*

The law of 1903 not only imposes a greater punishment in kind, but adds three months to the term of imprisonment. While the maximum term under the old law, is the minimum under the new, it is not what will, but what may, be inflicted, that determines the increase of punishment. *Wilson* v. *O. & M. R. R. Co.,* 16 Am. Rep. 565.

It cannot be that imprisonment of one under a death sentence is a mere incident and detail, and no part of the sentence or punishment. *Ex parte Medley, supra; People* v. *McNulty, supra.* Any change which does not mitigate the punishment, renders the statute *ex post facto* and void. *State* v. *McDonald,* 20 Minn. 126; *People* v. *Dane,* 45 N. W. Rep. 655.

Emerson H. Smith, State's Attorney, *J. A. McEldowney* and *W. H. Barnett,* for the state.

Section 8305 is not repealed by act of 1903, so far as it relates to the penalty, the only change being as to the time of the execution. The court may simply postpone the execution ninety days. The penalty is the same in both. Postponement of the execution is in no-wise additional punishment. It gives defendant further time for investigation of the facts of his case, and often results beneficially to him. Even when hope of reprieve, commutation of sentence, or a new trial is gone, it allows him time for preparation for enternity. Restraint at the penitentiary adds no greater ignominy to the name of the defendant. He is already branded by the verdict as a felon, unfit to live. The statute adds nothing by the new law other than is found in the old.

An *ex post facto* law is one which inflicts a greater punishment than the law in existence at the time that the crime was committed affords. *Calder* v. *Bull,* 3 Dallas 386, 1 L. Ed. 648. Tested by this rule, can it be said that the law of 1903 is *ex post facto,* because it detains the defendant in the penitentiary waiting execution, and gives the trial court discretion to delay execution ninety days?

Under section 5142, Rev. Codes 1899, the repeal of an act defining crime and its punishment does not prevent the prosecution and conviction of a party for its violation. *U. S.* v. *Barr,* 4 Saw. 254; *U. S.* v. *Mathews,* 25 Fed. Rep. 74; *U. S.* v. *Ulrici,* 3 Dil. 532. Sutherland on Stat. Con. 225, 226.

If the court finds that section 5142 must be read into the law of 1903, then it is not necessary to consider the constitutionality of the law of 1903, whether it is *ex post facto,* increases or decreases punishment; but it has but to order the trial court to proceed according to the law as it exists In re *Parks,* 45 N. W. Rep. 824; *People* v. *Bemis,* 16 N. W. Rep. 794; *ex-parte Gilmore,* 12 Pac. Rep. 800; *State* v. *Marple,* 14 Pac. Rep. 521; *Ratzky* v. *People,* 29 N. Y. 127.

Errors and mistakes, unless prejudicial, not regarded. Section 8423 Rev. Codes 1899.

COCHRANE, J. The defendant was convicted of the crime of murder in the first degree for the killing on August 26, 1902, of Harold C. Sweet. On March 9, 1903, chapter 99, Laws 1903, went into effect, changing the former statute as to place of inflicting the death penalty from the county jail to the penitentiary, and extending the time after sentence within which the judgment of death should be carried out. On March 31, 1903, defendant was sentenced to be conveyed to the penitentiary of the state of North Dakota, at Bis-

marck, there to be kept in close confinement until October 9, 1903, and then and there to be hanged by the neck until dead. This appeal is from the judgment.

Appellant insists that the law in force at the time of the offense for which he was convicted has been repealed, and that he cannot be punished under it, and that the statute (chapter 99, Laws 1903) as applied to his offense, is *ex post facto,* unconstitutional, and void; that he cannot, therefore, be punished under the provisions of that statute; that there is no law in this state under which the death penalty can be inflicted upon him; and that he must be discharged.

By the statute in force at the time of the homicide for which appellant stands convicted, and also at the time of his trial and conviction, it was provided: "Every person convicted of murder in the first degree shall suffer death or be imprisoned in the penitentiary for life." Section 7068, Rev. Codes 1899. "The jury before whom any person prosecuted for murder is tried, shall, if they find such person guilty thereof, fix and determine by their verdict, the punishment to be inflicted, within the limits prescribed by law, as for example, if they find such person guilty of murder in the first degree, they must designate in their verdict whether he shall be punished by death or imprisonment in the penitentiary for life." Section 7073, Rev. Codes 1899. "The jury before whom any person prosecuted for murder is tried, shall, if they find such person guilty thereof, determine by their verdict, whether it is of murder in the first degree or of murder in the second degree." Section 7072, Rev. Codes 1899. "Whenever any person is convicted of murder by the verdict of a jury, it shall be the duty of the court to enter judgment against such person, in accordance with such verdict, or otherwise as provided by section 8247 of the Code of Criminal Procedure." Section 7074, Rev. Codes 1899. Section 8319 provides that "the punishment of death must be inflicted by hanging the defendant by the neck until he is dead." By section 8321 it is provided that "a judgment of death must be executed within the walls or yard of the jail of the county in which the conviction was had, or within some convenient enclosure within said county." Section 8320 provided: "When there is no jail within the county, or whenever the officer having in charge any person under the judgment of death, deems the jail of the county where the conviction was had, insecure, unfit or unsafe for any cause, such officer may confine such person in the jail of any other convenient county of the state." Section 8305, Rev. Codes

1899, provided that, "when judgment of death is rendered, the judge must sign and deliver to the sheriff of the county, a warrant duly attested by the clerk under the seal of the court, stating the conviction and judgment, and appointing a day on which the judgment is to be executed, which must not be less than three months after the day in which the judgment is entered, and not longer than six months thereafter."

The legislative assembly passed an act, which was signed and approved on the 9th day of March, 1903, after the trial and conviction, but before the sentence, of appellant, the title of which act is "An act defining the mode of inflicting the death penalty; designating the warden of the North Dakota penitentiary executioner; prescribing that the death penalty shall only be inflicted within the walls of the North Dakota penitentiary; how execution may be suspended, and amending sections 8305 and 8308, of the Revised Codes of North Dakota of 1899." This act is known as chapter 99, Laws 1903. Section 1 of this act provides that "The mode of inflicting the punishment of death shall be by hanging by the neck until the person is dead; and the warden of the North Dakota penitentiary, or in case of his death, inability, or absence, a deputy warden shall be the executioner; that the punishment shall be inflicted within the walls of the penitentiary at Bismarck, within an enclosure to be prepared for that purpose under the direction of the warden and the board of trustees." Section 2 provides that "executions of the death penalty by hanging shall take place on the day designated by the judge passing sentence, but before the hour of sunrise of the designated day." Section 3 provides that "all writs for the execution of the death penalty shall be directed to the sheriff by the court issuing them, and the sheriff of the county wherein the prisoner has been convicted and sentenced, shall, within ten days thereafter, convey the prisoner to the penitentiary, where he shall be received by the warden or keeper, and kept in close confinement until the day designated for the execution; that a certified copy of the judgment and warrant to execute shall be delivered to the warden, and a receipt taken from the warden for the prisoner." Section 14 of this act reads "that section 8305 of the Revised Codes of 1899, relating to judgment of death, warrant to execute, be amended so as to read as follows: 'Section 8305. When the judgment of death is rendered the judge must sign and deliver to the sheriff of the county a warrant duly attested by the clerk under the seal of the court, stating

the conviction and judgment and appointing a day upon which the judgment is to be executed, which must not be less than six months after the day in which the judgment is entered and not longer than nine months thereafter.'" Section 16 of this act repeals all acts and parts of acts in conflict with the provisions of this act, and section 17 contains an emergency clause, as follows: "Whereas, an emergency exists in this, that there are now several persons in the state under sentence of death before the first of July, 1903, and if said persons are executed according to the existing laws the erection of several scaffolds will be necessary, which will entail considerable cost; therefore this act shall take effect and be in force from and after its passage and approval." By section 67 of the state constitution it is provided that "no act of the legislative assembly shall take effect until July 1st, after the close of the session, unless in case of emergency (which shall be expressed in the preamble or body of the act) the legislative assembly shall, by vote of two-thirds of all the members present in each house, otherwise direct."

It is apparent from the emergency clause (section 17 of this act) that the legislative assembly intended to have the same take effect at once, upon its passage, and that its terms should control in the pronouncing and execution of judgments of death in cases where the crime of murder in the first degree had been committed prior to its passage and approval. As to offenses committed subsequent to its approval, no constitutional objection can be urged against this legislation. But as to appellant, it is contended that this act changes the punishment so that a different penalty may be inflicted, under the operation of this act, from that which could have been inflicted upon him under the law as it existed at the time his offense was committed; that this later act increases the punishment, and therefore is a change to the disadvantage of the convict; and, for this reason, that chapter 99, Laws 1903, as applied to him, is *ex post facto* and void.

The law as contained in the Rev. Codes of 1899, and as it was prior to the sentencing of the appellant, is changed by the later act in three particulars: First. The execution of the death penalty must take place in the penitentiary, and be inflicted by the warden or his deputy, and not by the sheriff in the county where the offense was committed. Second. The time appointed for execution is changed so that the convict may be allowed a longer time to live between his sentence and his execution; the time fixed to be not less than six

nor more than nine months after the entry of judgment, while under the former statute the time was not less than three nor more than six months after the entry of judgment. Third. The convict, under the new and amendatory act, is confined in the penitentiary, pending execution, instead of the county jail.

The question for determination is this: Was the statute (chapter 99, Laws 1903) under which this judgment was entered *ex post facto* and void, as applied to appellant? The passage of *ex post facto* laws is inhibited by both the federal and the state constitutions. The section of the federal constitution (section 10, article 1), towit, "No state shall pass any *ex post facto* law," has been frequently considered and expounded by the Supreme Court of the United States, and its interpretation of this supreme law of the land is binding upon this tribunal. The court has said: "The plain and obvious meaning and intention of the prohibition is this: that the legislatures of the several states shall not pass laws, after a fact done by a subject or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts having a retrospective operation." *Calder* v. *Bull,* 3 Dall. 386, 390 1 L. Ed. 648. Justice Chase, in enumerating what laws he considered *ex post facto,* within the rules and intent of the prohibition, specified "every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed." *Calder* v. *Bull,* 3 Dall. 390, 1 L. Ed. 648; Cooley, Const. Lim. 322. "But," he added, "I do not consider any law *ex post facto,* within the prohibition, that mollifies the rigor of the criminal law, but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction." Justice Washington declared *ex post facto* any law "which, in its operation, makes that criminal or penal which was not so at the time the act was performed, or which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage." *U. S.* v. *Hall,* 26 Fed. Cas. 84, affirmed in 6 Cranch, 171, 3 L. Ed. 189; *Kring* v. *Missouri,* 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506; *Hopt* v. *Utah,* 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262; in re *Medley,* 134 U. S. 160; 10 Sup. Ct. 384, 33 L. Ed. 835; *Garvey* v. *People,* 6 Colo. 559, 45 Am. Rep. 531; *People* v. *McNulty* (Cal.) 28

Pac. 827; *Sage* v. *State* (Ind.) 26 N. E. Rep. 669; *U. S.* v. *Cannon* (Utah) 7 Pac. 388; *Lindsey* v. *State* (Miss) 5 South. 99, 7 Am. St. Rep. 674; in re *Wright* (Wyo.) 27 Pac. 566; *Marion* v. *State,* 16 Neb. 349, 20 N. W. Rep. 289. In *Fletcher* v. *Peck,* 6 Cranch 87, 138 3 L. Ed. 162, Chief Justice Marshall defined an *ex post facto* law to be one which makes an act punishable in a manner in which it was not punishable when committed. *Cummings* v. *Missouri,* 4 Wall. 277, 18 L. Ed. 356; *ex parte Garland,* 4 Wall. 333, 18 L. Ed. 366; *Shepherd* v. *People,* 25 N. Y. 406; in re *Petty,* 22 Kan. 482; *State* v. *McDonald,* 20 Minn. 136 (Gil. 119). But this definition is subject to the qualification that, where the new law mitigates the character or punishment of a crime already committed, it does not fall within the prohibition of the constitution, for it then is in favor of the citizen. In re *Petty,* 22 Kan. 482; *Lindsey* v. *State* (Miss.) 5 South. 101, 7 Am. St. Rep. 674; Cooley, Const. Lim. 329; *People* v. *Hayes,* 140 N. Y. 484, 35 N. E. Rep. 951, 23 L. R. A. 830, 37 Am. St. Rep. 572. As to Justice Marshall's definition of an *ex post facto* law, Justice Peckham (now of the Supreme Court of the United States), for the court of appeals of New York, in *People* v. *Hayes,* 140 N. Y. 484, 35 N. E. Rep. 951, 23 L. R. A. 830, 37 Am. St Rep. 572, said: "That it materially affects the punishment prescribed for a crime is not the true test of an *ex post facto* law. In regard to punishment, it must affect the offender unfavorably, before it can be thus determined. It seems to us plain that there can be no reason for any other view. I do not think that the mere fact of an alteration in the manner of punishment, without reference to the question of mitigation, necessarily renders an act obnoxious to the constitutional provision. I know it is alluded to in two cases in this state. *Hartung* v. *People,* 22 N. Y. 95; *Shepherd* v. *People,* 25 N. Y. 406. In those cases the alteration was not merely in the manner. It was an alteration from capital punishment to be inflicted in a certain manner and within a certain time after sentence was pronounced, to a punishment of a year's hard labor in state's prison, and then a possibility of capital punishment thereafter, at any time during the life of the criminal. * * * I think that where a change is made in the manner of the punishment, if the change be of that nature which no sane man could by any possibility regard in any other light than that of a mitigation of punishment, the act would not be *ex post facto,* where made applicable to offenses committed before its passage."

Under the terms of the 1903 act, this appellant is sentenced to close confinement in the penitentiary for six months and nine days before his execution can take place, and the court might have made the time anything short of nine months from the date of pronouncing judgment. He claims that close confinement in the penitentiary and the nine days' time over what was possible under the former law, constitutes this an increase of punishment over any it was in the power of the court to impose at the time the homicide was committed, and thus brings his case within each and every of the definitions of an *ex post facto* law hereinbefore stated.

The words "close confinement," as used in the statute and sentence, mean that the convict shall be safely and securely kept in confinement pending the execution of the judgment of death. They add nothing to the rigor of the former statute (section 8320, Rev. Codes 1899), which permitted the officer having in charge one under judgment of death, when he deemed the jail insecure or unsafe, to confine such person in any other jail of the state where he could be safely and securely confined; safety and security, through confinement, being the unchanged purpose of both statutes. Neither before nor since the act of March 9th could one convicted of a capital offense be admitted to bail. Appellant is entitled to as many privileges now, in the penitentiary, as the sheriff, under the former law, could accord to him in the county jail. No additional restrictions are placed upon his seeing his legal or spiritual adviser or members of his family. This statute works no change, in so far as it describes his confinement as close; nor is the word "close" synonymous with the word "solitary," as the latter term is used in the Medley case. It is there pointed out that the word "solitary" has a well defined and well understood legal significance. The change made in the Colorado statute, considered by the Supreme Court in the Medley case, was from a close confinement in the jail where the convict could be visited in the place of his confinement by his family, his legal, spiritual or medical adviser, without restriction, to solitary confinement, which excluded the possibility of such visits, and inhibited them, except under the restrictions of prison rules, which might prohibit them altogether.

The contention here made that appellant's confinement in the penitentiary is necessarily and in fact solitary—that, under the law regulating the control of convicts in the penitentiary, and the rules of prison discipline in this state, he is shut out from seeing all human

beings—is answered, in this: That the law has not been changed in this regard from what is was when his offense was committed. The statute, then, as it now, requires close confinement, as we have already shown. Neither the law, the judgment, nor the commitment require solitary confinement. The prison rules are not before us, but no presumption can be indulged that the officers of the penitentiary charged with the execution of the judgment of the court will go beyond the letter of its mandate, and make appellant's confinement solitary, in fact, when there is no legal authority therefor, and when to do so would, as to appellant, be illegal. *Holden* v. *State,* 137 U. S. 483, 11 Sup. Ct. 143, 34 L. Ed. 734.

That the penitentiary is in another part of the state from the county in which he was tried, and that he is thus further removed from possible visits of friends, is of no importance. He could, under the former statute, be removed to and confined in a jail in another part of the state. Section 8320, Rev. Codes 1899. The fact that the place of his confinement has been changed from the county jail to the penitentiary, pending execution, and that the place of execution has also been changed, does not render the 1903 statute *ex post facto.* The law has at all times required the confinement of persons convicted of capital offenses between the time of sentence and execution. The purpose of the confinement is that the convict may be produced at the time set for his execution, and that society may be protected against an outlaw in the meantime. The confinement is no part of the punishment, but is an incident connected therewith, referable to penal administration as its primary object. In re *Tyson,* 13 Colo. 487, 22 Pac. 810, 6 L. R. A. 472; *Hartung* v. *People,* 22 N. Y. 95; *Gut* v. *State,* 9 Wall. 35, 19 L. Ed. 573. In *Holden* v. *State,* 137 U. S. 483, 11 Sup. Ct. 143, 34 L. Ed. 734, it is said: "There is no ground upon which it can be held that his mere imprisonment in execution of the sentence of death is in violation of the constitutional provision against *ex post facto* laws. The sentence, the subsequent imprisonment under it, not in solitary confinement, and the warrant of execution, are in accordance with the law of the state as it was when the offense was committed, and do not infringe any right secured by the constitution of the United States." The Medley case, 134 U. S. 160, 10 Sup. Ct. 384, 33 L. Ed. 835, is not authority for the proposition urged that confinement in the penitentiary, instead of the county jail, pending his execution, is an aggra-

vation of his punishment, because the disgrace of confinement in the penitentiary is greater than attaches to confinement in the county jail. Nothing can aggravate the disgrace and infamy attendant upon and following a capital conviction for willful, deliberate, and premeditated murder. In re *Tyson,* 13 Colo. 487, 22 Pac. 810, 6 L. R. A. 472.

The language used by Justice Gray, in the Medley case, characterizing the penitentiary as a place for the punishment of infamous crimes, is used in his demonstration of the proposition that solitary confinement in the penitentiary of the convict, where he was cut off from the visits of his spiritual and his legal adviser and of friends, was an additional infliction to confinement in the jail, where he could have been so visited, and where such restrictions were not imposed; and it seems clear from the context that it was not the intention to, nor does the opinion, declare that change of the place of confinement from a county jail to the penitentiary, of one already rendered infamous by conviction of the felony punishable by death, could be treated as an aggravation of punishment, in that it carries with it disgrace and infamy.

That the 1903 statute requires the day of execution to be fixed at not less than six nor more than nine months after the pronouncing of judgment has the effect to add a period of imprisonment to the death penalty, and that appellant is condemned, under its operation, to nine day's imprisonment beyond what could have been given him under the law in force when his crime was committed, does not render the law *ex post facto* as to him. The law fixing the punishment for murder in the first degree was, at the time this homicide was committed, and it is now, the same. It has been in no way changed. The mode of inflicting the death penalty was then, and is now, by hanging the convict by the neck until dead. The changes effected have reference only to the mode of carrying out the sentence, and do not affect the substantial rights of the convict. *Holden* v. *State,* 137 U. S. 483, 11 Sup. Ct. 143, 34 L. Ed. 734. "Any change which is referable to prison discipline or penal administration as its primary object may be made to take effect upon past as well as future offenses, such as changes in the manner or kind of employment of convicts sentenced to hard labor, the system of supervision, the means of restraint, or the like changes of this sort, may operate to increase or mitigate the severity of the punishment of the convict, but will raise no question under the constitutional provision we are

now considering." *Hartung* v. *People,* 22 N. Y. 95, 105; Cooley, Const. Lim. 270, 271; in re *Tyson,* 13 Colo. 482, 487, 22 Pac. 810, 6 L. R. A. 472.

The Medley case, cited by appellant, is not authority to support his contention that this change increases his punishment to his disadvantage. In that case, one section of the Colorado statute under review permitted the warden of the penitentiary to fix the day (and that within the week designated by the court's sentence) when death should be inflicted. The prisoner could not be advised of the day and hour of his death until called upon to face it. The prisoner's feeling of uncertainty as to the time when he would be called to the scaffold was an infliction not contemplated by the former law. But under the statute we are considering, accused is advised, by the sentence, as to the precise day when he will be executed, and there is no chance for such uncertainty. That the day of his death is postponed by operation of this statute cannot be considered as a prolongation of the suffering and therefore added punishment. It is believed that the common instinct of mankind, when sane, is in favor of life and its prolongation. Death is the extreme penalty that can be inflicted. Any change of the penalty short of that is considered a mitigation, and postponement of the time of its infliction is also a mitigation.

In *Com.* v. *Gardner,* 11 Gray 438, it is said: "The substitution of imprisonment for life in place of death is a mitigation in the eye of the law. It is everywhere so regarded. It is on that ground that the executive power of commutation is founded. The statute proceeds on the same ground." In *Com.* v. *Wyman,* 12 Cush. 239, it is said: "An act plainly mitigating the punishment of an offense is not *ex post facto.* On the contrary it is an act of clemency. A law which changes the punishment from death to imprisonment for life is a law mitigating the punishment, and therefore is not *ex post facto.*" Judge Cooley in his work on Constitutional Limitations, section 272, says: "The substitution of any other punishment for that of death must be regarded as a mitigation of the penalty." In the Tyson case, 13 Colo. 482, 488, 22 Pac. 810, 6 L. R. A. 472, this point was under consideration. The court said: "If, under this act, the convict might be hanged within less than the minimum of time from the date of passing sentence enjoined by the former statute, we would unhesitatingly say that the law could not be made applicable to this case, as to hold otherwise would be contrary to the rule prohibiting a change of punishment to the disadvantage of the de-

fendant after the commission of the crime." If the shortening of the life for a single day is to the disadvantage of the convict, the extension of life for nine days or three months must be considered to his advantage. In *Territory* v. *Miller,* 4 Dak. 173, 181, 29 N. W. Rep. 7, 11, the court said: "It will not be contended that a statute which in no wise increases the penalty, or the defendant's risk in respect thereof, but rather affords the possibility of its mitigation, is of the character suggested. This statute confers upon the court a power which it did not before possess—to mitigate the penalty for murder, upon a plea of guilty, to imprisonment for life." In *State* v. *Williams* (S. C.) 45 Am. Dec. 741, it is held that the commutation of the death penalty to fine, whipping, and imprisonment is in mitigation. In *McInturf* v. *State,* 20 Tex. App. 352, after the commission of the offense, and before trial, the statute was changed so that, instead of the infliction of the death penalty, either capital punishment or imprisonment for life could be imposed. The court said, when this act was challenged as *ex post facto*: "In no sense can we conceive how a mere remedy which ameliorates punishment, and inures solely to the benefit of the party to be punished, can be considered as coming within the prohibition of retroactive or *ex post facto* laws." Justice Valentine, in the Petty case, 22 Kan. 485, makes use of the following language: "In all ages, and in all countries, immediate or sudden death has been considered as the highest of all earthly punishments, and torture alone has been the only other element resorted to to heighten this punishment. At the time of the passage of the act under consideration, changing the punishment for murder in the first degree, and ever since such time, it has been believed that the act was one lessening the punishment for murder in the first degree, instead of an act increasing it. And is not this belief correct? Suppose a man, in the ordinary course of nature, is to live ten years; would it not be a greater punishment to him to take from him the whole of that ten years by executing him immediately, than to permit him to live one year or more, even in the penitentiary, and then to take only nine of those years from him? As long as men live, there are always hopes of a better future. Even convicts hope for pardon and liberty and a long life."

Counsel insist that it is not for the court to say that the nine days of additional life extended appellant before his execution is not an increase of punishment, or to declare it a mitigation of the penalty; that it is a change of the punishment, and substitution of a different

one from that affixed to his crime when it was committed, and therefore within the condemnation of the constitutional mandate. It is urged that the court can have no means of saying whether a change of prescribed punishment, made after the commission of an offense and before sentence, is to the advantage or disadvantage of the convict, unless the substituted penalty falls within the idea of a remission of a separate part of the punishment before prescribed; that the question whether imprisonment for life or death by hanging would be the severer penalty would depend upon the disposition or temperament of the convict, and is for neither the legislature nor the court to decide; and counsel cites *Hartung* v. *People,* 22 N. Y. 95, Cooley, Const. Lim. 272, and in re *Petty,* 22 Kan. 485, in support of his contention. Judge Denio's statement in the Hartung case, which is relied upon by counsel, that "it is enough to bring the law within the condemnation of the constitution, that it changes the punishment, after the commission of the offense, by substituting for the prescribed penalty a different one," and "we have no means of saying whether one or the other would be the most severe in a given case. That would depend upon the disposition and temperament of the convict. The legislature cannot thus experiment upon the criminal law"—has, in its unmodified form, been condemned by the Court of Appeals of New York, and by the courts of many other states, as well as the reasons he assigns in its support. *People* v. *Hayes,* 140 N. Y. 484, 35 N. E. Rep. 951, 23 L. R. A. 830, 37 Am. St. Rep. 572, and cases hereinafter cited. The validity of chapter 99, Laws 1903, as applied to this defendant, must be determined by this court. The very purpose and sole point of this appeal is to secure such determination. The validity of the statute and of appellant's sentence depend upon the consideration whether, as applied to him, the enactment increases the punishment which may be inflicted upon him, or changes it to his disadvantage. The extension of life for a few days may be a prolongation of mental suffering to the condemned individual, and therefore an aggravation of punishment to one of his temperament and disposition; but whether this change mitigates or increases his suffering, and whether the change is to his advantage or disadvantage, cannot be left to him for determination. This, as other questions of like import, must be determined in the light of experience and precedent. Both experience and precedent declare, as we have already pointed out,

that any postponement of death is a mercy. There is a presumption that the legislature, in affixing the emergency clause to the act under review, thereby making it apply to past as well as future offenses, had in mind this law of nature, and intended, by making the maximum time between sentence and execution, under the old law, the minimum under the new law, to relieve the act of any possibility of being declared *ex post facto*. Whatever difference of opinion may arise upon this subject, upon the courts must rest the responsibility of declaring whether a given change is or is not an increase of punishment, or to the disadvantage of the accused. Although the power of the court to determine was not challenged in any of them, the courts have frequently been called upon to decide, and they have decided, that changes in the statutes punishing crimes, as applied to past offenses, either increased or diminished the punishment, and were to the advantage or disadvantage of the prisoner, and, by so deciding, necessarily held such determinations to be judicial questions. In re *Medley*, 134 U. S. 160, 10 Sup. Ct. 384, 33 L. Ed. 835; *Holden* v. *State*, 137 U. S. 483, 11 Sup. Ct. 143, 34 L. Ed. 734; *Turner* v. *State*, 40 Ala. 26; *Com.* v. *Gardner*, 11 Gray 438; *Com.* v. *Wyman*, 12 Cush. 237; *State* v. *Kent*, 65 N. C. 312; *State* v. *Ratts*, 63 N. C. 503; *Strong* v. *State*, 1 Blackf. 193; *People* v. *Hayes*, 140 N. Y. 484, 35 N. E. Rep. 951, 23 L. R. A. 830, 37 Am. St. Rep. 572; *Territory* v. *Miller*, 4 Dak. 173, 29 N. W. Rep. 7; *People* v. *McNulty* (Cal.) 28 Pac. 816; *State* v. *Williams* (S. C.) 45 Am. Dec. 741; *McInturf* v. *State*, 20 Tex. App 335; in re *Tyson*, 13 Colo. 482, 22 Pac. 810, 6 L. R. A. 472; *Hair* v. *State*, 16 Neb. 601, 21 N. W. Rep. 464; *State* v. *Arlin*, 39 N. H. 179.

We have not overlooked the McNulty case (Cal.) 28 Pac. 816, in examining these questions. That court's opinion upon the points here involved was controlled by its interpretation, and, we think, in some respects, a misinterpretation and misapplication, of the opinion of the Supreme Court of the United States in the Medley case. The California court finally succeeded, after several hearings, in reaching a conclusion in accord with the sentiments of Justices Brewer and Bradley, "whereby a convicted murderer was not permitted to escape the death he deserved, and to be turned loose on society." *People* v. *McNulty*, 93 Cal. 427, 29 Pac. 61, 26 Pac. 598, 28 Pac. 816.

Our conclusion is that the statute is not vulnerable to the constitutional objections urged against it; that it was within the power

of the legislature to make the provisions of this act applicable to offenses already committed; that the judgment appealed from is correct, and the same is affirmed. All concur.

(95 N. W. Rep. 513.)

F. P. WRIGHT *v.* THE MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY COMPANY.

Opinion filed June 27, 1903.

Under Statute, Negligence Presumed From Fact of Killing.

1. Where plaintiff, in an action for the negligent killing of cattle by a railroad train, made proof of his ownership of the cattle, their value, and the fact of their being killed by a train, a *prima facie* presumption of negligence was established without further proof. The statute, section 2978, Rev. Codes 1899, creates a presumption of negligence from the fact of killing by the cars.

Contributory Negligence—Stock Unlawfully at Large.

2. Where plaintiff, at a time when it was unlawful for stock to be at large, turned his horses out, with knowledge of their habit of going upon the railroad right of way, yet took no means of herding them or keeping them off from the railroad track which ran through and across his land, and in close proximity to and in plain view from his house, and where no duty was imposed upon the railroad company to fence its right of way, he was guilty of such contributory negligence as will defeat an action for the killing of a horse by one of defendant's trains.

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

Action by F. P. Wright against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company for the killing of plaintiff's stock. Verdict and judgment for plaintiff. From an order denying its motion for a new trial, defendant appeals. Reversed.

Lee Combs, for appellant.

The plaintiff, knowing that at the time of the injury, his cattle, including those killed, were in the habit of passing over the defendant's track and right of way, and being thus exposed to danger and injury from passing trains, and having deliberately turned his stock, including those injured, into the highway near such track, was guilty of such contributory negligence, as a matter of law, as precludes a recovery. *Peterson* v. *Wisconsin Central R. R. Co.*, 56 N. W.

Rep. 639; *Carey* v. *Chicago, Minneapolis & St. Paul Ry. Co.,* 20 N. W. Rep. 648; *Richardson* v. *Chicago & Northwestern Ry. Co.,* 14 N. W. Rep. 176; *Bennett* v. *Chicago & Northwestern Ry. Co.,* 19 Wis. 145; *Chicago & Northwestern Ry. Co.* v. *Goss,* 17 Wis. 428; *LaFlame* v. *Detroit & M. Ry. Co.,* 67 N. W. Rep. 556; *Schneekloth* v. *Chicago & W. M. Ry. Co.,* 65 N. W. Rep. 663; *Robinson* v. *Flint & P. M. R. Co.,* 44 N. W. Rep. 779; *Hanna* v. *Terre Haute & I. Ry. Co.,* 119 Ind. 316, 21 N. E. Rep. 903; *Nieman* v. *Mich. Cent. Ry. Co.,* 44 N. W. Rep. 1049; *Munger* v. *Ry. Co.,* 4 N. Y. 349; *Tower* v. *Ry Co.,* 2 R. I. 404. In this jurisdiction when cattle were lawfully at large, there can be no recovery for animals killed by a passing train, "unless the injury was occasioned by wanton or reckless misconduct of defendant or its employes." *Williams* v. *N. P. R. R. Co.,* 3 Dak. 168, 14 N. W. Rep. 97.

Without the introduction of any testimony by plaintiff, he relies upon the presumption of the statute, that mere killing of the stock by a railroad company is presumptive evidence of negligence; this presumption was rebutted by defendant by positive, uncontradicted testimony, and plaintiff cannot recover. *Hebron* v. *Chicago, M. & St. P. Ry. Co.,* 57 N. W. Rep. 494; *Lewis* v. *Fremont, E. & Mo. R. Co.,* 63 N. W. Rep. 781; *Harrison* v. *Chicago, M. & St. P. Ry. Co.,* 60 N. W. Rep. 405; *Keilbach* v. *Chicago, M. & St. P. Ry. Co.,* 78 N. W. Rep. 951.

The defendant owed no duty to the plaintiff in relation to trespassing horses until their presence was discovered, and then only owed the use of ordinary care to avoid injury to the horses. *Baker* v. *Chicago, R. I. & P. Ry. Co.,* 63 N. W. Rep. 667; *Connyers* v. *Sioux City & R. R. Co.,* 43 N. W. Rep. 267; *Thomas* v. *Chicago, M. & St. P. Ry. Co.,* 61 N. W. Rep. 967; *Railway Co.* v. *Barlow,* 71 Ill. 640; *Harrison v. Chicago, M. & St. P. Ry. Co., supra; Illinois Cent. R. Co.* v. *Noble,* 32 N. E. Rep. 684; *Memphis & Little Rock R. Co.* v. *Kerr,* 5 L. R. A. 429.

Lockerby & White and *E. H. Wright,* for respondents.

Plaintiff having shown the fact of the killing of his stock by defendant's trains, it was incumbent upon defendant to overcome by satisfactory proof the statutory presumption of negligence arising from the fact of killing. Section 2978 Rev. Codes 1899; *Hodgins* v. *M. St. P. & S. Ste. M. R. Co.,* 3 N. D. 382, 56 N. W. Rep. 139; *Bishop* v. *C. M. & St. P. Ry. Co.,* 4 N. D. 536, 62 N. W. Rep. 605.

If defendant overcomes this presumption by undisputed testimony, so clear and positive as to leave but one conclusion to be drawn by fair minded and reasonably intelligent men, the trial court should have directed a verdict for defendant and the case reversed *Hodgins* v. *Ry. Co., supra; Hebron* v. *Chicago, M. & St. P. Ry. Co.,* 57 N. W. Rep. 494; *Harrison* v. *Ry. Co.,* 60 N. W. Rep. 405; *Lewis* v. *Ry. Co.,* 63 N. W. Rep. 781; *Keilbach* v. *Ry. Co.,* 78 N. W. Rep. 951.

COCHRANE, J. Plaintiff's farm is crossed by defendant's railway in a northwesterly direction. A public road or highway runs north and south through plaintiff's farm, crossing the railroad track thirty rods northwest of plaintiff's house. From this road, crossing eastward, defendant's track is fenced on both sides to a point beyond the east boundary of plaintiff's land, but at the east end these fences are not connected by an end fence. At the highway crossing there was a cattle guard between the rails, and the space between the cattle guard on either side of the track and the fence was closed. This cattle guard was not sufficient to turn cattle or stock, but plaintiff's stock frequently walked over it. It was conceded that there was no duty on defendant to fence its right of way. On March 2, 1901, two cows, valued at $30 each, belonging to plaintiff, were killed by defendant's trains. On April 14, 1901, a horse of plaintiff's valued at $150, was found near the railroad track with his legs broken, so that he had to be shot. After a verdict for plaintiff for the full value of the property claimed, defendant moved for a new trial because of the insufficiency of the evidence to justify the verdict. The trial court denied the motion of defendant upon condition of plaintiff's remitting $30 of his verdict, the value of one of the cows. The remittitur was made, and defendant appealed from the judgment entered on the verdict.

In making out his case as to the killing of the cows, plaintiff made proof of his ownership and the value of the cows, that they were killed by defendant's trains, but offered no evidence tending to show any negligence by defendant or its employes. He relied upon the statutory presumption of negligence raised by the fact of such killing, as he had a right to do in the first instance. Section 2978, Rev. Codes 1899; *Hodgins* v. *Railway Company,* 3 N. D. 382, 56 N. W. Rep. 139; *Bishop* v. *Railway Company,* 4 N. D. 536, 62 N. W. Rep. 605.

Defendant, to overcome the *prima facie* case so made by its adversary, introduced as witnesses the engineer and fireman of the passenger train No. 108, which passed the place where these cattle were killed, going east on the morning of March 2, 1901. The testimony of these witnesses disclosed the killing of one only of the cows by this train, but under circumstances which, in the judgment of the trial court, fully overcame the statutory presumption of negligence, and entitled the defendant to a discharge as to this part of plaintiff's demand. *Hodgins* v. *Railway Company*, 3 N. D. 382, 56 N. W. Rep. 139. The remittitur of $30, ordered by the trial court on the motion for a new trial, was for the value of this cow. As to the second cow included in the verdict, the evidence was such as to indicate that it was killed by a train going west, and therefore could not have been killed by passenger train No. 108, which killed the first one. This second cow was found dead near the track, about two rods west of the highway crossing. From a point about twenty-five rods east of this crossing there were footmarks for seven or eight rods, where "the cow had made great leaps along the track"; also evidence indicating that she had been dragged west along the track fifteen rods, leaving marks of blood, hair, horns, and hide on the track, to the point near which the broken and bruised body was found. This evidence is not reconcilable with the theory that the cow was killed by a train moving in an easterly direction. The jury must have found, as they had a right to do if they believed this evidence, that this cow was killed by some other train, and not by passenger train No. 108. Defendant offered no evidence to meet this condition of the proof. The statutory presumption of negligence from the killing of this cow by defendant's train was not overcome, and is sufficient to sustain the verdict for her value.

As a second cause of action, plaintiff sought to raise against the defendant the statutory presumption of negligence by proof of circumstances tending to show that the horse, the subject of his second cause of action, was injured through coming in contact with the cars. No direct proof of this fact was made. The circumstances proven were consistent with, and render probable, the conclusion that the horse was injured through being struck by one of defendant's trains, as alleged in the complaint, but such circumstances do not exclude the possibility that the horse became frightened at the train or some other object, and received his injuries by running over the cattle guard, or in some other way. Assuming, for the pur-

poses of this opinion, that a *prima facie* case of negligence was made out by these proofs, as against this plaintiff's evidence discloses a clear case of contributory negligence, which must defeat his recovery as a matter of law. Between April 1st and November 1st it was unlawful for stock to be at large. *Ely* v. *Rosholt,* 11 N. D. 559, 93 N. W. 864. Plaintiff's horse was a trespasser upon defendant's right of way, and as to it the measure of defendant's duty was to exercise ordinary care not to injure it after it was discovered to be in a place of danger. Defendant's employes, in operating its train, were not required to keep a lookout for trespassing stock. *Bostwick* v. *Railway Company,* 2 N. D. 450, 51 N. W. 781; *Hodgins* v. *Railway Company,* 3 N. D. 389, 56 N. W. Rep. 139; *O'Leary* v. *Elevator Company,* 7 N. D. 554, 75 N. W. Rep. 919, 41 L. R. A. 677. Plaintiff's land was on both sides of the railroad track, the land north of the right of way was open prairie, his house in plain view of and within thirty rods of the track. The fence and cattle guards at the west end of the railroad fence at the highway crossing were insufficient to turn stock. Plaintiff's horses and cattle walked over this cattle guard without let or hindrance. At the east end of the fence there was nothing to prevent the stock going onto the right of way. Plaintiff's stock were in the habit of going onto the right of way over the cattle guard, and had done so all winter. He had seen them do so a good many times up to the day of the killing. Plaintiff knew that his horses, when they went onto the right of way and along the railroad track, were in danger, and he usually drove them out when he saw them there. Three weeks before this horse was injured he had the two cows hereinbefore mentioned killed on this right of way, yet he turned his horses loose on this 14th day of April, without watch or attendant, to follow what he speaks of as the "habit" of going onto the right of way. On April 14th both plaintiff and his hired man saw his horses on the track at 1 p. m., yet neither made any endeavor, so far as the evidence shows, to drive them out of their plain exposure to danger. Plaintiff was guilty of the grossest kind of negligence in permitting his horses to run at large under these circumstances. He turned them out, in defiance of the law prohibiting their being at large, into a place of known danger, with knowledge of their habit of going onto the track, there to become a menace to the safety of the traveling public as well as to the property rights of the common carrier. The law and the golden rule require that parties find a safer method

than this of marketing their stock. *Peterson* v. *Railway Company* (Wis.) 56 N. W. Rep. 639; *Carey* v. *Railway Company* (Wis.) 20 N. W. Rep. 648; *Richardson* v. *Railway Company* (Wis) 14 N. W. Rep. 176; *McMullan* v. *Dickinson Company* (Minn.) 65 N. W. Rep. 663; *LaFlamme* v. *Railway Company* (Mich.) 67 N. W. Rep. 556; *Robinson* v. *Railway Company* (Mich.) 44 N. W. Rep. 779; 19 Am. St. Rep. 174; *Niemann* v. *Railway Company* (Mich.) 44 N. W. Rep. 1049; *Hanna* v. *Railway Company* (Ind.) 21 N. E. Rep. 903; *Railway Company* v. *Skinner,* 19 Pa. 303, 57 Am. Dec. 654; *St. Louis, etc., Co.* v. *Monday* (Ark.) 4 S. W. Rep. 784; *Chicago, etc, Ry. Co.* v. *Goss,* 17 Wis. 433, 84 Am. Dec. 755. Defendant's request for a directed verdict as to the second cause of action should have been granted.

The judgment of the district court is reversed. That court is directed to set aside its judgment and to order judgment for the plaintiff for $30, conditioned upon his filing a remittitur for $150 of the amount of his verdict, this representing the value of the horse; otherwise to order a new trial. Appellant will recover costs of this appeal. All concur.

(96 N W. Rep. 324.)

JOHN P. GALBRAITH *v.* J. A. PAYNE.

Opinion filed July 1, 1903.

Maintenance—Common Law Doctrine Not Abolished but Perpetuated in this State.

1. The common law doctrine which condemns as void a grant of land, which is held adversely under claim of title, by a grantor who has not been in possession or taken rent for the space of a year prior thereto, as an act of maintenance, was not abolished by the Revised Codes of 1895, but was perpetuated, and remains in force in this state.

Conveyance of Pretended Title to Land—Void as to Party in Adverse Possession.

2. Section 7002, Rev. Codes, makes it a misdemeanor for any person to convey any pretended title to land, unless the grantor has been in possession or taken rent for the space of a year prior thereto. A deed executed in violation of this section is void, but its invalidity extends only to the party in adverse possession claiming title. As between the grantor and grantee and all other persons, it is valid.

Grantee of Such Title Can Sue Only in Name of Grantor.

3. The grantee under a deed which is invalid under the above section may not maintain an action in his own name against the adverse claimant, because, as to the latter, his deed is invalid. An action may be maintained against such claimant, however, in the name of the grantor for the grantee's use; and for the purpose of maintaining such action the grantor is the real party in interest within the meaning of section 5221, Rev. Codes.

Deeds Executed in Violation of Sec. 7002 Are Void as to Party in Adverse Possession.

4. It is *held*, in an action to determine adverse claims to real estate upon a trial *de novo* under section 5630, Rev. Codes, that the deeds upon which plaintiff relies to establish his title were executed and delivered in violation of section 7002, Rev. Codes, and are, therefore, void as to the defendant.

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

Action by John P. Galbraith against J. A. Payne and others. Judgment for plaintiff, and defendant Payne appeals.

Reversed.

Newman, Spalding & Stambaugh, for appellant.

Plaintiff must recover under his deed from St. Paul Harvester Company. *Dever* v. *Cornwall*, 10 N. D. 123, 86 N. W. Rep. 227. His deed is void as to the defendant, under section 7002, Rev. Codes. The statute applies to all titles whether good or bad. 1 Russell on Crimes 180; 2 Bishop on Criminal Law, section 136; *Tomb* v. *Sherwood*, 13 Johnson 291; Bacon's Abrs. Maintenance E.; *Teel* v. *Fonda*, 7 Johnson (N. Y.) 251. The seller is presumed to have knowledge of the condition of the title. *Hassenbrat* v. *Kelly*, 13 Johns. (N. Y.) 466. The transaction is contrary to express law, and therefore unlawful. Section 3920, Rev. Codes. As against a person holding adversely the deed is a mere nullity. *Livingston* v. *Proseus*, 2 Hill 529. This action is barred by the statute of limitation. Chap. 126, Laws of 1897, section 79. The statute runs against all defects whatever their nature. *Saranac L. & T. Co.* v. *Roberts*, 177 U. S. 328. Similar statutes barring inquiry into all questions except the taxability of the land, the non-payment of the taxes, and the redemption of the land, have frequently been held valid and curative of the defects in the assessment. *Geekie* v. *Kirby Carpenter Co.*, 106 U. S. 379, 27 L. Ed. 157; *Terry* v. *Anderson*, 95 U. S. 628, 24 L. Ed. 365; *Williams* v. *Supervisors*, 122 U. S. 163, 30 L. Ed. 1090;

in re *Brown,* 135 U. S. 701, 34 L. Ed. 316; *Bronson* v. *St. Croix Lbr. Co.* 44 Minn. 348, 46 N. W. Rep. 570; *Coulter* v. *Stafford,* 48 Fed. 266; *Imp. Co.* v. *Bardon,* 45 Fed. 706; *Ensign* v. *Barse,* 107 N. Y. 329; *Ostrander* v. *Darling,* 127 N. Y. 70; *Allen* v. *Armstrong,* 16 Iowa 508; *Freeman* v. *Thayer,* 33 Me. 83; *Smith* v. *Cleveland,* 17 Wis. 563; *Pillow* v. *Roberts,* 13 How. 472, 14 L. Ed. 228. The defects found are no ground for setting aside the sales under section 72, chapter 132 of Laws of 1890, or section 78, chapter 126, Laws of 1897, such defects being by those statutes rendered immaterial after sale. The defects found in the levies of state taxes of 1890, 1891, 1892, 1894, 1895, 1897, and 1898 by percentages are within the power of the legislature prior to the sale. *Shattuck et al.* v. *Smith et al.,* 10 N. D. 56, 69 N. W. Rep. 5; *Dever* v. *Cornwall,* 10 N. D. 123, 86 N. W. Rep. 277. Such power may be exercised in its discretion by retroactive, curative act, and by statute of limitations contained in the act providing for the levy, or passed afterwards, or by any other provision clearly showing the intention to render the requirement directory. Cooley on Con. Lim. (6 Ed.) 457; *Ensign et al.* v. *Barse et al.,* 107 N. Y. 337, 15 N. E. Rep. 401; *Wells Co.* v. *McHenry,* 7 N. D. 256, 74 N. W. Rep 241; *Saranac Land & Trust Co.* v. *Roberts,* 177 U. S. 330, 44 L. Ed. 792; *Terry* v. *Anderson,* 95 U. S. 628, 24 L. Ed. 365; *People* v. *Turner,* 145 N. Y. 451, 40 N. E. Rep. 400. A departure from the strict letter of the statute, cannot be said to be a jurisdictional defect in a constitutional sense, and the legislature may validate acts which it might originally have authorized, and limit the time within which actions to set aside tax sales based on irregularities may be commenced. *Ensign* v. *Barse, supra; People* v. *Turner, supra.* Under the provisions in question all inquiry is foreclosed, as to other facts, and the state guarantees the purchaser that his purchase shall not be assailed, except for one of the reasons stated. *Dunda* v. *Harlan,* 25 Pac. 883 (Kan.); *Martin* v. *Garrett,* 30 Pac. 168 (Kan.); *Hiles* v. *LaFlesh,* 18 N. W. Rep. 435 (Wis.); *Oconto* v. *Jerraud,* 50 N. W. Rep. 591 (Wis.); *Sherry* v. *Gilman,* 17 N. W. Rep. 252 (Wis.)

C. J. Murphy, for the respondent.

Statutes of limitations cannot apply to cases where the assessment, or some other vital step was defective. *Roberts* v. *Bank,* 8 N. D. 474, 79 N. W. Rep. 993; *Sweigle* v. *Gates,* 9 N. D. 538, 84 N. W. Rep. 481; *Powers* v. *Kitching,* 10 N. D. 254, 86 N. W. Rep. 737.

Defendant is entitled to relief. Tax certificates prove nothing outside of the regularity of the proceedings pertaining to the sale. *Sanborn* v. *Cooper,* 17 N. W. Rep. 856; *Smith* v. *Ryan,* 11 S. W. Rep. 647; *DeTreville* v. *Smalls,* 98 U. S. 521, 25 L. Ed. 174; 2 Desty on Taxation. There is no evidence to show assessment and levy of tax upon which the sales set forth in the certificate were made. Tax certificates offered no proof of these. Tax certificates for 1891, 1892, and 1895 are involved, 1st, because the assessment was defective for each of these years; 2d, because the state levies for those years were made by percentages and not in specific amounts. The assessment for 1891 and 1890 was bad, as the land is described therein "S. W. 4-10" and did not contain township and range. *Powers* v. *Bowdel,* 3 N. D. 107, 54 N. W. Rep. 404; *Sheets* v. *Paine,* 10 N. D. 103, 86 N. W. Rep. 118.

If the title conveyed is a *real,* not a *pretended* title, that is no violation of section 7002, Rev Codes. Courts have for years found and still find ways of evading this statute. 48 Warvelle on Vendors, 33; 4 Kent. Com. 477. Where such conveyances are discouraged they have been held to be good against the grantors and all others except the adverse possessor. 1 Warvelle on Vendors 34; *University* v. *Joslyn,* 21 Vt. 52; *Abernathy* v. *Boazman,* 24 Ala. 189; *Hamilton* v. *Wright,* 37 N. Y. 502. The grantee may recover possession to his own use in the name of the grantor. 1 Warvelle on Vendors 34, and cases cited; Maupin on Marketable Title to Real Estate, section 212; *Farnum* v. *Peterson,* 111 Mass. 148, and cases cited. But this principle does not exist in this state. The old common law rule was expressly adopted. But there has been an express repeal of this obsolete rule by the action of the revisors of the codes, who have dropped sections 3303 and 4870 of Compiled Laws, as far as it provided for an action in the name of the grantor. The rule in this state is propounded in *Kreuger* v. *Schultz,* 6 N. D. 301, 70 N. W. Rep. 269. That courts look with disfavor upon this law see *Crary* v. *Goodman,* 22 N. Y. 177; *Higanbotham* v. *Stoddard,* 72 N. Y. 94.

YOUNG, C. J. This is an action to determine adverse claims to 160 acres of land situated in Nelson county, and to recover possession. The plaintiff deraigns his title as follows: (1) A patent from the United States government to Frank A. Willson, dated March 26, 1886; (2) a quitclaim deed from said Frank A. Willson to the St. Paul Harvester Company, a corporation, executed and delivered on May 8, 1900; (3) a quitclaim deed from the St. Paul Harvester

Company to the plaintiff, dated April 25, 1901. All of said deeds were recorded at or about the time of their execution. The defendant Paine claims title under two tax deeds executed by the county auditor of Nelson county—one in 1894, upon a sale of the premises for the tax of 1889; the other executed in 1895 upon a sale for the tax of 1890. He also claims liens under six tax certificates issued upon tax sales for the taxes of 1891, 1892, 1895, 1896, 1897, and 1898, and also for taxes paid for the years 1893, 1894, 1899, and 1900. Paine took possession of the premises on May 7, 1898, and leased the same to the defendant Turcotte upon shares. His possession has continued since, and during the years 1898, 1899, and 1900 he received the rents from his tenant, and at all times held possession and claimed title to said premises under his tax deeds. The trial court found that the plaintiff was the owner of the premises, and entitled to possession thereof; that both of defendant Paine's tax deeds were void; that all of his tax certificates were void, except the one issued in 1897 upon the tax of 1896; and, further, that the taxes paid by the defendant were voluntarily paid, and do not constitute liens. Judgment was entered canceling and discharging of record all claims and demands of the defendant Paine by virtue of his tax deeds, tax certificates, and payment of taxes, except as to the tax certificate for the tax of 1896, and awarding possession of the premises to the plaintiff. The defendant Paine appeals from the judgment and asks a review under section 5630, Rev. Codes.

The case involves no disputed facts. The first question presented relates to plaintiff's title. Counsel for appellant contend that plaintiff has failed to establish his title. Their contention is that Willson's deed to the St. Paul Harvester Company and the latter's deed to the plaintiff are void as to the defendant, and that, plaintiff having failed to establish his title and right of possession in the premises, the action should, therefore, be dismissed. This contention must be sustained. It is agreed that neither Willson nor the St. Paul Harvester Company were in possession of the premises, or took the rents and profits thereof, during the year preceding the execution of their deeds. In fact, the St. Paul Harvester Company, the plaintiff's grantor, never was in possession. On the other hand, the defendant Paine was in possession three years before the deed to plaintiff was executed and two years before the Willson deed was executed, claiming title under his tax deeds. Further, he received the rents and profits of the premises during all of that period. Upon this state of facts, under

the law of this state, both deeds must be held void as to the defendant. The common-law doctrine, which condemns as void conveyances of real estate when title is in suit, or when the vendor has not been in possession or taken rents for the space of a year prior to the conveyance, as acts of champerty and maintenance, has not been abolished in this state, but, on the contrary, is perpetuated by express statute. Section 7001, Rev. Codes, makes it a misdemeanor for any person to take a conveyance of lands, or of any interest or estate therein, from any person not in possession, where such lands are the subject of controversy in court, knowing the pendency of the suit and that the grantor was not in possession. Section 7002, Rev. Codes, provides that: "Every person who buys or sells or in any manner procures, or makes or takes any promise or covenant to convey any pretended right or title to any lands or tenements, unless the grantor thereof or the person making such promise or covenant has been in possession, or he and those by whom he claims have been in possession of the same, or of the reversion and remainder thereof, or have taken the rents and profits thereof for the space of one year before such grant, conveyance, sale, promise or covenant made, is guilty of a misdemeanor." The sweeping condemnation of the above sections is modified by section 7003, which reads as follows: "The last two sections shall not be construed to prevent any person having a just title to lands, upon which there shall be an adverse possession, from executing a mortgage upon such lands." The fact that mortgages are thus excepted strongly emphasizes the legislative purpose to condemn as void all conveyances not thus excepted. Section 4708 of the Civil Code repeats the exception of mortgages from the condemnation of the foregoing provisions of the Penal Code. That section provides that: "A mortgage may be created upon property held adversely to the mortgagor. A mortgage of property held adversely to the mortgagor takes effect from the time at which he or one claiming under him obtains possession of the property, but has precedence over every lien upon the mortgagor's interest in the property, created subsequently to the recording of the mortgage." The right to mortgage is saved, but it will be noted that by the very terms of the statute a mortgage given upon property adversely held does not take effect until the mortgagor, or his successors, obtains possession of the property. The facts of this case bring both the Willson deed and the St. Paul Harvester Company deed under the

direct condemnation of section 7002, *supra.* The grantors had not been in possession of the premises or received the rents thereof for the space of a year prior to the execution of the deeds. The title attempted to be conveyed was a "pretended title," according to the meaning of that phrase as it is used in the statute. The words of the statute are that no person shall buy or sell any pretended right or title, or make or take any promise, grant or covenant to have any right or title of any person to any lands, etc. Under this statute it is well settled that it is immaterial whether the right or title purchased or sold be good or bad; for, if it be ever so good, if the vendor is not in possession, nothing passes by the deed, and the case comes within the statute. *Tomb* v. *Sherwood,* 13 Johns. 288.

Chancellor Kent, in reviewing the common-law doctrine upon which the New York statute just quoted is based, in 4 Kent's Comm. 466, said: "There is one check to the power of alienation of a right or interest in land, taken from the statute of 32 Hen. VIII, c. 9, against selling pretended titles; and a pretended title, within the purview of the common law, is where one person lays claim to land of which another is in possession, holding adversely to the claim. Every grant of land, except as a release, is void as an act of maintenance, if, at the time, the lands are in actual possession of another person, claiming under a title adverse to that of the grantor. This principle has always been received as settled law in New York, and it has been incorporated into the Revised Statutes. But even in such a case the claimant is allowed by the statute to execute a valid mortgage of the lands, which has preference, from the time of recording it, over subsequent judgments and mortgages, and binds the lands from the time of recovering possession. The ancient policy, which prohibited the sale of pretended titles, and held the conveyance to a third person of lands held adversely at the time to be an act of maintenance, was founded upon a state of society which does not exist in this country. A right of entry was not assignable at common law, because, said Lord Coke, 'under colour thereof pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed.' The repeated statutes which were passed in the reigns of Edward I and Edward III against champerty and maintenance arose from the embarrassments which attended the administration of justice in those turbulent times from the dangerous influence and oppression of men in power. The statute of 32 Hen. VIII imposed a forfeiture upon the seller of the

whole value of the lands sold, and the same penalty upon the buyer also, if he purchased knowingly. This severe statute was re-enacted literally in New York in 1788, and in Virginia in 1786; but the penal provisions are altered by the New York Revised Statutes, which have abolished the forfeiture, and made it a misdemeanor for any person to buy or sell, or make or take a promise or covenant to convey, unless the grantor, or those by whom he claims, shall have been in possession of the land, or of the reversion or remainder thereof, or of the rents and profits, for the space of a year preceding. The provision does not apply to a mortgage of the lands, nor to a release of the same to the person in lawful possession. It seems to be unnecessarily harsh; but it is to be observed that it was a principle conformable to the whole genius and policy of the common law that the grantor in a conveyance of land (unless in the case of a mere release to the party in possession) should have in him at the time a right of possession. Feoffment was void without livery of seisin, and without possession a man could not make livery of seisin. This principle is not peculiar to the English law. It was a fundamental doctrine of the law of feuds on the continent of Europe. No feud could be created or transferred without investiture, or putting the tenant into possession; and delivery of possession is still requisite in Holland and Germany to the transfer of real property. It seems to be the general sense and usage of mankind that the transfer of real property should not be valid unless the grantor hath the capacity, as well as the intention, to deliver possession. Sir William Blackstone says that it prevails in the Codes of 'all well-governed nations,' for possession is an essential part of the title and dominion over property. * * * The doctrine that a conveyance by a party out of possession and with an adverse possession against him, is void, prevails equally in Connecticut, Massachusetts, Vermont, Maryland, Virginia, North Carolina, Tennessee, Kentucky, Indiana, and probably in most of the other states. There are some states, such as New Hampshire, Pennsylvania, Illinois, Missouri, and Louisiana, in which the doctrine does not exist."

In *Crary* v. *Goodman*, 22 N. Y. 170, Selden, J., states that the purpose of the statute was to prevent the transfer of disputed titles, and compel their settlement between the original parties. Where the doctrine prevails, deeds executed in violation thereof are, without exception, held to be void. The invalidity of such deeds, however, exists only between the grantor and those holding adversely and

their successors. As between the parties to the deed and all other persons, it is valid. It does not work a forfeiture of title in favor of the adverse possessor. While it is true that the grantee may not maintain an action in his own name against the adverse possessor unless expressly authorized by statute, for the reason that as to the latter the deed is void, yet an action may be maintained in the name of the grantor for his use. Such, generally stated, is the doctrine of the cases. *Jackson* v. *Demont,* 9 Johns. 55, 6 Am. Dec. 259; *Livingston* v. *Peru Iron Co.,* 9 Wend. 512; *Van Hoesen* v. *Benham,* 15 Wend. 165; *Jackson* v. *Brincherhoff,* 3 Johns. Cas. 101; *Williams* v. *Jackson,* 5 Johns. 489; *Jackson* v. *Leggett,* 7 Wend. 377; *Livingston* v. *Proseus,* 2 Hill 526; *Chamberlain* v. *Taylor,* 12 Abb. N. C. 473; *Hamilton* v. *Wright,* 37 N. Y. 501; *Hassenfrats* v. *Kelly,* 13 Johns. 466; *Teele* v. *Fonda,* 7 Johns. 251.

In *Livingston* v. *Proseus, supra,* Bronson, J., speaking for the court, said: "It is extremely well settled that a conveyance of lands which are at the time held adversely to the grantor is inoperative and void. It would seem to follow from this doctrine that the title remains in the grantor, and that he may assert it in the same manner as though the deed had not been made. But it is equally well settled that, as between grantor and grantee, any persons standing in legal privity with them, the deed is operative, and passes the title. * * * From these two propositions, towit, that the owner has parted with his title, and that the grantee cannot assert it on account of the adverse holding which avoids the deed, it has been supposed to result as a necessary consequence that the title was extinguished or lost. But it has been denied that any such consequence follows. * * * Indeed, it may be laid down as a maxim in the law that a title which once existed must continue to reside somewhere. It cannot be annihilated. * * * It is often said in the books, without any qualification, that the deed is void. But that is only true in relation to the person holding adversely and those who afterwards come in under him. As to all the rest of the world the deed is valid, and passes the title from the grantor to the grantee. This, I think, is sufficiently established by the cases already mentioned and the authorities on which they rest. The deed is void as against the party who might otherwise be injured, but it is good as to all others. * * * But as against the person holding adversely the deed is utterly void —a mere nullity. There was an attempt to convey, but the parties failed to accomplish the object. The title still remains in the original

proprietor, and he may—indeed, must—sue to recover the land. It is true that the recovery will inure to the benefit of the grantee in the deed; but that is a matter between him and the grantor, and with which the person holding adversely has nothing to do. It is enough for him that the deed does him no injury."

An examination of the authorities will show that, while a deed of a disseisee conveys no title which can be enforced in the name of the grantee against the disseisor or his privies, they go no further. It is now held that such deed is good against the grantor, and that it entitles the grantee to an action to recover the land, in the name of the grantor, but to his own use, even against the desseisor. *Farnum* v. *Peterson,* 111 Mass. 148; *Wade* v. *Lindsey,* 6 Metc. 407; *Cleaveland* v. *Flagg,* 4 Cush. 76. *McMahon* v. *Bowe,* 114 Mass. 140, 19 Am. Rep. 321. By executing and delivering the deed the grantor impliedly authorizes the grantee to use his name in an action to recover the land, and for that purpose the grantor is a real party in interest within the meaning of the statute requiring every action to be prosecuted in the name of the real party in interest. *Steeple* v. *Downing,* 60 Ind. 478.

Counsel for plaintiff urges that the necessity of the law under consideration has long since disappeared; that it has outlived its usefulness; and that it is "the duty of this court to hold that the law invoked by the appellant in this case shall not defeat what would unquestionably, in the absence of the statute, be a just and valid title." It is true the common-law doctrine and statutes declaratory thereof seem to be in increasing disfavor in a number of states, on account of the embarrassing restrictions placed upon the right of free alienation. See *Kreuger* v. *Schultz,* 6 N. D. 310, 70 N. W. Rep. 269. The legislature of South Dakota passed an act in 1899 (chapter 109, p. 144, of the Laws of 1899) which expressly authorizes transfers by persons out of possession, and gives to their grantees the same rights as are obtained by persons receiving conveyances from parties in possession. Similar abrogating statutes will be found in several other western states. The older states, notably New York and Massachusetts, firmly adhere to the common-law doctrine. Ohio, at an early date, repudiated it. The fact that this had been done, however, was deplored by Hitchcock, J., who wrote the opinion in *Cressinger* v. *Lessee of Welch,* 15 Ohio, 156, 45 Am. Dec. 565, in the following language: "I have no hesitation in saying that, in my opinion, the rule contended for by plaintiff's counsel would be bene-

ficial, and highly conducive to the public interest. It would prevent the practice of purchasing doubtful titles. It might interfere with the interest of keen sighted speculators, who make it a business to hunt up and purchase in such titles; but it could do no injury to the honest man. But, although such is my opinion, still, acting in a judicial capacity, I cannot consent to change the rule. Such change would interfere with a multitude of land titles heretofore acquired, and acquired, too, with a knowledge of the law as expounded by the court. But there is a body which can apply a remedy which shall operate hereafter. That body is the general assembly. And to me it is a matter of surprise that we have not an act upon our statute books declaring void sales made under the circumstances referred to by counsel in their second request to the court. But, until some statute of the kind is enacted, we feel ourselves bound by the law as heretofore settled." The common-law doctrine has existed in this jurisdiction since the organization of the territory. Whether it is wise or unwise is a question of public policy for the legislature to determine. The power to abolish it rests with the legislature, and not with the courts. So long as it remains the law of this state, it is the duty of the courts to give it effect.

Counsel also claims that the common-law doctrine, which admittedly was in force in this state prior to 1895, was abrogated by the adoption of the Revised Codes of 1895. This argument is based upon the fact that the Revised Codes wholly omit section 3303 of the Compiled Laws, which provided that: "Every grant of real property * * * is void, if at the time of the delivery thereof, such real property is in the actual possession of a person claiming under a title adverse to that of the grantor;" and also omit that portion of section 4870, Comp. Laws, which declared that a grantee of land under the void grant might maintain an action in the name of the grantor. These omissions did not affect the law as it theretofore existed. The provisions of section 3303 and that part of section 4870 which was omitted were merely legislative declarations of the common law as it existed independent of those provisions. As has been seen, where the common-law doctrine prevails—and concededly it was in force in this state—a grant, under the circumstances described in section 3303, is void. Further, its invalidity extends only to the adverse possessor, and the grantee may maintain an action in the name of the grantor. That authority existed independent of section 4870. It is patent, therefore, that the mere omission of these provisions was

without effect or special significance. No abrogating statute has ever been enacted in this jurisdiction. On the contrary, sections 7001, 7002, and 7003 of the Penal Code, above referred to, were retained, and are still in force. Section 7002 makes it a misdemeanor for any person to convey any pretended title to lands, unless he or those under whom he claims have been in possession or have taken the rents and profits for one year before his conveyance. The deed upon which the plaintiff relies to establish his title was executed in violation of this section. It was, therefore, void, as contrary to the express provisions of the statute, and contrary to the policy of the law of this state as expressed in said section. See section 3920, Rev. Codes. Counsel says in his brief that this section "was overlooked by both the commissioners and the legislature in revising the Code, and that the intent to repeal it existed, but it escaped by oversight," and asks us to give this alleged intent effect, and hold that the statute was in fact repealed. It is idle to speculate upon the undisclosed intention of the legislature and of the Code commissioners. The Code, as adopted, and the statutes as they exist, represent the legislative will, so far as we can take cognizance of it. As we have seen, the Revised Codes did not abrogate the common-law doctrine, but, on the contrary, perpetuated it.

It follows from what we have said that the plaintiff wholly failed to sustain his title. The district court is directed to vacate the judgment entered, and to enter a judgment dismissing this action. All concur.

(96 N. W. Rep. 258.)

FORESTER v. VAN AUKEN.

Opinion filed July 1, 1903.

Reformation of Instruments—Parol Evidence.

1. Courts of equity have power to reform written instruments to conform to the true intention of the parties, and parol evidence is admissible for that purpose.

Deed Declared a Mortgage on Mistake Only When It is Mutual.

2. In an action to reform a warranty deed to conform to the intentions of the parties that it was to be a mortgage on the ground that

there was a mistake, courts of equity will not grant the relief, in the absence of fraud, unless it clearly appears that the mistake was a mutual one.

Evidence Must Be Clear, Specific and Convincing.

3. In such a case the evidence must be clear, satisfactory, specific, and convincing that there was such a mistake, or the relief will be denied.

Consideration in Deed Not Conclusive.

4. The consideration expressed in a deed is not conclusive as to the real consideration for the transfer, and may be inquired into, and matters not expressed in the deed considered in determining whether the consideration was grossly or manifestly inadequate.

Inadequacy of Price, Evidence Only.

5. Mere inadequacy of price is not alone ground for declaring a deed to be a mortgage, but, if grossly inadequate, is a circumstance to be considered in determining what the intentions of the parties were.

Evidence Insufficient.

6. Evidence considered, and *held* not to warrant a decree declaring a deed to be a mortgage.

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

Action by Jennie A. Forester against Belle R. Van Auken. Judgment for defendant, and plaintiff appeals.

Affirmed.

C. L. Harris and *Lockerby & White* (*E. H. Wright,* of counsel), for appellant.

A deed absolute on its face but intended as a trust deed, may be reformed to express the relation and intention of the parties. Rev. Codes 1899, section 4703. *Pugh* v. *Davis,* 96 U. S. 333, 24 L. Ed. 775; *Farmer* v. *Grose,* 42 Cal. 169; *Hickman* v. *Cantrell,* 9 Yerg. 171; *Teal* v. *Walker,* 111 U. S. 242, 28 L. Ed. 415; *Rodgers* v. *Sanders,* 16 Me. 92; *Patterson* v. *Blumer,* 35 Conn. 57; *Walden* v. *Skinner,* 101 U. S. 577, 25 L. Ed. 963; *Gunter* v. *Janes,* 9 Cal. 643; *Mullard* v. *Hathaway,* 27 Cal. 191; *Roach* v. *Carrafa,* 85 Cal. 436, 25 Pac. Rep. 22; *Tapia* v. *Demartina,* 77 Cal. 383, 19 Pac. Rep. 641; *Lockwood* v. *Canfield,* 20 Cal. 126, 2 Devlin on Deeds, 1136. There can be no difference between a trust deed and a mortgage security, where the writing is silent, as we have it in this case. 26 Am. & Eng. Enc. of Law 860; Boone on Mortgages 96, 226; *Lookwood*

v. *Canfield,* 20 Cal. 126. If a deed can be reformed and declared a mortgage by resort to parol evidence, then deed, absolute on its face, can be shown to be a trust deed, and parol evidence resorted to for that purpose. *Gunter* v. *Janes,* 9 Cal. 643; *Mullard* v. *Hathaway,* 27 Cal. 191; *Hayne* v. *Hermann,* 97 Cal. 259, 32 Pac. Rep. 177. A written instrument, executed under the misapprehension that it embodies an agreement, whereby the mistake of the draughtsman as to law or fact it fails of its purpose, equity will reform in accordance with the contract. *Truesdale* v. *Lehman,* 47 N. J. Eq. 218, 20 Atl. Rep. 319; *Keister* v. *Meyers,* 17 N. E. Rep. 161; *Adams* v. *Wheeler,* 122 Ind. 257, 23 N. E. Rep. 760; *Knight* v. *Glasscock,* 51 Ark. 390, 11 S. W. Rep. 580; *Andrew* v. *Andrew,* 81 Me. 339, 17 Atl. Rep. 166.

While oral evidence is not admissible to vary a written instrument, such evidence is admissible to show that, by reason of fraud, mistake or accident, the instrument fails to show the true intent of the writing; and when mistake, fraud or accident clearly appears, equity will rectify. *Rogers* v. *Sanders,* 16 Me. 92; *Patterson* v. *Bloomer,* 35 Conn. 57; *Waldron* v. *Skinner,* 101 U. S. 577, 25 L. Ed. 963; *Gunter* v. *Janes,* 9 Cal. 643; *Andrews* v. *Gillespie,* 47 N. Y. 491. Courts of equity reform contracts, courts of law act on them as they find them. *Nance* v. *Metcalf,* 1 West Rep. 443, 19 Mo. App. 183; *Loss* v. *Orby,* 22 N. J. Eq. 55. Equity will reform when the mistake occurs from either ignorance, forgetfulness, unconsciousness, or belief in a thing which does not exist. 2 Pom. Eq. Jur. 299; *Briggs* v. *Vanderbilt,* 19 Barb. 222; *Durgan* v. *Cranston,* 7 Johns. 442; *McDaniels* v. *Bank of Rutland,* 29 Vt. 248; *Ewell* v. *Chamberlain,* 4 Bosw. 320; *Rhell* v. *Hick,* 25 N. Y. 289; *Ketchum* v. *Bank of Commerce,* 19 N. Y. 502; *Belknap* v. *Sealey,* 14 N. Y. 143; *Martin* v. *McCormick,* 8 N. Y. 335; *Gardner* v. *Troy,* 26 Barb. 423; *Kip* v. *Monroe,* 29 Barb. 579; *Wedon* v. *Olds,* 20 Wend. 174.

Winterer & Winterer, for respondent.

Mistake must be mutual. *Life Ins. Co.* v. *McMarter,* 87 Fed. 63; *Stewart* v. *Gordon,* 53 N. E. Rep. 797; Bispham Eq. section 469.

All declarations of trust in land should be proven by some writing signed by the declarant, or be void; but resulting trusts, or trusts created by operation of law need not be in writing, and may be proved by parol. *Williams* v. *Williams,* 180 Ill. 361, 54 N. E. Rep. 229; *Cameron* v. *Nelson,* 77 N. W. Rep. 771; *Arnold* v. *Ellis,* 48 S.

W. Rep. 883; *Rogers* v. *Rogers,* 39 Atl. Rep. 755; *Fitzgerald* v. *Fitzgerald,* 47 N. E. Rep. 431; *Hamilton* v. *Hall's Estate,* 69 N. W. Rep. 484; *Meyers* v. *Meyers,* 47 N. E. Rep. 309; *Klamp* v. *Klamp,* 70 N. W. Rep. 525; *Luce* v. *Reed,* 65 N. W. Rep. 91; *Thomas* v. *Thomas,* 67 N. W. Rep. 182; *Goelz* v. *Goelz,* 41 N. E. Rep. 756; *Sherman* v. *Sandell,* 39 Pac. Rep. 797; *McCahill* v. *McCahill,* 25 N. Y. S. 219; *Patterson* v. *Boswell,* 36 N. E. Rep. 845; *Beavers* v. *McKinley,* 33 Pac. Rep. 359; *Renz* v. *Stoll,* 54 N. W. Rep. 276; *Smith* v. *Mason,* 55 Pac. Rep. 143.

MORGAN, J. This action is brought to recover the possession of certain real estate situated in Valley City, N. D., and to reform the terms of a deed of such property executed and delivered to the defendant by the plaintiff on August 21, 1893. The complaint alleges that it was mutually agreed between the parties that plaintiff should execute to defendant a trust deed of said real estate; that the ownership of the same should be vested in the plaintiff, but that the defendant was to have full possession and control thereof, lease it, collect rents, pay taxes, and keep buildings insured and in good repair; that out of the money coming into defendant's hands from rents collected, the defendant was to pay such taxes, insurance, expenses of repairs, and to pay a mortgage of $2,000, then in force upon one lot and the brick building situated thereon, and out of such money collected was also to pay herself a certain note given to her by plaintiff and her husband in 1891 for $800; that upon the payment of such debts according to such agreement possession of such premises should be restored to plaintiff, and the same reconveyed to her by a warranty deed. These are substantially the allegations of paragraph 3 of the complaint. The complaint further states: "That in pursuance of said agreement this plaintiff conveyed to the said defendant, by a deed of warranty, in writing, the premises hereinbefore described; * * * that through the inadvertance and mistake of this plaintiff and the defendant the conditions mentioned and specified in paragraph 3 of this complaint were not inserted in said deed, but said deed was intended by plaintiff and defendant as a trust deed or mortgage security, under which said defendant might carry out the conditions and covenants mentioned and described in said paragraph 3 of this complaint, but said deed does not express the true and real intention of this plaintiff and said defendant by reason of said omission." The prayer of the complaint is for an ac-

counting and a reconveyance, and for such other and general relief as may be necessary and proper under the evidence. The complaint states many other facts bearing on this cause of action, but the substance of the cause of action is as stated. The answer alleges that the said property was sold to the defendant for a valuable consideration, and conveyed to her by said warranty deed; that such sale was an absolute sale, and contained no contemporaneous, prior, or subsequent stipulations or agreements for a reconveyance, and contained no agreement that the transfer was made in trust or for security purposes. The trial court made findings of fact and conclusions of law in favor of the defendant. Judgment was entered pursuant thereto. This appeal is taken from such judgment. A trial *de novo* is demanded in this court pursuant to section 5630, Rev. Codes 1899.

The evidence in the case is voluminous, covering nearly 400 pages of the printed abstract. The facts pertinent to a determination of the issues may be summarized as follows: The plaintiff is the daughter of the defendant. In 1889 the plaintiff's husband, Alex. McConnell, died, leaving to her and to her daughter, Georgia McConnell, individually, considerable real and personal property. In 1891 the plaintiff married one George W. Forester, who engaged in business in Montana, and carried on such business with the plaintiff's money partly, and lost considerable of her money in that way. For the purpose of providing him with money, the plaintiff sold some of her property, and borrowed $2,000, and secured its payment by a mortgage on lot 13, in Valley City, on which lot there was a brick building, which is a part of the property in dispute in this action. This mortgage did not mature until about four years from August 21, 1893, the day on which the warranty deed was given by plaintiff to defendant. The plaintiff had signed notes jointly with her husband for goods purchased in his business, amounting to several hundred dollars, and some of these notes were about to become due in August, 1893. The plaintiff and her husband also owed the defendant $800 and two years' accrued interest at eight per cent per annum. The defendant had written Forester, asking him to pay this sum. He and his wife were then living in Montana. She came east to Valley City, where the defendant resided, to make some arrangement in regard to this indebtedness. At the making of the contract in relation to the disposition of the property herein involved, the plaintiff and defendant were the only persons present. As to what was said there in coming to the agreement, their testimony is

in conflict, and cannot be reconciled on the theory that both are endeavoring to tell the truth. The plaintiff testifies that there was no sale or agreement to sell; that the conveyance was executed to secure the defendant on her $800 note. She says: "My understanding, and we talked it, I was to give her a trust deed of the property. She was to look after it, and, after paying the mortgage, she to hold it long enough to collect the rent and pay the taxes, so she could pay the mortgage of $2,000 and her note of $800 and taxes, keep the property insured, and at the end of that time I was to have the property back." She further testifies that she did not know when she signed the deed that it did not express their agreement and her intention in regard to the disposition of the property, and that, had she known that it did not express their intention, agreement and understanding, she would not have signed it. The defendant denies that there was ever any talk, suggestion or intimation whatever as to deeding the property back, or that anything was said by them that contemplated anything but an absolute sale of the property, free of any conditions whatsoever. Her testimony as to the agreement is as follows: "A. On or about the 21st of August she (plaintiff) received a letter from Mr. Forester, asking her if she had fixed up the business of mine, and to be sure and do it at once. She told me how she said she was used. She didn't know that Mr. Forester was asking her to pay money at Livingston, and she had her interest to pay at Fargo. She said she had no money to pay that, and said that she was discouraged, but he wrote to her that she must fix that up, and she wondered how she would do it. We talked about it, and I told her I would be glad to help her if I could. But, finally, when she received the letter from Mr. Forester, saying she in the meantime had a letter from an attorney in Livingston, telling her she might as well pay the $600, because she would have to meet it later. * * * Then she received these letters in the morning, and in the afternoon, or at dinner time, or about that time, she says: 'Monie, I will sell you this property.' I said, 'Can you sell it?' She says, 'I can.' She says: 'Charlie is a good workman, and he can make a good living anywhere, but he will never settle down to work as long as I have a dollar. I will sell you this property. There is enough left of it to make you a good home. You have Georgia.' I said, 'What will the consideration be?' She says: 'It will pay your note, and you assume the mortgage and taxes.'" The defendant did not then and there accept the proposition to sell her

the property, but stated that she wished to think it over, and talk it over with Mr. Winterer, an attorney of Valley City. She started for his office, but met him on the street, and asked him to come to her house. He came there some time later, and the terms of the sale were stated to him by the plaintiff. The amount due on the $800 note was computed, and some other items of indebtedness due defendant from plaintiff were agreed on and settled, and the consideration for the deed agreed on as $1,100, in addition to assuming the payment of the $2,000 mortgage and payment of the 1892 taxes on all the property conveyed. At this interview all the details of the agreement were agreed upon, according to the testimony of Mr. Winterer and the defendant, and it was further agreed that the conveyance was to be a warranty deed. Mr. Winterer testifies that the agreement, as stated to him in their presence, was that the property was to be sold absolutely, and without any reservations. He procured from them the description of the property, and left for his office to draw the deed. He returned with the deed drawn, and was accompanied by his sister as a witness. He read or stated to the plaintiff the substance of the deed, and she stated that it was what she wanted, and perfectly satisfactory. She then signed it. It was witnessed and acknowledged in due form. He then took it to his office, placed his seal as notary public thereon, and returned to the house. There he delivered the deed to the plaintiff and she to the defendant. The defendant delivered the $800 note to plaintiff, who immediately destroyed it. The tenants were then notified of the sale, and that all rents were to be collected by the defendant. Mr. Winterer's testimony corroborates that of the defendant, although expressly denied in most particulars by the plaintiff. From this testimony and other circumstances shown in the record we are to determine what the intentions of the parties were at the time that this deed was executed. Was the transfer to be an absolute one, or was it to be a transfer subject to reconveyance after certain conditions had been performed?

Upon the oral testimony alone, we have no difficulty in reaching the conclusion that it was an absolute sale. There is a decided preponderance of evidence in favor of this conclusion. The circumstances surrounding the transfer are such as to corroborate this oral testimony, in our judgment. These circumstances will be referred to later. It is claimed by the plaintiff in her complaint and in her testimony that there was a mutual mistake made by the parties in

signing a warranty deed in place of a trust deed or mortgage security, as intended. This contention is utterly unsustained. The plaintiff claims that she supposed it was a trust deed. She does not attempt to show that the defendant thought it to be such. Her mistake alone would not be ground for reforming the deed. It must be a mutual mistake before the contract actually signed by the parties will be changed. 2 Pom. Eq. Juris. section 862; *Spare* v. *Home Ins. Co.* (C. C.) 19 Fed. 14; *Wachendorf* v. *Lancaster* (Iowa) 14 N. W. 316; *Bradford* v. *Remney,* 30 Beaver, 431; *Nevius* v. *Dunlap,* 33 N. Y. 676; *Ludington* v. *Ford,* 33 Mich. 123; *Paulison* v. *Van Iderstine,* 28 N. J. Eq. 306; *Diman* v. *Railroad Co.* 5 R. I. 130. "It must appear that both have done what neither intended." *Hearne* v. *Marine Ins. Co.,* 20 Wall. 488, 22 L. Ed. 395. The evidence does not warrant the conclusion that the deed was to be a mortgage, but, on the contrary, amply supports the finding that the deed was in exact compliance with the prior agreement. It is urged that the circumstances in evidence show that the deed was intended as a mortgage, and that its execution was made through mistake, and that such circumstances overcome the positive evidence of the defendant, and show satisfactorily that the deed was intended as a trust deed or mortgage. First it is claimed that the consideration was so grossly inadequate as to render it wholly improbable that an absolute conveyance could have been intended. The property consisted of four lots in Valley City. On three of them there were buildings, and one was a vacant lot. One of the buildings was a business block built of brick. The other buildings were for residence purposes. The evidence as to the value of this property in August, 1893, is very conflicting. Witnesses with apparently equal judgment and opportunities to speak of its value differ greatly in their conclusions. The highest valuation placed on the property was $7,000, and the lowest $3,825. This conveyance was made during the panic of 1893, and the witnesses testifying on behalf of the defendant place great stress upon the fact that the scarcity of money and the demand for it at that time caused a depreciation in values. The difficulty at that time of raising money necessarily affected the market value of property, and is a fact to be taken into consideration in determining what the fair value of the property then was. The consideration paid for this property by the defendant was, when all summed up, $3,300. This included the $800 note, the $2,000 note, other indebtedness on money paid out for plaintiff or loaned to her, and taxes for the year

1892. If the property were worth $3,825, a sale for $3,300 would not be at all inadequate in the sense that it would be evidence to indicate that a transaction was a mortgage and not a sale. But we may concede that the property was more valuable than that, and still the conveyance for the sum of $3,300, under the circumstances of this case, would not indicate to any degree that a trust or mortgage transaction was intended. The plaintiff and defendant were at that time on friendly terms. The defendant was the guardian of plaintiff's daughter, Georgia, who had lived with the defendant, and was to live with her in the future much of the time. The plaintiff was anxious to make some disposition of the property, and was anxious to pay or secure her mother the money due her. There were other debts due from the plaintiff, and it is quite clear from the evidence that some of her creditors were making inquiries as to the plaintiff's property with a view to realizing therefrom on some of those debts. The testimony shows that the plaintiff came from Montana to make some arrangement as to the Valley City property and the payment or securing of the $800 note. The plaintiff's husband was then doing a failing business, and had lost considerable money. He was in debt, and his wife was a joint maker with him on some of the notes given for these debts. The financial condition of plaintiff and her husband was becoming alarming and serious. It must have been forced upon the minds of plaintiff and her husband that the Valley City property was liable to be wrested from her by urgent creditors. With this state of facts confronting her, it was natural that she should prefer to sell the property to her mother, even at a sacrifice, and thereby pay her the $1,100 due her. Her daughter, Georgia, would thereby be directly benefitted, and her mother as well. It is quite reasonable, therefore, that the plaintiff should have stated, as testified by the defendant: "I will sell you this property. There is enough left of it to make you a good home. You will have Georgia." Her husband had lost much of her property, and it appeared that it would all soon be gone. Her desire to see her mother protected was, therefore, a most natural feeling. Our conclusion is, therefore, that under the circumstances, and in view of the relations of the parties, the consideration for the sale is not so inadequate as to give it any weight as a circumstance against the validity of the sale, or as showing that there was a mistake in the execution of the deed.

It is further claimed that there was no sale, and none intended by either party, and as tending to sustain such contention it is

urged that the $800 note was not turned over to the plaintiff when the deed was delivered, or at any other time. On this question the testimony of the defendant and of Mr. Winterer is positive and explicit that the note was turned over to the plaintiff, and by her torn up, when the deed was delivered. The plaintiff says it was not, but she is not corroborated by any other witness, nor by a single fact or circumstance. Her testimony on this point is, therefore, overthrown by so decisive a preponderance of the evidence that there remains no doubt in our minds that the note was returned to her.

On a careful consideration of the evidence we find no ground upon which to reform the deed as prayed for. The sole ground on which a reformation is asked is that there was a mutual mistake by the parties. No fraud is pleaded, and, had it been pleaded, the record lacks any evidence to support it. The contention is made in the argument that, "even though her (defendant's) mind was free from fraud at the time of the transaction, and though she still intended to carry out in good faith the conditions of the trust, at a later date, at least, she determined to retain the property." There would be some foundation for this contention if some admissions attributed to the defendant were made as claimed. The defendant denies making any of these alleged admissions. No independent circumstances tend to show that she ever made them. Such testimony consisted of admissions claimed to have been made years before this trial, and is not sufficient to establish the fact that the deed was mutually intended as security, simply, in the face of solemn recitals of the deed itself and the positive and convincing evidence of the two persons named, coupled with the positive denials of the defendant that she made them. It is further claimed that defendant, before selling one of the lots transferred by the deed in suit, advised with the plaintiff before making such sale. This is not established. The advice is claimed to have been sought at Billings, Mont., while defendant was visiting the plaintiff there. The defendant testifies that the transfer was made before she left Valley City to make the visit at Billings, and it is not shown in any way that there was any correspondence between them relating to the sale of the lot. The deed was made on September 28, 1894, and the defendant started for Billings on the 29th. The action has been considered and treated by us as one to reform a warranty deed, and make it conform to the alleged intentions of the parties that it should be a mortgage. The term "trust deed" is frequently used in the complaint and in the

evidence. The facts pleaded show, we think, that the trust deed mentioned was intended to be used as synonymous with the words "mortgage," "mortgage deed," or "mortgage security." This is shown conclusively by the clause of the complaint above quoted, wherein it is alleged that the deed was intended as a trust deed or mortgage security. Plaintiff's evidence also is to the same effect. She testifies that the agreement was that she was to give defendant a trust deed as security for the $800 note. Section 4703, Rev. Codes 1899, authorizes a transfer by deed to be shown to be a mortgage, and without such statutory authority courts of equity have such power. Parol evidence is admissible to show that a deed absolute on its face was intended as a mortgage. *Jasper* v. *Hazen,* 4 N. D. 1, 58 N. W. Rep. 454, 23 L. R. A. 58; Pomeroy Eq. Jur. section 1196.

Our conclusion is that the deed, as executed, expressed the real intention of the parties when executed. The most that can be said in favor of recovery by the plaintiff is that there is some evidence to sustain it. In the place of plaintiff having sustained her contention by that clear, convincing, and satisfactory evidence required in this class of cases, we find the defendant has disproved such contention by evidence that is clear and convincing, and leaves no substantial doubt in our minds of the truthfulness of the defendant's answer. Not only does the oral testimony thus convince our judgment, but the written evidence and other circumstances add to the weight of the oral testimony. On April 23, 1896, plaintiff's husband wrote the defendant asking her to loan him $50, saying in the letter that he would return it in a few days. On January 13, 1897, he again wrote her in regard to the loan of money. In neither of these letters was anything said about the property, nor the accumulated rental therefrom. The money was called for as a loan, and not as an advancement on account of these rents. If he was then relying on this deed as a mortgage simply, and considered that the defendant was holding it in trust for his wife, and he wished her to furnish the money, it would have been a most natural inquiry to make whether the rents had not now fully paid the debt due to the defendant. Instead of making such an inquiry, he asked for a loan, with express promises to return it soon. For nearly six years the defendant was permitted to manage this property, collect the rents, and make valuable improvements thereon, and never during that time did plaintiff or her husband demand an accounting, or show any interest in the outcome of the sale now claimed to have

been for temporary purposes only. There is nothing contained in the correspondence in evidence to indicate that the plaintiff or her husband ever entertained the idea of a reconveyance during these six years. So far as the correspondence is concerned, they seemed to have abandoned all interest in the property, as they never referred to it. The plaintiff does say that she asked for an accounting, but in her cross-examination on this subject her statements are so indefinite and contradictory as to entirely deprive them of any weight. In this the burden rests with the plaintiff to show by clear, convincing, and satisfactory proof that this deed was executed through a mistake existing as to its terms when it was executed. *Jasper* v. *Hazen, supra; McGuin* v. *Lee,* 10 N. D. 160, 86 N. W. Rep. 714. She has failed to do so. She has failed to show that there was a mistake on her part, even, much less to show that there was a mutual mistake. She does not claim any deception by reason of false statements as to the terms of the deed. The most she claims is that she supposed it to be a trust deed. She heard it read, or its contents stated, and could have read it herself. She is a woman of equal intelligence and business ability with her mother, so far as the record shows. No circumstances appear showing that she placed any particular confidence in her mother and was imposed on.

The fact is suggested in argument that the defendant committed a fraud on plaintiff in permitting her to sign the deed believing it to be a mortgage, when the defendant knew otherwise. There is not a scintilla of evidence to show this, and it fully appears that the facts known to the defendant were also made known to the plaintiff. After a careful examination of the evidence, we find that the contract made by the parties, as evidenced by the deed, should not be reformed. The deed expressed their intentions. By reforming it to comply with plaintiff's request, we would be making a contract for the parties not contemplated by them when the deed was signed, and this should never be done. Our conclusion accords with that of the trial court.

The judgment is affirmed. All concur.

(96 N. W. Rep. 301.)

JOHN HERTZLER *v.* L. R. FREEMAN, ET AL., AND CASS COUNTY.

Opinion filed July 1, 1903.

Tax Not a Personal Obligation, Mere Charge on Land.

1. A tax imposed upon real estate pursuant to the provisions of chapter 126, p. 256, of the Laws of 1897, does not create a personal obligation against the owner, but is merely a charge against the land.

Assessment in Name of Owner Merely Directory.

2. The provisions of said chapter requiring real estate to be assessed in the name of the owner are directory.

Failure to Assess in Owner's Name Does Not Render Tax Void.

3. Construing section 81 of said chapter, which provides that "no sale of real estate for taxes shall be considered invalid on account of the same having been charged in any other name than that of the rightful owner," in connection with other provisions of the act, it is *held*, that an assessment of real estate in the name of another than the owner does not render the tax void.

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

Action by John Hertzler against the county of Cass and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Newman, Spalding & Stambaugh, for appellant.

The statutory requirement, that taxes on land be assessed in the name of the owner, if known, and if unknown to so state, is for the benefit of the taxpayer, and is mandatory, and failure to so assess is fatal to the tax. *Roberts* v. *First National Bank of Fargo*, 8 N. D. 504, 79 N. W. Rep. 1049; *Sweigle* v. *Gates*, 9 N. D. 538, 84 N. W. Rep. 481; *Eaton* v. *Bennett*, 10 N. D. 346, 87 N. W. Rep. 188; *Himmelman* v. *Stiener*, 38 Cal. 175; *People* v. *Whipple*, 47 Cal. 591; *Smith* v. *Davis*, 30 Cal. 537; *Smith* v. *Cofran*, 34 Cal. 310; *Hughes* v. *Reese*, 40 Cal. 255; *Beidleman* v. *Brooks*, 28 Cal. 72; *Kelsey* v. *Abbott*, 13 Cal. 609; *Grotenfend* v. *Ultz*, 53 Cal. 666; *Gwynn* v. *Dierssen*, 36 Pac. Rep. 103; *Klumpke* v. *Baker*, 68 Cal. 559, 10 Pac. Rep. 197.

Emerson H. Smith and *Edward Engerud*, for respondents.

The name of the owner of the land taxed is not essential to its valid assessment under the state revenue laws. *Sweigle* v. *Gates,* 9 N. D. 538, 84 N. W. Rep. 481, is not applicable, as it was rendered under the territorial law, which provided a system unlike that under Chap. 126, Laws of 1897. Under the state system, the proceeding is *in rem;* while under the territorial law it was *in personam.* The distinction between the two systems is pointed out in Burroughs on Taxation, chapter 2, section 95. See also Cooley on Taxation, p. 275. The personal liability theory prevails in California. *Kelsey* v. *Abbott,* 13 Cal. 609; *Taylor* v. *Palmer,* 31 Cal. 240. In Massachusetts, *Sargent* v. *Bean,* 7 Gray 125; *Peas* v. *Whitney,* 5 Mass. 380; *Green* v. *Croft,* 6 Cush. 70; *Alvord* v. *Collin;* 20 Pick. 418; In New York *Newell* v. *Wheeler,* 48 N. Y. 486; *Whitney* v. *Thomas,* 23 N. Y. 284; *Cottle* v. *Cary,* 70 N. Y. S. 129. In Oregon, *Tracy* v. *Reed,* 38 Fed. 69.

The Supreme Court of Nebraska points out the difference between tax *in personam* and *in rem. Lyman* v. *Anderson,* 2 N. W. Rep. 732; *Grant* v. *Bartholomy,* 78 N. W. Rep. 314.

YOUNG, C. J. This is an action to quiet title to 160 acres of land situated in Cass county. The plaintiff alleges that he has a lien thereon, consisting of a mortgage, upon which a judgment of foreclosure has been entered; that the defendants claim certain estates or interests in or liens or incumbrances upon the same adverse to the plaintiff; and prays that they may be required to set forth their claims, to the end that their validity and priority may be determined, and that title may be quieted in the plaintiff. L. R. Freeman, R. E. Fleming, the Richards Trust Company, and Cass county were made defendants. The three defendants first named made default. Cass county served notice of appearance, but did not answer within the statutory period. Judgment was entered by default quieting title in the plaintiff as against the three defendants first named, and also declaring that the defendant Cass county had no interest in or lien upon the premises for taxes assessed and levied for the years 1900 and 1901. Thereafter the state's attorney of Cass county, upon his affidavit, procured an order to the plaintiff to show cause why the judgment should not be vacated. The application to vacate the judgment was granted. The plaintiff then obtained leave to serve and file a supplemental complaint, alleging that since the commencement of the action the county of Cass

claims to have acquired a new and additional lien upon the premises adverse to the plaintiff, and asked that it be required to set the same forth, that its validity and superiority might be determined. Cass county answered, alleging that the premises in question were duly and regularly assessed for taxation in the years 1900 and 1901, and taxes levied thereon for said years; that the same are still of record against said land, and are unpaid, and constitute liens upon the land, and asks that the taxes for both of said years be adjudged and decreed to constitute liens upon said premises. The trial court made and filed findings of fact, and as conclusions of law found that the premises were duly and lawfully assessed in the years 1900 and 1901, and that the taxes for said years constitute valid liens thereon, and that the defendant is entitled to a judgment dismissing the plaintiff's complaint as to the defendant Cass county. From the judgment so entered the plaintiff appeals.

Appellant claims that the taxes for the years 1900 and 1901 are void for want of a valid assessment. It is conceded that in both years the land was assessed to L. R. Freeman, and that he was not the owner of the land. Does this fact render the assessment void? We are agreed that it does not. The assessments were made under chapter 126, p. 256, Laws 1897. A real estate tax imposed under this act does not become a personal obligation against the owner, but is merely a charge against the land itself. In other words, the entire tax proceedings as to real estate are *in rem,* and not *in personam.* There is no provision in our state constitution which requires that real estate shall be assessed in the name of the owner. It was entirely competent, then, for the legislature to provide that real estate should be assessed without any reference whatever to the name of the owner; that is to say, by any such description or method as would have been legally adequate to convey either actual or constructive notice to the owner (*Castillo* v. *McConnico,* 168 U. S. 674, 18 Sup. Ct. 229, 42 L. Ed. 622), and to declare that land "shall be chargeable with taxes, no matter who is the owner, or in whose name it is assessed and advertised, and an erroneous assessment does not vitiate a sale for taxes." (*Witherspoon* v. *Duncan,* 4 Wall. 217, 18 L. Ed. 339). Section 179 of the state constitution provides that "all property * * * shall be assessed * * * in the manner prescribed by law." This section gives the taxpayer a constitutional right to have the mandatory provisions of the law regulating assessments complied with. Are the

provisions of the act of 1897, in so far as they require an assessment of real estate to be made in the name of the owner, mandatory? Counsel for appellant contend that they are, and that there can be no valid assessment of real estate unless made in the name of the owner. We are of a contrary opinion. It will be noted at the outset that the act of 1897 does not, in express language, command assessors to list real estate in the name of the owner, as did section 1548, Comp. Laws, which was construed in *Sweigle* v. *Gates*, 9 N. D. 538, 84 N. W 481. While it is true that the assessor is not specifically directed to list real estate in the name of the owner, there are certain other provisions contained in the act which make it clear that it was intended that he should do so. For instance, section 31 requires the county auditor to prepare and deliver to the assessor assessment books "showing the name of owners if to him known, and if unknown so to state." Section 106 provides for a notice of expiration of redemption "to the person in whose name such lands are assessed." Both of these sections assume that the assessment of real estate is to be in the name of the owner. It is quite clear, however, that the use of the owner's name under this act is essentially for the guidance of the taxing officers, and for the purpose of securing system in the tax proceedings; and that it is not essential to a valid assessment. The requirement is, therefore, not mandatory. The rule is that regulations designed to secure order, system and dispatch in tax proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected, are not usually regarded as mandatory, unless accompanied by negative words importing that the act required shall not be done in any other manner or time than as designated. *French* v. *Edwards*, 13 Wall. 506, 511, 20 L. Ed. 702; Cooley on Taxation (2d Ed.) 233. This act contains no words importing that the assessment shall not be made in any other manner than to the owner. The reverse is true. Section 78 enumerates the only grounds which, according to the legislative intent, will defeat a tax sale. The failure to assess in the name of the owner is not one of the grounds. The fact that the legislature did not intend that the failure to assess real estate in the name of the owner should be fatal to the tax is also shown by section 1241, Rev. Codes, which authorizes a change and correction of the name after the assessment roll has been completed. There is a further provision, however, which places the immateriality of an error in assessing real estate to another than

the owner beyond question. Section 81 of this act, in referring to tax sales, expressly provides that "no such sale of real estate for taxes shall be considered invalid on account of the same having been charged in any other name than that of the rightful owner." This provision has been in force in Minnesota since 1874, and, while it refers to the avoidance of the tax sale, it applies generally to the charge of the tax. Jaggard on Taxation, 364. Statutes substantially similar are now in force in many states, and they are uniformly construed as rendering an error in naming the owner of no consequence. *Lake County* v. *Sulphur Bank Quicksilver Min. Co.*, 66 Cal. 17, 4 Pac. 876; *Landregan* v. *Peppin*, 86 Cal. 22, 24 Pac. 859; *Haight* v. *The Mayor*, 99 N. Y. 280, 1 N. E. 883; *Haight* v. *The Mayor*, 32 Hun. 153; *Petrie Lumber Company* v. *Collins*, 66 Mich. 64, 32 N. W. 923; *Hill* v. *Graham*, 72 Mich. 659, 40 N. W. 799; *Bradley* v. *Bouchard*, 85 Mich. 18, 48 N. W. 208; *Michigan Dairy Company* v. *McKinlay*, 70 Mich. 574, 38 N. W. 469; *McQuade* v. *Jaffray*, 47 Minn. 326, 50 N. W. 233; *Cobban* v. *Hinds*, (Mont.) 59 Pac. 1; *Merrick* v. *Hutt*, 15 Ark. 332; *Kinsworthy* v. *Mitchell*, 21 Ark. 145; *Garibaldi* v. *Jenkins*, 27 Ark. 453; *Cooper* v. *Jackson*, 71 Ind. 244; *Stilz* v. *City of Indianapolis*, 81 Ind. 583; *Schrodt* v. *Deputy*, 88 Ind. 90. In *McQuade* v. *Jaffray, supra,* in the original and published lists, which served as the basis for a tax judgment, the name of the owner was given as "E. S. Jeffray" instead of "E. S. Jaffray," which was the correct name. It was assumed in the opinion in the case just referred to that the land was assessed in the same way. The Minnesota statute required "that the name of the owner shall be given if known, and if unknown, it shall be so stated." Mitchell, J., in denying the contention that the omission of the owner's name was fatal to the judgment, used the following language, which we think is applicable to the statute under which the taxes here in question were assessed: "Under our statute proceedings to enforce the collection of real estate taxes are purely *in rem.* They are against the land and not against the owner. It is elementary that no reference to the name of the owner is necessary in proceedings *in rem.* It is, however, a common practice in such proceedings to give the name of the owner, if known, for frankness' sake, to increase the chances of his attention being called to the notice. The provisions of our statute on the subject are but declaratory of this established practice, and are to be construed as merely directory. The essential thing

in such proceedings is the description of the *res* (the land), and this is complete without the name of the owner." Counsel for appellant rely upon *Sweigle* v. *Gates,* 9 N. D. 538, 84 N. W. 481. In that case we held that the requirement of section 1548, Comp. Laws, with respect to listing real estate in the name of the owner, was mandatory, and that a failure to comply therewith rendered the assessment void. The case is not in point. The statute then under consideration differs in two important particulars from that under which the assessments here in question were made. Section 1548 Comp. Laws, expressly required that: "If the name of such owner be known to the assessor, the property shall be assessed in his, her or their name. If unknown to the assessor the property shall be assessed to unknown owners." A further and important difference to be noted is that under the Compiled Laws a real estate tax became a personal charge against the owner, and not merely a charge upon the land. The absence of a curative statute was also noted in the Sweigle case, in the opinion formulated by Justice Wallin in the following language: "The legislature had authority to declare by statute that an error in listing for taxation as to the name of the owner, or any omission in this respect, should not defeat the assessment, but no such curative statute existed when the assessment of 1887 was made." *Roberts* v. *Bank,* 8 N. D. 504, 79 N. W. 1049, is also cited in support of appellant's contention. This case cannot be said to be controlling. In that case the court said: "It is clear that the statute required the land to be assessed in the name of the owner, if known. Such statutes are mandatory, and compliance therewith is jurisdictional." The court then had under consideration chapter 132 of the Laws of 1890, and not the revenue law of 1897. When the assessment involved in the Roberts case was made, section 1273, Rev. Codes 1895, authorizing personal judgments for real estate taxes was in force, and the court's attention was not called to section 75, c. 132, p. 405, of the 1890 act, which in fact contained the same curative provisions as to assessments of real estate made to others than owners as are found in section 81 of chapter 126, Laws 1897, before quoted. The validity of the taxes involved in this action depends wholly upon the provisions of chapter 126 of the Laws of 1897, under which they were assessed. For the reasons already given, it is clear to us that the provisions of this act, so far as they require that the assessment of real estate shall be in the owner's name are directory, and that an assessment

of real estate in the name of another than the owner, the assessment being otherwise regular, does not invalidate the tax.

Appellant also assigns error upon an order of the district court opening the default judgment and in permitting Cass county to answer. The propriety of the order cannot now be considered. An amended abstract filed by respondent shows that the plaintiff appealed from the order vacating the judgment, and that the order was affirmed by this court. The propriety of the order is not, therefore, open to review upon this appeal.

Judgment affirmed. All concur.

(96 N. W. Rep. 294.)

GEO. E. NICHOLS ET AL *v.* MATILDA M. ROBERTS.

Opinion filed July 1, 1903.

Taxation—Penalty.

1. Under chapter 119, p. 164, Laws 1889, a five per cent penalty is to be added to the amount of the tax, with accrued interest thereon, on June 1st.

Same.

2. After June 1st that law allowed interest at one per cent per month to be computed on the sum total of the tax, penalty, and interest unpaid on June 1st, up to the date of sale.

Salaries Law of 1887 Did Not Repeal Statutes Fixing Fees.

3. Chapter 50, p. 151, Laws 1887, did not repeal that portion of section 1417, Comp. Laws Dakota, which gives treasurers five per cent commission on sale of lands for delinquent taxes.

Including Treasurer's Five per cent Commission Under Sec. 1417, Comp. Laws, Does Not Make Sum Sold for Excessive.

4. Section 1417, Comp. Laws Dakota, authorizes a treasurer to charge five per cent commission on sale of lands, and a sale is not made for an excessive amount which includes such commissions in the amount for which the land is sold. On this point *Lee* v. *Crawford*, 88 N. W. 97, 10 N. D. 482, overruled.

Same.

5. The fees legally chargeable on sales made in 1889, under section 1417, Comp. Laws Dakota, considered, and the sale is *held* not made for an excessive amount.

Matter Extraneous to Record Will Not Control Disposal of Appeals.

6. Affidavits cannot properly be considered in this court to determine the disposition to be made here of a case on an appeal from a judgment.

Appeal from District Court Cass county; *W. S. Lauder,* J.

Action by George E. Nichols and William C. McFadden against Matilda M. Roberts. Judgment for defendant, and plaintiffs appeal. Reversed.

Morrill & Engerud, for appellants.

In *Lee* v. *Crawford,* 10 N. D. 482, 88 N. W. Rep. 97, the court overlooked section 1417, Comp. Laws, in computing costs legally chargeable. Chapter 50, Laws of 1887, did not repeal the statutes of fixing fees of officers. It merely changed disposition of them, and turned the fees into a source of revenue to county instead of to the persons holding office.

J. E. Robinson, for respondents.

Sale for an excessive amount renders such sale void. *Lee* v. *Crawford,* 10 N. D. 482, 88 N. W. Rep. 97. Appellant adds interest to the tax, then computes interest and penalty on that. This is not the rule laid down in *Wells County* v. *McHenry,* 7 N. D. 246, 74 N. W. Rep. 241. Any excess in amount of all sums legally chargeable, however slight, render a tax sale void. Cooley on Taxation, 12th Ed. 497; *Kimball* v. *Ballard,* 19 Wis. 601; *Barden* v. *Supervisors of Columbia County,* 33 Wis. 445; *Milledge* v. *Coleman,* 2 N. W. Rep. 77; *Harper* v. *Rowe,* 55 Cal. 132; *Case* v. *Dean,* 16 Mich. 12; *Riverside* v. *Howell,* 113 Ill. 259; *Keul* v. *McClellan's Lessee,* 19 Ohio 308; *Gage* v. *Plumpelly,* 115 U. S. 462, 29 L. Ed. 449.

MORGAN, J. This is an action brought to quiet title to a certain lot in the city of Fargo. In the complaint the plaintiffs allege their ownership in fee of the lot. In the answer the defendant alleges, by way of counterclaim, that she is the absolute owner of said lot by virtue of a patent from the United States. In a reply, the plaintiffs allege ownership of said lot by virtue of a tax deed issued by the auditor of Cass county on the 13th day of June, 1902, pursuant to a sale of said lot made in November, 1889, for delinquent taxes of the year 1888. The trial court found that the deed under which the plaintiffs claim was void, for the reason that it

was based on a sale for taxes which were in excess of the amount that said lot could be legally sold for under the law then in force. This appeal is from the judgment entered pursuant to such findings.

The assignments of error are: (1) That the conclusions of law and the judgment entered are not warranted by the findings of fact. (2) That the court erred in its conclusions that the sale was for an excessive amount.

The sale was made in 1889 for $38.57. The amount of the tax levied in 1888 was $31.61. When the sale was made, penalties and interest were chargeable under chapter 119, p. 164, Laws 1889. That law provides that the taxes of 1888 "shall become delinquent on the first Monday of February, 1889," and shall draw interest at the rate of 1 per cent per month from the date of such delinquency until the first day of June, 1889, at which latter date there shall be added as penalty 5 per cent upon the amount so remaining unpaid, and 1 per cent per month thereafter until paid, to be added on the 1st day of each succeeding month. Respondent in her argument claims that this law does not authorize the 5 per cent penalty to be charged on the tax with interest added, but should be charged on the tax only. The reading of the section shows a contrary intention. The amount "so remaining unpaid" when the penalty is to be added is clearly the tax and interest added together. There is no room for any other construction.

This statute is also authority for computing interest upon the sum total of the tax, interest, and penalty from June 1, 1889, when they are added together, until the time of sale on November 4th. No other rule of computation could be followed and give the language of the statute force. Counsel claims that the method of computing penalties and interest contended for by him was followed by this court in *Wells County* v. *McHenry*, 7 N. D. 268, 74 N. W. 241. In that case the precise question here involved does not seem to have been raised, considered, or decided. Computing the amount due on this tax at the day of the sale on November 4, 1889, in accordance with the law of 1889, and adding to the sum total thereof ten cents for advertising, 5 per cent treasurer's commission on the sale, and fifty cents for a certificate of sale, a sum total is produced exactly equal to the amount for which the lot was sold. There was, therefore, no excess in the sum for which the lot was sold, and the conclusion that there was a sale for an excessive amount is not sustained. The trial court, in holding the sale to

have been made for an excessive amount, relied on the decision of this court in *Lee* v. *Crawford,* 10 N. D. 482, 88 N. W. 97. In that case both court and counsel overlooked section 1417 of the Compiled Laws (Dak.) providing for a 5 per cent commission to be charged by the treasurer in making the sale. What was there said about the sale being for an excessive amount in no way affects the correctness of that decision, as the decision was based on other grounds.

It is further contended by the respondent that section 1417 of the Compiled Laws (Dak.) was repealed by chapter 50, p. 151, Laws 1887. Under the latter law, county treasurers received a salary in lieu of the fees theretofore allowed them by statute. They are to account under that law for all fees received by them, and are paid a regular salary by the county. That law only changes the disposition to be made of the fees legally chargeable by the treasurer for official acts. The repealing clause of this law is not general, but is confined to such matters as are inconsistent with the provisions of the 1887 enactment. This act provides for an accounting for all fees received by the treasurer, and provides a penalty if he fails to charge and collect the fees allowed by law for his services. In place of this law containing provisions as to charging fees for services inconsistent with former provisions, it implies that former fees are to be charged in all cases. The claim that section 1417, Comp. Laws Dak., was repealed by the law of 1887, is therefore untenable. The findings of fact show the amount of the tax assessed and the sum for which the property was sold. From these two facts found, the question whether the lot was sold for an excessive amount becomes a question of law, and is not a question of fact.

It is urged that the charge of fifty cents for a certificate of sale is an excessive charge by the treasurer, and avoids the sale for that reason. The claim is that it is not shown nor found that the purchaser of said lot was not a purchaser of other lots at the same sale, and that such other sales should have been included in one certificate, and this charge apportioned on all the lots under section 1627, Comp. Laws Dakota. The findings show that this one lot was sold and nothing more. We cannot indulge in presumptions as to what could or might have been done in any case on matters of fact. If the claim be a meritorious one, it cannot be considered in this case.

Counsel for respondent presents an affidavit referring to the merits of the action, and in view thereof asks that the case be remanded for a new trial in case the judgment is to be reversed by this court. The application cannot be considered. The record only can be considered in disposing of cases in this court. Matters extraneous to the record, based on affidavits or any new evidence, will not control the disposition here made of appeals.

The judgment is reversed, and the district court is directed to enter judgment granting the relief demanded in the complaint. All concur.

(96 N. W. Rep. 298.)

C. E. FISHER *vs.* N. N. BETTS AND O. P. SMITH.

Opinion filed July 3, 1903.

Taxation—Construction of Statute.

1. In 1890 a revenue law was passed by the Legislature providing for the sale of land for the nonpayment of taxes, and providing for issuing certificates of sale, and the effect of such certificates as evidence. It further provided that the purchaser would be entitled to a deed in a prescribed time There was a failure to designate the officer who should issue such deed, or what the recitals or effect of the deed should be. In 1891 the Legislature provided for the issuance of deeds under sales made under the 1890 law, and prescribed what the recitals of the deed should be, and defined the effect of such recitals, and provided that the deeds should be prima facie evidence of the regularity of prior proceedings. *Held*, that the two laws should be construed together, the same as though passed at the same time.

Tax Sales—Contract With Purchaser.

2. A sale made under the 1890 law for a tax levied in 1889 constituted a contract between the state and the purchaser, the terms of which are embraced in the law in force when the sale was made.

Statute Part of Contract—Effect of Repeal.

3. No subsequent legislation could repeal the law in force when the sale was made, so as to change the effect of the deed as evidence in matters of substance, as that would be imparing the validity of a contract.

Under Law of 1891, Auditor Executes Tax Deeds, Notwithstanding Repeal.

4. Under the 1891 law the county auditor was the officer to issue deeds under tax sales made thereunder. In 1895 that provision of law was repealed, and it was therein enacted that deeds should be issued by county treasurers. The 1895 law was general in its terms, and made no reference to past sales. *Held,* for reasons given in the opinion, that the law was prospective only, and did not repeal the prior provisions of the law that auditors should issue deeds, and that a deed issued by an auditor on past sales after the 1895 law was in force was not void on its face.

Where Law Requires Levy by Specific Amount, Levy By Percentage Not Fatal to Tax Deed.

5. The fact that the state board of equalization in 1891 and 1892 levied taxes by percentage, when the law required a levy in specific amounts, does not render such taxes so levied invalid, and is not fatal to a tax deed issued on a sale for delinquent taxes based on such levy.

Recitals of Tax Deed—Evidence of Notice of Redemption.

6. The fact that a tax deed was not supported by evidence showing that notice of the time when the redemption period would expire had been published before the deed was issued is not ground for attacking a tax deed, as the auditor is presumed to have performed that duty, and the recitals of the deed are *prima facie* evidence that such notice was published.

Same.

7. Under a statute making a tax deed, when issued, *prima facie* evidence of the regularity of all prior tax proceedings, the deed is *prima facie* evidence that notice of the expiration of the time for redemption was published.

Absence of Official Papers and Record Entries—Proof.

8. A witness not connected with a county office, and not in charge of the records thereof as a public official, clerk or employe, is not a competent witness to testify to the absence from such office of certain papers; nor is he a competent witness to testify as to the absence from the records of such office of certain material entries.

Testimony of Custodian of Public Record, Best Evidence.

9. The best evidence in such cases is that of an official in charge of its files and records.

Official Records and Files Must be Produced by Custodian.

10. Ordinarily the records and files pertaining to the matter under investigation should be produced in court by the official in charge of them.

Officer's Certificate.

11. A certificate of an officer to the correctness of copies is not evidence of any other fact recited therein.

Same.

12. An officer certifying that a certain motion or other matter is all that the records of his office show that "pertains" to a levy is not evidence that the records do not show other matters pertaining to the levy.

Performance of Official Duty—Presumption.

13. In this state the statute provides that public officials are presumed to have regularly performed their duties, until the contrary is shown.

Validity of Tax Deeds Offered—Evidence.

14. Evidence considered, and *held* not to show that certain deeds offered in evidence as a source of title are invalid upon either of the several grounds of objection urged thereto.

Evidence Outside of Statement of Case Not Considered.

15. Matters shown by affidavit or other evidence not in the statement of the case as settled will not be considered in determining what disposition shall be made of a case on appeal.

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

Action by C. E. Fisher against N. N. Betts and O. P. Smith. Judgment for defendants, and plaintiff appeals.

Affirmed.

J. E. Robinson, for appellant.

Tax deeds are not *prima facie* evidence of title, and defendant offered no other evidence. There was no evidence to show levy of tax, notice of sale, or of expiration of period of redemption. There is no statute making tax deeds evidence of title, or regularity proceedings. There was no statute prescribing form of tax deed, or making it evidence, for tax sales of 1890. Whatever effect section 7, chapter 100, Laws of 1891, had, was destroyed by its repeal by Rev. Codes of 1896. Without impairing the obligation of contract, laws changing rules of evidence may be modified as the legislature sees fit. Cooley on Cons. Lim. 347, 349, 450, 451; *Hickox* v. *Tillman,* 38 Barb. 608; *Howard* v. *Moot,* 64 N. Y. 262; *Strode* v. *Washer,* (Or.) 16 Pac. 926; *Karnley* v. *Paisley,* 13 Iowa 89; *Kendall* v. *Kingston,* 5 Mass. 524; *Ogden* v. *Saunders,* 12 Wheat. 213,

349, 6 L. Ed. 606; *Fales* v. *Wadsworth,* 23 Me. 553; *Commonwealth* v. *Williams,* 6 Gray 1; *Pratt* v. *Jones,* 25 Vt. 303. After the repeal of statute making tax deed evidence of title, introduction of deed, without proof of preliminary steps, vesting the power of sale, does not show *prima facie* title. *Emerick et al.* v. *Alvarado et al.,* 27 Pac. 357; *Hickox* v. *Tillman,* 38 Barb. 608. Purchaser at tax sale at common law must prove taxes were duly assessed, the successive steps leading to a lawful sale, at which he, or some one under whom he claims, became the purchaser. Cooley on Taxation (2d Ed.) 473 and cases cited. A statute declaring a tax deed evidence of regularity of all proceedings leading up to it, does not render it evidence of compliance with an act requiring a redemption notice. *Herrick* v. *Niesz et ux.* 47 Pac. 414; *Miller* v. *Miller,* 31 Pac. Rep. 247, 98 Cal. 376; *Reed* v. *Lyon,* 31 Pac. 619, 96 Cal. 501; *Halbrook* v. *Fellows,* 38 Ill. 440; *Wilson* v. *McKenna,* 52 Ill. 43; *William* v. *Underhill,* 58 Ill. 137; *Jewell* v. *Tyuhn,* 38 Minn. 433, 38 N. W. Rep. 106; *Muller* v. *Jackson,* 39 Minn. 431, 40 N. W. Rep. 565. That county commissioners held a session of the board of equalization in July, 1889, was essential to the validity of a tax. Comp. Laws 1584; *Powers* v. *Larabee,* 2 N. D. 141, 49 N. W. Rep. 724. The tax sale for the year 1889 was void, because county commissioners failed to attach their warrant to tax list, requiring treasurer to collect. Cooley on Taxation, 424, 481. Blackwell on Tax Titles, chapter 7.

The testimony of Mr. Robinson to the effect that he had examined tax list of 1889, Cass county, and that no warrant under the hand and seal of county commissioners was attached, was competent. Greenleaf on Evidence, section 93. A public document may be proven by a witness who has taken a copy of it. Thayer on Evidence, 490. The law does not require plenary evidence to prove a negative fact. 2 Blackwell, 846.

There was no legal designation of a newspaper for the publication of the delinquent tax list of 1889, 1891, and 1892, Laws of 1890, 68; *Cass County* v. *Certain Lands of Security Improvement Co.,* 7 N. D. 528, 75 N. W. Rep. 774. Sales and deeds for 1891 and 1892 are void, as state taxes were levied by percentages and not in specific amounts. *Wells County* v. *McHenry et al.,* 7 N. D. 246, 261, 74 N. W. Rep. 241; *Dever* v. *Cornwell,* 10 N. D. 123, 86 N. W. Rep. 229; A sale which is void by reason of a failure to levy a tax, cannot be validated by subsequent legislation. *Dever* v. *Cornwell, supra; Wells County* v. *McHenry, supra.* A statute of limitation does not cure

defects in assessor's affidavit. *Lee* v. *Crawford,* 10 N. D. 482; 88 N. W. Rep. 97; Cooley on Taxation, 555 (2d Ed.) Cooley's Con. Lim. 447, 449; *Groesbeck* v. *Seeley,* 13 Mich. 329, 342; *Baker* v. *Kelly,* 11 Minn. 480, 593, 499; *Conway* v. *Cable,* 37 Ill. 82; *Waln* v. *Shearman,* 8 Sar. & Raw. (Pa.) 357; *Kipp* v. *Johnson,* 31 Minn. 360; *Farrar* v. *Clark,* 85 Ind. 449; *Gabe* v. *Root,* 98 Ind. 256; *Case* v. *Dean,* 16 Mich. 12; *Quinlan* v. *Rogers,* 12 Mich. 168. A tax sale is void when made for any sum in excess of legal taxes and charges. *Baker* v. *Supervisors of Columbia County,* 39 Wis. 444; *Milledge* v. *Coleman,* 47 Wis. 184, 2 N. W. Rep. 77; *Kimball* v. *Ballard,* 19 Wis. 601; *Barden* v. *Supervisors of Columbia County,* 33 Wis. 445; *Harper* v. *Rowe,* 53 Cal. 233; *Treadwell* v. *Patterson,* 51 Cal. 637; *Case* v. *Dean,* 16 Mich. 12, 32, 33; *Riverside* v. *Howell,* 113 Ill. 259; *Gage* v. *Plumpelly et al.,* 115 U. S. 454, 463, 29 L. Ed. 449; Cooley on Taxation (2d Ed.) 497. In each year the city levies were void, not being based on an estimate of expenses, or on a valid appropriation ordinance. *Shattuck et al.* v. *Smith,* 6 N. D. 56, 69 N. W. Rep. 5. As defendant had no lien, he acquired no right by the payment of subsequent taxes. *McHenry* v. *Brett,* 9 N. D. 68, 81 N. W. Rep. 65.

Morrill & Engerud, for the respondent.

A tax sale creates a contract between the state and the purchaser at such sale, and its terms are found in the statute governing the sale. *Roberts* v. *First National Bank of Fargo,* 8 N. D. 504, 79 N. W. Rep. 1048. Hence it follows, that a purchaser at 1890 sale was, by statute under which he bought, entitled to a deed, and a legal obligation rested upon the state to provide for its execution and form. This obligation the state fulfilled by the enactment of chapter 100, Laws of 1891. Section 7 of such act provides such a deed, and its legal effect, which became, by relation, a part of its original contract of sale as to purchasers in 1890, and was a part of the contract under which they bought at sales of 1891 to 1895 inclusive. Such deed evidenced the contract between the state and the tax purchaser and was guaranteed by the state to evidence, *prima facie,* the regularity of all proceedings requisite to its issuance. Such contract the legislature had no right or power to impair. Constitution of the U. S., article 1, section 10. Constitution of North Dakota, article 1, section 16; *Roberts* v. *First National Bank of Fargo et al. supra; Smith* v. *Cleveland,* 17 Wis. 556; *Marx* v. *Hawthorne,* 30 Fed. 579; *Tracy* v. *Reed,* 38 Fed. 59; *Hart* v. *Ross,* 64 Ala. 96. *Contra, Hickox* v.

Tillman, 38 Barb. 608; *Strode* v. *Washer,* 16 Pac. 926. The latter overruled in *Tracy* v. *Reed,* 38 Fed. *supra.*

The legislature could not deprive the tax purchaser of his deed by repealing the law, without substituting some provision for a deed to him. The revisers of the code intended to repeal the old revenue law only as to sales made after its adoption. The same rule of construction applies as in construing the repealing clause of the Rev. Codes relating to assessors. *State ex rel. Scovill* v. *Morehouse,* 5 N. D. 406, 67 N. W. Rep. 140. The tax deeds were, therefore, competent evidence of the regularity of all proceedings up to their execution, because all issued under section 7, chapter 100, Laws of 1891, which was never repealed so far as it relates to sales made prior to 1896.

Under the revenue law of 1890 and 1897, the county auditor gives the notice of the expiration of redemption. This act of giving such notice is, therefore, official; and the giving thereof a step in the proceedings preceding the execution of the deed, of which act the deed is evidence. *Garmoe* v. *Sturgeon,* 21 N. W. Rep. 493; *Reed* v. *Thompson,* 9 N. W. Rep. 331; *Wilson* v. *Crafts,* 9 N. W. Rep. 333; *Fuller* v. *Armstrong et al.,* 6 N. W. Rep. 61; *Young* v. *Goodhue,* 76 N. W. Rep. 822.

Appellant introduced a certified copy of the tax levies for the city of Fargo, and proceedings of the city council relating thereto. These are immaterial, in that they do not relate to taxes upon which respondent's tax deeds are based. Such proof is also incompetent. The auditor's certificates fail to show that the transcript is a true and *complete* transcript of *all* the minutes under any given date, or on any given page. The auditor certifies that, what he has seen fit to transcribe, is a true and correct transcript from the records. The auditor cannot substitute his judgment for that of the court, as to what is pertinent to any given subject. *Wood* v. *Knapp,* 2 N. E. Rep. 632. Mr. Robinson undertook to prove, by his own testimony, what the record of the county auditor's office failed to show. He was not the custodian of the records. It is not claimed that it was necessary to offer the records. But if an examination is to be made, and the result stated, it must be under proper instructions. The rule is well established. *State* v. *Cadwell,* 44 N. W. Rep. 700. Whatever force there may be in the several objections to the validity of the tax sales in dispute, they are barred by the statute of limitation. Section 1269, Rev. Codes of 1895, barred any action to attack a tax deed

three years from its record, and applies to both past and future deeds. That law was repealed by chapter 126, Laws of 1897, which substituted section 79 of that chapter for it, and thereby the limitation as to past deeds was fixed at three years after the passage and approval of the act, towit: March 7, 1897. The bar of the statute was complete March 8, 1900. Such acts are constitutional. *Meldahl* v. *Dobbin et al.*, 8 N. D. 115, 77 N. W. Rep. 280; *Roberts* v. *First Nat'l Bank of Fargo et al.*, 8 N. D. 504, 79 N. W. Rep. 1049; Black on Tax Titles, section 492. They take effect on existing causes of action. Black on Tax Titles, section 500; *Merchants' Nat'l Bank of Bismarck* v. *Braithwaite*, 7 N. D. 358, 75 N. W. Rep. 244; *Osborne* v. *Lindstrom*, 9 N. D. 1, 81 N. W. Rep. 72. Short periods of limitation are very common relating to judicial sales by administrators and guardians. In such cases it is uniformly held, that such limitations cure all irregularities except as to jurisdiction to act generally. 11 Am. & Eng. Enc. of Law (2d Ed.) 1130; *Streeter* v. *Wilkinson*, 24 Minn. 288; *Rice* v. *Dickerman* (Minn.) 50 N. W. Rep. 698. Statutes of limitation as to tax sales are of the same nature and receive a similar construction. No objection will avail against the bar of such statute, unless it shows, either that the land was not taxable, or that the persons acting had no power, or that the tax was paid before sale. There must be a valuation of the land, a levy and a sale for unpaid taxes. These different acts may be irregularly performed, but the irregularity is of no avail after the statute has run. *Ruggles* v. *Fond du Lac Co. et al.*, 23 N. W. Rep. 417; *Milledge* v. *Coleman*, 2 N. W. Rep. 321; *Wis. Cent. Ry. Co.* v. *Lincoln Co. et al.*, 30 N. W. Rep. 619; *Oconto Co.* v. *Jerrauld et al.*, 50 N. W. Rep. 591; *Dupen et al.* v. *Wetherby*, 48 N. W. Rep. 378; *Ensign et al.* v. *Barse et al.*, 107 N. Y. 329, 15 N. E. 401; *Bower* v. *O'Donnell*, 12 N. W. Rep. 352; *Jordan* v. *Kyle*, 27 Kan. 190; *Maxon* v. *Huston*, 22 Kan. 643; *Doudna* v. *Harlan*, 45 Kan. 484, 25 Pac. Rep. 883; *Slocum* v. *Slocum*, 30 N. W. Rep. 562; *Bullis* v. *Marsh*, 2 N. W. Rep. 578; *Shawlu* v. *Johnson*, 3 N. W. Rep. 604; *Thomas* v. *Stickle*, 32 Iowa, 71; *Douglas* v. *Tulock*, 34 Iowa 262. The statutes involved in the foregoing decisions are all similar to that of North Dakota. See also, *Sweigle* v. *Gates*, 9 N. D. 538, 84 N. W. Rep. 480; *Roberts* v. *Bank, supra; Meldahl* v. *Dobbin, supra.*

MORGAN, J. In this action it is sought to determine adverse claims to lots 17 and 18 of block A1, Northern Pacific addition to the city of Fargo. The plaintiff alleges ownership of said lots, and

alleges that the defendants claim a certain estate and interest therein adverse to that of the plaintiff, by virtue of certain alleged assessments of taxes thereon, which said taxes, and the tax sales thereunder, as well as all certificates and deeds based thereon, are void. The plaintiff prays that the defendants set forth such adverse claims, and that they be adjudged void and of no effect. The defendant Betts answered, and alleged the following facts: That said lot 17 was in 1889 subject to taxation in the city of Fargo, and was in that year regularly assessed for taxation, and that the taxes were regularly and lawfully levied thereon; that, upon said taxes remaining unpaid and becoming delinquent, the said lot was duly and regularly sold by the auditor of Cass county, after all the preliminary steps to said sale had been duly complied with, to the defendant O. P. Smith; and that a certificate of such sale was duly issued by said auditor to said Smith on said day. Further answering, the defendant alleges that said lot was assessed regularly and lawfully in 1892, and, the taxes thus assessed becoming delinquent, the said lot was regularly sold by the auditor to said Smith on December 5, 1893, and a certificate of such sale issued to said Smith on that day; that the defendant Betts paid all the taxes levied on said lot during the years 1890 and 1891 and during the years from 1893 to 1899, inclusive; that on the 4th day of April, 1894, a deed to said lot was regularly issued to said Smith by said auditor, based upon the certificate of sale of the same issued on December 2, 1890, which vested in said Smith the absolute fee simple title to said lot; that more than three years had elapsed since said deed was recorded before this action was commenced, in consequence of which this action is barred. The answer also sets forth similar allegations in regard to lot 18 of said block, and alleges that said defendant Smith secured an absolute title to said lot by virtue of a tax deed issued to him by the auditor of said county, based upon a certificate of sale of said lot dated December 6, 1892, upon a sale made upon the delinquent taxes for the year 1891; that said deed was dated January 15, 1896, and filed for record on the 10th of August, 1896; that said Smith conveyed both of said lots to defendant Betts on the 28th day of February, 1899; and that he is now the owner thereof in fee simple. The answer contains allegations of ownership based on other tax deeds, but no claims are made thereto under the evidence by virtue of said deeds; hence no mention will be made of them. After making findings of fact in favor of the defendants, the district judge

entered judgment on said findings in favor of the defendants. From such judgment the plaintiff has appealed to this court, and requests a review of all the issues in this court.

In the year 1890, when lot 17 was first sold for the delinquent taxes thereon for the year 1889, section 72, c. 132, p. 404, of the revenue law of 1890, was in force, and provided as follows: "Such certificate shall in all cases be *prima facie* evidence that all the requirements of the law with respect to the sale have been duly complied with, and that the grantee named therein is entitled to a deed therefor after the time of redemption has expired." It will be seen that neither this section nor the revenue law of 1890 made any provision as to the issuing of deeds upon sales made pursuant thereto. In March, 1891, the legislature, recognizing the omission by the legislature of 1890 to make any provision for issuing deeds under tax sales made thereunder, enacted section 110, c. 100, p. 271, of the Laws of 1891, which is as follows: "Section 7. That the following section be added to said chapter 132, to be known as section 110: 'Section 110. At the expiration of the time for redemption of lands sold for delinquent taxes, as provided in section 103 of chapter 132 of Laws of 1890, the county auditor of the county in which the sale of lands took place shall execute to the purchaser, his heirs or assigns, in the name of the state, a deed of the land remaining unredeemed, which shall vest in the grantee an absolute estate in fee simple in such land, subject, however, to all the claims which the state may have thereon for taxes or other liens or incumbrances. Such deeds shall be issued by the county auditor under the seal of the county, and shall be conclusive evidence of the truth of all the facts therein recited, and *prima facie* evidence of the regularity of all the proceedings, from the valuation of the land by the assessor up to the execution of the deed. Such deed shall be substantially in the following form:' " (Here follows the form of deed.) This section supplemented the law of 1890, so far as the form and effect of deeds to be issued on sales under the law of 1890 were concerned, and fulfilled the obligation contained in the law of 1890 that purchasers were entitled to a deed. Before the law of 1890 was repealed a deed had been issued for lot 17, sold in 1890.

In 1895, when the Rev. Code was enacted, section 72, c. 132, p. 404, of the Laws of 1890, and section 7, c. 100, p. 271, of the Laws of 1891, were expressly repealed, and another revenue law was

enacted. This new law provided, among other things, that the treasurer of the county should issue tax deeds, and not the auditor, as provided by the Laws of 1891, set forth above. Said sections of the law of 1895 are as follows:

"Section 1267. If no person shall redeem such lands within two years, at any time after the expiration thereof and on production of the certificate of purchase, the treasurer of the county in which the sale of such lands took place, shall execute to the purchaser, his heirs or assigns, in the name of the state, a deed of the land remaining unredeemed, which shall vest in the grantee an absolute estate in fee simple in such land, subject, however, to all the claims which the state may have thereon for taxes, or other liens or incumbrances.

"Section 1268. Such deeds shall be executed by the county treasurer under his hand and the execution thereof shall be attested by the county auditor with the county seal and such deed shall be conclusive evidence of the truth of all the facts therein recited and of the regularity of all of the proceedings, from the assessment and valuation of the land by the assessor up to the execution of the deed, and such deed shall be substantially in the following form, or other equivalent form:" (Here follows form of deed.) Both of the sections quoted were expressly repealed in 1897.

The questions presented for determination may be summarized as follows: (1) The effect upon the sales of 1891 and 1892 of the repeal in 1895 of section 72, c. 132, p. 404, of the revenue law of 1890, and the repeal of section 7, c. 100, p. 271 (being added as section 110 to the revenue law of 1890), of the revenue law of 1891; (2) the effect upon the sale of lot 17 in 1890 of the fact that no provision was made in the law of 1890 as to what officer should issue tax deeds upon sales made pursuant thereto; (3) the effect of the 1896 deed of lot 18 having been issued by the auditor, when that law provided for the issuance of deeds by the county treasurer; (4) whether said section 7, c. 100, p. 271, Laws 1891, added to the Laws of 1890 as section 110, and making tax deeds *prima facie* evidence of the regularity of all the proceedings from the valuation of the land by the assessor up to the execution of the deed, could be repealed by the legislature, so as to deprive grantees under the law of 1891 of the benefit of that law defining what effect such deeds were entitled to; (5) whether it is shown by the plaintiff that the deeds issued under the 1890 and 1891 laws are invalid by reason of

failure to comply with the provisions of the law in respect to the levy of taxes, or for any other reasons.

The appellant claims that inasmuch as the laws of 1890 and 1891, under which the deed to lot 17 was issued, were repealed in 1895, the deed has no force as evidence that the tax proceedings were regular, and that the regularity of all acts of all of the taxing officers must be affirmatively established before the deed can be sustained, or can cut off plaintiff's right to the land. He claims that such repeal related solely to the remedy, and that the legislature has a right to change existing remedies, as such change involves a change of the rules of evidence only. Such contention would not be disputed if the change referred to the remedy only, but if the change of remedy or change in the rules of evidence goes further in its results, and affects contract rights, such changes are inhibited. The legislature will not be permitted, under the guise of changing a remedy or a rule of evidence, to impair a vested right under an existing contract; and the presumption that all requirements of law with respect to the sale had been complied with, raised by the delivery of the tax certificate, was raised in favor of the tax purchaser by the law in force at the time of his purchase. This presumption was perpetuated by the deed, was a vested matter of right, and could not be taken away by a repeal of these laws. Cooley on Const. Lim. 347. Speaking of section 1639 of the Compiled Laws of 1887, which was practically the same as the section under consideration, this court said in *Roberts* v. *Bank,* 8 N. D. 504, 79 N. W. Rep. 1049: "This statute entered into the contract of purchase, and became a part thereof." In *Smith* v. *Cleveland,* 17 Wis. 573, that court said: "This was a most material and important advantage to the purchaser, and could not have escaped his attention. It concerned the life and validity of the contract. Could the legislature afterwards step in and take it away, and thus remove the foundation of his right? Can the legislature say, as to contracts past and executed, that they shall mean one thing today and another tomorrow? That they shall have one construction at time of execution, and another afterwards? That the title of the purchaser by deed first indefeasible shall afterwards be defeasible? If these things can be done, then certainly the protection afforded by the constitution to private rights is very slight and inadequate. But, as has already been decided, the legislature is deprived of this power." The following cases are also authority for the same principle: *Morgan* v. *Commissioners,* 27 Kan.

89; *Forqueran* v. *Donnally,* 7 W. Va. 114; *Merrill* v. *Dearing,* 32 Minn. 479, 21 N. W. Rep. 721; *Hart* v. *Ross,* 64 Ala. 96; Cooley on Taxation, p. 545.

The deed to lot 17 was actually delivered before the law under which it was issued was repealed. Hence no question can arise upon the validity of the deed to lot 17, so far as this point is concerned. The deed to lot 18 was not delivered until after the law under which it was issued was repealed. The Revised Codes of 1895 provided for issuing tax deeds by county treasurers only. The law under which these sales were made provided for issuing tax deeds by auditors only. The deed to lot 18 was issued by the county auditor after the 1895 Code took effect. It is claimed that the issuing of the deed by the auditor, and not by the treasurer, made the deed void on its face. This would be true if the auditor had no right to issue it. The revenue law of 1895 is entirely prospective. It relates solely to proceedings had under it. It makes no reference to past sales, or to deeds upon past sales. The form of deed prescribed in that law relates only to sales made thereunder, and is not adapted to the provisions of the 1891 law. The purchaser at the 1890 and 1891 sales was entitled to a deed from the state. The state had obligated itself to give him one. It could not deprive him of the right to one. It could not repeal the law under which he became entitled to a deed, without making provision in the new law for a deed the equivalent in substantial matters to that to which he was entitled under the law when the sales were made. The treasurer not having any right to issue the deed under past sales, under the laws of 1895, it must be held that any attempted repeal of the laws of 1891 was inoperative, so far as sales that had occurred under the 1891 law were concerned. The repeal was operative only so far as the future was concerned. The deed having been issued by the auditor, and the law authorizing him to do so not having been repealed, so far as this case is concerned, the deed is not void on its face. It needs no mention that the purchaser has no vested right to a deed by a particular officer. It is his right to a deed which was impaired, if the enactment of this law of 1895 be held valid as a repeal of the 1891 law. See also, *Pounds* v. *Rogers,* 52 Kan. 558, 35 Pac. 223, 39 Am. St. Rep. 360; *Adams* v. *Beale,* 19 Iowa 61; *Garrett* v. *Wiggins* (Ill.) 30 Am. Dec. 653; *McCann* v. *Merriam,* 11 Neb. 241, 9 N. W. Rep. 96, holding that the law in force at the time of the sale governs as to the terms of the contract of sale.

The authority of the auditor to issue the deed was not taken away from him, and such deed is not, therefore, void on its face.

It is next urged that neither of the deeds is admissible in evidence in the absence of an affirmative showing that a notice as to when the time for redemption would expire had been given by the publication of a notice to the person against whom the land was assessed prior to the issuing of the deed, as provided by section 103, c. 132, p. 414, of the revenue law of 1890. This section provides that the time for redemption shall not expire until sixty days after the service of such notice. It is therefore claimed that the deeds were issued before the time for redemption had expired, and are therefore void. Sec. 7, c. 100, p. 271, of the Laws of 1891, provides that deeds issued thereunder shall be *prima facie* evidence of the regularity of all the proceedings from the valuation of the land by the assessor up to the execution of the deed. These deeds recite that the time for redemption from the sale under which they were made had expired, but do not recite the fact of the service of such notice. The deeds are in the precise form prescribed by the Laws of 1891. The contention of the plaintiff is that a showing of compliance with the provisions as to the publication of this notice was an indispensable prerequisite to the production of the deeds in evidence. The defendants contend that the deed, of its own force, shows a compliance with the law requiring notice, by virtue of section 7, c. 100, p. 271, of the Laws of 1891, enacted as section 110 of the Laws of 1890, making the deed *prima facie* evidence of the regularity of all the proceedings prior thereto. Neither party has offered any proof to the effect that such notice was published or was not published. The question must therefore be determined on the deed and the statute quoted, prescribing what the deed shall be evidence of. Without the publication of such notice the time for redemption would not expire. Its service would cut off redemption after the deed issued. The notice is a requisite step between the sale and the deed. It does not go to the groundwork of the tax, but is a necessary condition precedent to the issuance of the deed. The legislature required this notice to be published by the auditor before issuing the deed. Without any proof on the subject, we deem it the better rule to hold that the officer performed his duty and gave the notice. In this state there is a presumption that officers regularly perform their duty, in the absence of any showing to the contrary. Subdivision 15, section 5713a, Rev. Codes 1899. The recital of the

deed that the time for redemption had expired is also at least *prima facie* evidence that the notice was published as required by the statute before the deed was issued. Section 7, c. 100, p. 271, Laws 1891. It is not necessary in this case that the defendants should have made any other than a *prima facie* showing on this question, as such *prima facie* showing was not attempted to be rebutted. In *Sounkup* v. *Union Investment Company*, 84 Iowa 448, 51 N. W. Rep. 167, 35 Am. St. Rep. 317, the court said: "The deed being *prima facie* evidence of the regularity of all proceedings prior to its execution, it must be presumed, in the absence of a showing to the contrary, that the notice was served upon the person in whose name the land was taxed. There being no showing to rebut this presumption, we must hold that the notice was properly served on John M. Curless." The following cases tend to sustain defendants' contention that the deed is *prima facie* evidence of the service of notice of expiration of the time of redemption: *Young* v. *Goodhue* (Iowa) 76 N. W. Rep. 822; *Wilson* v. *Crafts* (Iowa) 9 N. W. Rep. 333. In Wash*ington* v. *Hosp.*, 43 Kan. 324, 23 Pac. 564, 19 Am. St. Rep. 141, the court said: "More than that, the presumption of law, in the absence of testimony, is that the officer does his duty; and in this case we must assume, from the state of the record, that the county treasurer did that which was required of him. There was no proof offered to overthrow the *prima facie* case established by the defendant in error." We have examined the cases cited by the attorney for the appellant, from the Supreme Courts of the states of California and Illinois. From our understanding of such cases we do not consider them in point, as they are based upon statutes entirely different from the statutes of our state. In those states the notice to be given of the expiration of the time for redemption must be given by the purchaser at the tax sale, and not by the auditor. Hence no presumption arises that an official performed his duty, when that duty was to be performed by the purchaser.

It is next contended that the sale was void for the reason that the tax list had no warrant attached to it, authorizing and directing the treasurer to collect the taxes levied as required by the provisions of section 1596 of the Compiled Laws of 1887, and that the sale was void for the further reason that the tax list "contains no certificate * * * showing that it is a tax list, or that the taxes are correctly charged, * * * and that no such certificate or warrant is anywhere annexed or attached to this tax list for the year

1889." In support of this contention the attorney for the appellant testified at the trial as follows: "I have also examined the tax list of Cass county for the year 1889, on which is listed the property in question, and I find that the tax list for that year is not in any manner authenticated. It contains no warrant under the hand or under the seal of the county commissioners directing the treasurer or auditor or any person to collect the taxes for the year 1889, and it contains no certificate by the county auditor, under the seal of the county, showing that it is a tax list, or that the taxes are correctly charged against the property described in the tax list; and no such certificate or warrant is anywhere annexed or attached to this tax list for the year 1889. It is in no manner authenticated as a tax list." The tax list was not produced in court; nor was the county auditor, the legal custodian of the tax list, nor the county treasurer, the legal custodian of the duplicate tax list after the warrant has been attached to it, called as a witness. The testimony of the attorney is that he simply examined the tax list. It cannot be gathered from his testimony whether he failed to find any warrant at all, or whether there was no warrant sufficient in law as such. From such evidence the court cannot base a finding that there was no warrant at all. It is too indefinite, and seems more like the conclusion of the witness that the papers found did not sufficiently show, as a matter of law, that the tax list was properly certified, or that the warrant attached was sufficient as a matter of law. This testimony does not negative the fact that no warrant or no certificate at all is attached to the tax list. His testimony does no show whether there is an entire absence of a warrant, or whether the warrant is defective, in his opinion, as not complying with the statute. If the warrant or the certificate was there in some form, the court should pass upon its sufficiency, and not the attorney. However, giving the testimony the fullest scope possible—that it negatives the existence of the warrant—the testimony is not the best evidence, and no effect can be given to it in this case. The custodian of the tax list may have known of the existence of the warrant and of the certificate. It is not enough to show that the witness found none by his search. The custodian of these records should have been called, before their existence can properly be negatived. A question similar to the one here involved has been decided at this term in *Sykes* v. *Beck*, 96 N. W. Rep. 844, and the incompetency of such evidence clearly shown on principle, and also as based on a careful review

of the authorities. What is there said is decisive of this case adversely to the contention of the appellant. The attorney for the respondents made seasonable objections to the testimony of the appellant's counsel given on this matter, and as to other matters concerning which he testified. These objections are urged in this court, and are here and were in the court below specifically stated, viz., "as merely a conclusion, incompetent, irrelevant, immaterial, and not the best evidence, and hearsay."

It is next contended that the county commissioners failed to designate a newspaper in which to publish the delinquent tax lists for the years during which these taxes were levied. The contention is that, if there was any designation at all, it was the Fargo Republican that was designated, and that such designation was not a designation at all, as there was no newspaper in the city of Fargo at that time of that name; that there was a daily newspaper then published there as the Fargo Daily Republican, and a weekly newspaper as the Fargo Weekly Republican. It is shown in this case by the recitals of the deed that there was a publication of the delinquent tax lists for those years. The objection goes simply to the failure to designate by the county commissioners. The proof in support of this objection is the following extract from the proceedings of the county commissioners, in connection with the following certificate of the county auditor and the oral testimony of Mr Robinson, namely: "Upon motion the contract for publishing the delinquent tax list was awarded to the Fargo Republican at four cents per description, and a bond of four hundred dollars to be furnished for the faithful performance of the contract." The certificate of the auditor attached thereto is as follows: "I * * * do hereby certify that the above is a true and correct transcript from the records of the county commissioners, so far as the same pertains to the resolutions designating a newspaper for the publication of the delinquent tax lists, * * * as the same remains of record in my office." The certificate is not in such form as to negative the existence of other matters in the proceedings of the board that pertain to the designation of a newspaper for the purpose named. What pertains to a designation of a newspaper in which to publish a delinquent tax list is a question of law, depending for its answer upon the facts proven. It is the auditor's conclusion that the above motion contains all that pertains to that question. It is not for him to determine the question. He does not certify that the portion of the record to which he certifies

is a true and correct transcript of the whole motion, even. For these reasons, the copy is not comprehensive enough to negative the existence of other matters in the record. The certificate of the auditor should be confined to the correctness of copies. It is only by force of the statute that certified copies are permitted to be used, and when used they should be taken as evidence of such facts only as are authorized to be so certified. Mr. Robinson testified that he had examined the proceedings of the board of county commissioners for the years mentioned, and that the record "contains no resolution designating a newspaper for the publication of the tax lists for said years, excepting the three resolutions of which certified copies have been put in evidence." One of the exceptions is the certified copy referred to above. The records were not produced in court. The county clerk was not called as a witness. This mode of showing the absence of a part of public records has been heretofore condemned in this case, and nothing more need be said on the subject. If official acts are to be set aside, it should only be done on competent proof that such acts are not in accordance with prescribed modes. This oral testimony does not negative the fact that there was no designation of a newspaper other than by the so-called resolution testified to. The deed recites the publication of the list. The law does not declare how the newspaper shall be designated by the commissioners. It is not specified in the Code that it must be done by resolution, and that there is no designation by any other resolution than the one spoken of by the attorney is the only way that the fact that there was a designation is negatived. The records could not be of that voluminous character making their production in court burdensome, and, if shown so to be, no reason is apparent why the auditor could not have been produced to testify as to what they failed to show. As there is no showing that there was no designation of a newspaper as provided by law, the case of Cass *County* v. *Security Improvement Company*, 7 N. D. 528, 75 N. W. 775, is not in point. This objection is overruled, because the basis of it is not shown by the evidence to exist.

It is next shown that the records of the board of county commissioners do not show that the county commissioners held sessions as a board of equalization in the years 1889 to 1895, inclusive. It is not claimed that the county commissioners did not meet and act as a board of equalization during these years. The contention is that the minutes of the board of county commissioners do not show

a meeting of the board of equalization. It is conceded that the proceedings of the board of equalization were kept in a separate record, called "The Record of the Board of Equalization." In 1889 the membership of these two boards was identical. In 1891 it was not identical. The appellant relies on section 586 of the Compiled Laws of 1887 to sustain his contention on this point. Said section reads: "They shall keep a book in which the orders and decisions made by them shall be recorded, except those relating to roads and bridges." What would be the effect, had the county commissioners acting as a board of equalization, failed to keep a separate record of their proceedings, we need not determine. In this case they met as a board of equalization, and kept minutes of their proceedings in a separate book. There was an opportunity for objecting taxpayers to be heard. We deem that sufficient and a compliance with the statute. It is the fact that there was no meeting that makes a tax void, and not possible irregularities in the method of perpetuating the record of the board's proceedings. This objection therefore has no such force as to avoid the tax levied during that year.

It is next claimed that the levies for the city of Fargo in 1889, 1891, and 1892 are void, because not based on an estimate of expenses or on a valid appropriation ordinance. This contention is based on section 922 of the Compiled Laws of 1887, which is as follows: "The city council shall at the first regular meeting in September or within ten days thereafter levy a tax for general purposes sufficient to meet the expenses of the year, based upon estimates furnished by the city auditor or a committee of the city council." Counsel for appellant testified that he had examined the records of the city council, and that he found that "the records contain no estimate of expenses in connection with such tax levies, and no estimate of such expenses for any year from 1889 to 1895, inclusive, excepting such as is shown by the certified copies offered in evidence." In this case the records of the city council were not produced when the witness testified as to what they did not contain. Besides his own testimony, to substantiate this point the appellant's attorney introduced in evidence a certificate of the county auditor, certifying to the correctness of certain copies of the proceedings of the council. This certificate is to the effect that the foregoing copies are true and correct transcripts of the record "of the city council of the city of Fargo, of the appropriation ordinance, and

of the city tax levy for the year 1889, and of all that pertains to such tax levy." This certificate does not wholly negative the fact that such estimate by the auditor or by a committee was not made. The estimate contemplated by the above section of the Compiled Laws is to be made by the auditor or by a committee for the enlightenment of the council as to the amount to be raised to meet the expenses for the coming fiscal year. It is not provided that such estimates shall be in writing, or entered in the minutes of the council, nor preserved in the auditor's office. It is not provided when such estimate must be submitted, nor must it be submitted at the same meeting when the levy is made. The evidence, therefore, does not negative the fact that the council made the levy without basing it on any such estimate. This evidence pertains only to the records of the council. It does not pertain to the files of the auditor. The testimony of the attorney was incompetent, under the rule laid down in this case, but, granting its competency, it does not negative the fact that the levies were based on proper estimates. In short, there is a clear failure to show a noncompliance with this statutory provision. *Shattuck* v. *Smith,* 6 N. D. 56, 69 N. W. 5.

It is further claimed that the tax proceedings subsequent to the levy, and the levy, are all void, for the reason that the state board of equalization levied the state tax by percentages instead of by specific amounts. This objection applies to the sale of lot 18 only, as the state levy of 1889 was made in specific amounts. Section 6, c. 100, p. 270, of the Laws of 1891, under which the levy affecting lot 18 was made, provides as follows: "The state tax shall be levied by the state board of equalization at their meeting in August of each year and the rate of such tax shall be certified by the state auditor to each county auditor on or before the fifteenth day of September annually. * * * Such levy shall be made in a specific amount and the rate shall be determined by the state auditor." It is contended by the appellant that this provision of the law is mandatory, and imposes the duty upon the board to make the levy in specific amounts, and that the failure to do so renders the levy, and all subsequent proceedings based on the levy, void. The respondents contend that this provision is directory merely, and does not render the tax levy or subsequent proceedings void. It is a matter within legislative control to regulate the mode or method of making levies by boards or officers. The legislature may provide for a levy by mills, percentages, or in specific amounts. The levy

by percentages for the year 1890 was not, therefore, in strict accordance with the provisions of the statute. The effect of a levy by percentages when the law prescribed that levies should be made in specific amounts, is the question presented by this objection to the deed. That a levy made by the county commissioners by percentages renders the tax void, as well as sales and deeds based on such levy, has been held by this court. *Wells County* v. *McHenry,* 7 N. D. 246, 74 N. W. 241; *Dever* v. *Cornwell,* 10 N. D. 123, 86 N. W. 227. It is there also held that a judgment for a tax cannot be entered on such levies. It is held to be no levy at all in the decisions cited. A levy by county commissioners by percentages, and a levy by the state board of equalization in the same way, differ in results, because not based on similar conditions. The total valuation of the property of the person taxed is not definitely known until the state board of equalization has acted. The valuation of his taxable property may be changed, either by being lowered or raised, or some of it lowered and some of it raised; and the property of different taxpayers may not be affected in the same way. The valuation basis on which the tax was to be raised was not definitely known when the levies were made by the county commissioners in July. A levy by percentages at that time might not have resulted in raising the amount necessary for current county expenses, in view of the possible changes made by the state board. No such consequences can follow a percentage levy by the state board of equalization. The amount to be raised is fixed and definite when the levy is made. The valuation of all the taxable property on which the tax is to be levied and the estimated expenses of the state are definitely known and fixed when the state board of equalization makes its annual levy. It then becomes a matter of computation to determine what the rate of taxation shall be. No detriment can follow if the amount to be raised is figured by percentages. The amount to be raised through taxation will be the same. For that reason, in case of a levy not in accordance with the statute, in which the same results are reached as if the statute had been followed, we fail to see that any injury follows to the taxpayer, and see no ground for holding that such a levy by the state board of equalization is void and a nullity. Under no view can it be held that the taxpayer suffered any injury by reason of the levy by percentages. If the injury be presumed by reason of a deviation from the method prescribed by the statute, a computation will show that such presumption is not

well founded. The mere fact that the law has not been literally complied with cannot be held to render the proceedings void, when no change is thereby made in the final result of the levy. When the levy is made by the state board, the total sum to be raised by state taxation is fixed and certain. So is the total equalized valuation of all the property of the state subject to taxation fixed and certain. With these two factors certain and fixed, the determination of the rate of taxation is simply a matter of computation. In legal effect, the specific sum to be raised is certain, fixed, and specific, because easily made so. These considerations leave no doubt in our minds that the levy was not void, but valid, and not subject to the attack made upon it. The contrast between the conditions under which a levy is made in July by county commissioners and those existing when the levy is made by the state board is so great as to warrant a different conclusion as to the effect of a levy by percentages in each case. In the matter of the county levy made in July, the valuation of the property on which the tax must be raised is not then known or capable of being made known. To fix a rate by percentages under those conditions is a mere guess as to the sum that will be raised thereby. This question was before the Supreme Court of Michigan in *Hubbard* v. *Winsor,* 15 Mich. 146, and the court said: "Instead of fixing a specific sum to be raised by taxation, the board directed a percentage on the assessed value. The legislature subsequently passed a statute designed to legalize this method of taxation, and it is claimed this statute is void. We do not perceive any illegality in the original proceedings, and do not deem it necessary to inquire into the validity of the law. The designation of a percentage on a definite sum is just as certain as if it were calculated and stated in figures, and leaves nothing to be done to make it known except a simple computation. It would be absurd to hold a tax valid or void according as a sum of this nature is done by one or another officer from the same data. The law presumes that the rules of arithmetic are the same in all offices." This decision was made under a statute providing that the board of supervisors "shall at their annual session in October in each year ascertain and determine the amount of money to be raised by tax for county purposes * * * and also the amount of state tax required to be raised," etc. The decision is an express authority upholding a levy by percentages when the statute commands a levy in fixed sums. In *Peed* v. *Millikan,* 79 Ind. 86, the Supreme Court of Indiana said:

"Taking the entire order into consideration, we incline to the opinion that it may be treated as showing a levy of fifty-two hundredths of one per cent, and that it is not void because in the shape of a per cent instead of a gross sum. Assuming, as counsel for appellant contends, that the levy must be deemed to have been made upon or with reference to the duplicate of the preceding year, it is a percentage upon a definite and known sum or sums, and the total amount is as certain as if the aggregate had been stated in figures. *'Id certum est quod certum reddi potest.'*" Both of the cases cited were equity proceedings to restrain the collection of taxes so levied. These cases accord with our conclusion that it would be too technical and narrow a construction to hold that a mere irregularity, not possibly affecting the result, vitiates a levy and all subsequent proceedings. We therefore hold that the levy was a valid levy, and in so doing do not overrule the previous decisions of this court pertaining to county levies. *Wells County* v. *McHenry* and *Dever* v. *Cornwell, supra.* This renders it unnecessary to consider the constitutionality of section 79, c. 126, p. 286, of the Laws of 1897, as a decision thereon could not affect this case, for the reason that the taxes are held valid and not subject to the objections urged against them.

On the first argument of this case, in September, 1902, Chief Justice Wallin was strongly of the opinion that the state levy was invalid, and wrote a dissenting opinion. The court as now constituted, has, after an exhaustive argument upon this point on rehearing, unanimously reached the conclusion that the objection to the validity of the state tax levy cannot be sustained.

Appellant presents an affidavit, and on it bases a request that, in case of a decision adverse to the plaintiff, the cause be remanded for another trial. The request is that he be allowed to present further testimony to show that no warrant was ever attached to the tax list, and that no notice was published of the time when the right of redemption would expire. We have recently held, in *Nichols* v. *Roberts* (decided at this term), 96 N. W. 298, that matters extraneous to the record on appeal will not be considered in determining what disposition shall be made of cases appealed to this court. There was ample opportunity in the court below to have presented the testi-

mony now sought to be presented. If such an application were ever to be viewed with favor this one may be denied as without merit.

The judgment is affirmed. All concur.

(96 N. W. Rep. 132.)

N. D. GAGNIER *v.* CITY OF FARGO.

Opinion filed April 29, 1903.

An Instruction, Defective When Considered Alone, Not Erroneous When the Charge as a Whole States Law Correctly.

1. In an action against a city for damages for personal injury caused to a person riding on a defective sidewalk on a bicycle, an instruction which may be defective when considered alone will not be held erroneous when the charge considered altogether states the law correctly.

Damages for Pain and Mental Suffering Recoverable Although Not Specially Pleaded.

2. In such an action, damages for pain and mental suffering growing out of the physical injury or recoverable without pleading or proving such pain or mental suffering.

Insufficiency of Evidence—Specification as to Particulars.

3. The insufficiency of the evidence to justify the verdict will not be considered when there is no specification as to the particulars wherein such evidence is insufficient.

Specification that Verdict is Against the Law of the Case, Not Sufficient.

4. A specification of error that "the verdict is against the law of the case" means, as applied to the evidence, that the verdict was rendered in disregard of the instructions, and is not a sufficient specification to raise the question of the insufficiency of the evidence to justify the verdict.

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

Action by N. D. Gagnier against the city of Fargo. Judgment for plaintiff and defendant appeals.

Affirmed.

See 88 N. W. Rep. 1030.

M. A. Hildreth, for appellant.

The plaintiff was guilty of contributory negligence as a matter of law, and motion for a new trial should have been granted. *Collins* v. *City of Janesville*, 83 N. W. Rep. 695; 6 Mun. Corp. Cases,

600; *Gilmar* v. *Inhabitants of Deerfield,* 15 Gray. (Mass.) 557; *Bunker* v. *Town of Covington,* 69 Ind. 35, 35 Am. Rep. 202.

The plaintiff claimed damages for physical injuries. The evidence introduced related solely to such injuries. The court erred in its instruction to the jury, that they should take into consideration "his physical pain and mental suffering arising from such injury, and which you may find that he is to continue to suffer from in the future, by reason of such injury."

The character of this instruction has already been condemned in *Comaskey* v. *Northern Pacific Railway Co.,* 3 N. D. 276, 55 N. W. Rep. 732.

M. A. Hildreth, for appellant on reargument.

The plaintiff was guilty of negligence as a matter of law. With knowledge of the defect in question, in open daylight, with the street before him and with nothing to prevent his taking the street or the other sidewalk, he attempts to ride across the point of danger without exercising, as we claim, ordinary care on his part, and such care as the law demands of him.

Durkin v. *Troy,* 61 Bar. 437, 4 L. Ed. 213; *Town of Gosport* v. *Lydia E. Evans,* 11 West Rep. 115; *Neir* v. *Mo. Pac. Ry. Co.,* 4 West Rep. 597; *Neal* v. *Town of Merriam,* 40 S. E. Rep. 116; *Devine* v. *City of Fond du Lac,* 88 N. W. Rep. 913; *Bohl* v. *City of Dell Rapids,* 91 N. W. Rep. 315; *Rust* v. *City of Goshun,* 42 Ind. 339; *Cooler* v. *City of Leavenworth,* 27 Kan. 673; *Schafeter* v. *City of Sandusky,* 33 Ohio St. 245; *Town of Gosport* v. *Evans,* 112 Ind. 113; *Goldstein* v. *C. M. & St. P. R. R. Co.,* 46 Wis. 404, 1 N. W. Rep. 37; *Hausman* v. *City of Madison,* 87 Wis. 187, 55 N. W. Rep. 167, 21 L. R. A. 263; *Fisher* v. *Town of Franklin,* 61 N. W. Rep. 80, 89 Wis. 42; *Collins* v. *City of Janesville,* 111 Wis. 348, 87 N. W. Rep. 241.

The instruction to the jury was prejudicial error.

McClengham v. *Omaha, etc.,* 41 N. W. Rep. 350; *McPherson* v. *Wiswell,* 26 N. W. Rep. 916; *Richmond & D. R. Co.* v. *Freeman,* 11 So. Rep. 800; *Wasson* v. *Palmer,* 14 N. W. Rep. 171; *Ballard* v. *State,* 28 N. W. Rep. 271.

A misdirection of the judge may have influenced the verdict, and a new trial will be granted although the evidence may have warranted such verdict.

Wendel v. *Hughes,* 3 Wend. 418.

The verdict was a compromise. Plaintiff sued for $2,000; recovered in first trial, $300; in second, $400. When it appears that verdict was the result of a compromise, it should be set aside. *Bigelow* v. *Garwitz,* 40 St. Rep. 580.

David R. Pierce, for respondent.

The court did not err in instructing the jury "that prior knowledge of a defect in a sidewalk by one who is injured, is not necessary proof of contributory negligence." When the highway is out of order, it is not negligent to use it in as prudent a way as practicable.

Beach on Contributory Negligence, p. 257; *City of Montgomery* v. *Wright,* 72 Ala. 411; *Huntington* v. *Breen,* 77 Ind. 29; *Osage City* v. *Brown,* 27 Kan. 74; *Dewire* v. *Bailey,* 131 Mass. 169; *Weston* v. *El. R. R. Co.,* 73 N. Y. 595; *Dooley* v. *Meriden,* 44 Conn. 117; *Aurora v. Hellman,* 90 Ill. 61; *Reed* v. *Northfield,* 13 Pick. 94; *Evans* v. *City of Utica,* 69 N. Y. 166.

Mere knowledge of defects or danger in the highway on the part of the person injured thereby, is not conclusive evidence of negligence contributory to the injury.

Beach on Contributory Negligence, p. 258; *City of Erie* v. *Magill,* 101 Penn. St. 616; *Shaefler* v. *Sandusky,* 33 Ohio St. 246; *Centralia* v. *Krouse,* 64 Ill. 19; *Durkin* v. *Troy,* 61 Barb. 437; *Parkhill* v. *Brighton,* 61 Iowa 103; *Wilson* v. *Charlestown,* 8 Allen 137; *Corbett* v. *Leavenworth,* 27 Kan. 673.

The court did not err in the following passage from the charge: "His physical pain and mental suffering arising from such injury, and which you may find he is certain to suffer from in the future by reason of such injury." No allegations of special damage is necessary to recover for mental suffering; it is inseparably connected with, and attends personal injuries. 5 Enc. Pl. & Pr. 758; *Robinson* v. *Marino,* 3 Wash. 434, 28 Pac. Rep. 752.

Damages that are the natural and necessary result of an injury need not be specially pleaded. They are implied by law and need not be so alleged. *Curtis* v. *Rochester R. R.,* 18 N. Y. 534; *Tyson* v. *Booth,* 100 Mass. 258; *Feeney* v. *Long Island R. R. Co.,* 116 N. Y. 375, 22 N. E. Rep. 402; *Comasky* v. *N. P. Railway Co.,* 3 N. D. 276, 55 N. W. Rep. 732.

MORGAN, J. The plaintiff seeks to recover damages claimed to have been received by him while riding on the defendant's sidewalk on a bicycle, which damages are claimed to have been caused by the

defendant's negligence in not keeping said sidewalk in proper condition. The complaint states the cause of action, after describing the defects in the sidewalk, in the following language: "That on the 18th day of October, 1889, the plaintiff was lawfully and rightfully riding over and upon said sidewalk on a bicycle, and that when he had arrived at a point in the same where said hole and loose bricks were located as aforesaid, and without fault or negligence on his part, his said bicycle was then and there overturned by a loose brick, and he was precipitated with great violence to the ground, whereby he received great injuries," etc. The defendant's answer was a general denial, with an allegation that the injury was occasioned by the contributory negligence of the plaintiff. The plaintiff recovered a verdict for $400. Defendant gave notice of intention to move for a new trial upon the following grounds: (1) Insufficiency of the evidence to justify the verdict; (2) that the verdict is against the law of the case; (3) errors of law occurring at the trial and duly excepted to by the defendant. A motion for a new trial was made, based upon a settled statement of the case and upon the grounds stated in the notice of intention. The motion for a new trial was denied, and this appeal from the judgment perfected.

This case was in this court on a former appeal, and is reported in 11 N. D. 73, 88 N. W. 1030. On that appeal this court ordered a new trial because of erroneous instructions given to the jury, and the rule was then followed that a municipality owes no greater duty to riders of bicycles, when allowed to ride on sidewalks, than to keep the same in proper condition for safe travel by pedestrians. On this appeal the assignments of error pertain to the instructions given to the jury solely. There is an assignment of error on the refusal of the court to grant a new trial. But the grounds thereof refer solely to the instructions claimed to be erroneous. There is no specification in the record at all as to the particulars wherein the evidence is insufficient to justify the verdict. No request for instructions by the defendant was refused. Hence consideration of the evidence to determine whether it sustains the verdict, or whether the plaintiff was guilty of contributory negligence, or assumed all risks with knowledge of the condition of the walk, is not permitted under the statute; and error can be claimed on the giving of instructions only, as none is specified or assigned. Section 5467, Rev. Codes 1899; *Pickert* v. *Rugg*, 1 N. D. 230, 46 N. W. 446; *National Cash Register Co.* v. *Pfister*, 5 S. D. 143, 58 N. W. 270.

The first assignment on which appellant relies is in the giving of this instruction: "I charge you, gentlemen of the jury, that prior knowledge of a defect in a sidewalk by one who is injured is not necessarily proof of contributory negligence; and if you believe from the evidence in this case that the plaintiff had knowledge that the sidewalk was out of repair and even dangerous, yet because of that fact alone he would not, therefore, be bound to forego travel on such sidewalk." The objection to this instruction is stated by the appellant's attorney as follows: "Under the rule laid down in the case of *Collins* v. *Janesville* (Wis.) 83 N. W. 695, the instruction practically eliminated from the jury any consideration of the knowledge that the plaintiff possessed with reference to the point of injury, and consequently is destructive of that rule which required the plaintiff to exercise ordinary care to prevent an injury." Immediately preceding and next before the instruction quoted above the court gave this instruction: "You are to consider all the facts, including the condition of the sidewalk, the facts which were within the knowledge of the plaintiff in reference thereto, the character and nature of the defect in the walk which was the direct cause of the injury, the fact that the plaintiff was passing over the walk on a bicycle, and the manner in which he sought to pass, and then determine whether, under all the circumstances, he was in the exercise of such care and prudence as would have been used and exercised by a man of ordinary care and prudence under the same circumstances and conditions." Immediately following the instruction objected to, the court gave this instruction: "The real fact for you to ascertain as bearing upon the question of contributory negligence if any you so find, is this: Did the plaintiff, by his own fault or negligence, contribute directly to produce the injury? Could he, by ordinary prudence, have prevented the injury? And if you find that he was guilty of contributory negligence, then he cannot recover, and your verdict must be for the defendant." Reading the charge altogether, as given, it is clear that the objection urged to the instruction was fully covered in other portions of the charge. The jury was told in plain language that the plaintiff must exercise such care as an ordinarily prudent and careful person would have exercised under like circumstances, which circumstances included plaintiff's knowledge of the condition of the walk at the time. As the only defect claimed against the correctness of the instruction was fully supplied in other portions of the charge, we do not deem

it necessary to say anything further on this assignment. It is too well understood to need argument or citation of authorities that an omission in stating the law in a particular instruction is not prejudicial error if covered by other portions of the charge. No prejudice can follow such an omission when supplied elsewhere in the charge.

The next assignment urged arises out of the giving of an instruction as to the elements to be considered in assessing the damages. The jury was instructed to take into consideration the plaintiff's bodily injuries and "his physical pain and mental suffering arising from such injury." The objection urged against the instruction is that mental suffering should not have been included as an element of damage in the case. Appellant's attorney urges that "there is no claim that the plaintiff suffered any mental impairment which injured his mental power." Neither does the complaint allege, nor the evidence show expressly, that the plaintiff suffered mentally, nor that there was any impairment of the mental powers by reason of the injury. The complaint and the evidence show serious physical injury, consisting of breaking two ribs, injuring his arm and shoulder, and other injuries, which were of such character that he was unable to lie in bed, and was compelled to sit in a chair for 170 hours. Such evidence clearly shows physical injuries from which physical pain and mental suffering necessarily follow. Mental suffering is the natural and necessary result of physical injury, and equally as much so as physical pain. The physical injury being proved, pain and mental suffering are presumed. The physical pain and mental suffering need not be pleaded nor specially proved, but are taken to follow as a necessary consequence of the physical injury, and to be inseparably connected therewith. There is great uniformity in the authorities on this question. Among those so holding are the following, which could be added to largely without difficulty: 1 Sutherland on Dam. (2d Ed.) sections 419-421, *Fry et al.* v. *Hillan* (Tex. Civ. App.) 37 S. W. 359; *Gronan* v. *Kukkuck*, 59 Iowa 18, 12 N. W. 748; *C., B. & Q. Ry.* v. *Warner*, 108 Ill. 538; *Brown* v. *Hannibal & St. J. Ry.*, 99 Mo. 310, 12 S. W. 655; *McCoy* v. *Milwaukee St. Ry. Co.*, 88 Wis. 56, 59 N. W. 453. Defendant's attorney relies upon *Comaskey* v. *N. P. Ry. Co.*, 3 N. D. 276, 55 N. W. 732, as supporting his contention. We do not so understand that case. That case lays down the rule that, before damages on account of the "impairment of the mental powers" become allowable, they

must be specially pleaded and proven. The syllabus expressly states this as the question decided, and the opinion does not lay down the rule that damages on account of "mental suffering" must be specially pleaded and proved. In that case it was said: "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." We think it clear that the damages that must be "claimed and proved" are expressed in that case as those growing out of the impairment of the mental powers, and not those growing out of mental suffering. The case is not an authority against the doctrine followed by the trial court in this case that damages growing out of a physical injury causing mental suffering may be recovered without specially pleading or proving the physical pain and mental suffering. As stated in that case, there is a clear distinction between "mental suffering" and "impairment of the mental faculties."

This disposes of all the assignments. The judgment is affirmed. All concur.

ON REHEARING.

(October 29, 1903.)

On the reargument appellant's counsel urged that the plaintiff was guilty of contributory negligence as a matter of law, and that it was not necessary for appellant to particularly specify wherein the evidence was insufficient to sustain the verdict, inasmuch as the evidence, considered as a whole, failed to show that the plaintiff was in the exercise of ordinary care in riding over the walk in question under the circumstances disclosed by the evidence. This contention cannot be upheld. As stated before in the opinion, the insufficiency of the evidence to justify the verdict was not particularly pointed out or specified on the motion for a new trial. This not having been specified, the evidence cannot be considered, and the statement alleging that it was insufficient must be disregarded. If insufficient to justify the verdict in any case, the insufficiency must be pointed out and specified, or the trial and appellate courts must disregard the specification. The language of the statute does not admit of excepted cases, but applies to all cases. The insufficiency of the evidence must be specified on the motion for a new trial, or its insufficiency raised by a motion for a directed verdict, before the verdict can be set aside on appeal as based on insufficient

evidence. Hence the question is not before us whether the plaintiff was guilty of contributory negligence as a matter of law; nor is the question before us whether the evidence was insufficient to sustain the verdict. Counsel cite many cases holding that an unqualified misdirection in the instructions is ground for a new trial. The contention is not disputed, but it has no application to this case. The cases cited do not hold that an omission to fully state the law bearing on the case in one instruction is prejudicial error, providing the omission is fully and clearly supplied in the other instructions given. This is not a case of contradictory instructions. The charge as a whole is not contradictory, but is a correct statement of the law applicable to the case, so far as excepted to.

Finally, it is urged on the reargument that the specification that "the verdict is against the law of the case" is a sufficient specification to warrant this court in setting aside the verdict as not based on sufficient evidence. The specification "against the law," as generally applied in code states, means that the verdict is in disregard of the instruction of the court. The case of *Sweeney* v. *C. P. R. Co.*, 57 Cal. 15, is especially relied on by counsel to support his contention. In that case the record is silent as to what specifications were made as grounds for a new trial. The trial court granted a new trial on the ground that the verdict was against the law as laid down in the instructions, and also contrary to the uncontradicted evidence. It is not authority for holding that a verdict is "against law" as based on insufficient evidence when no particular specification of the insufficiency of the evidence is made on the motion for a new trial. In *Brumagin* v. *Bradshaw*, 39 Cal. 24, this language is used in disposing of a similar specification of error: "It is not enough to aver that the verdict is against the law, and then offer to support the averment by showing that the verdict is not supported by the evidence, and is for that reason 'against law.' If such a course of proceeding were tolerated, all the other specific grounds for new trial enumerated in the statute might, for the same reason, be condensed into one general ground that 'the verdict is against law,' for in that general sense it would be 'against law' if there was any valid reason whatsoever for a new trial." As bearing on the meaning of "against law" in specifications of error, see also, *Declez* v. *Save*, 71 Cal. 552, 12 Pac. 722; *Valerius* v. *Richard*, 57 Minn. 443, 59 N. W. 534. The specification that the verdict was "against the law of the case," when considered with reference to

the instruction and the evidence does not warrant setting aside the verdict. Before a specification that the verdict is "against law" can be relied on for a new trial based on a consideration of the evidence, it must appear that the verdict was rendered in disregard of the instructions. This is not shown in this case. We find no reason for departing from the conclusions formerly announced by this court.

The judgment is affirmed. All concur.

(96 N. W. Rep. 841.)

J. K. SONNESYN *v.* L. W. AKIN AND G. M. BABCOCK.

Opinion filed May 28, 1903.

Attachment When Debt Incurred for Property Obtained Under False Pretenses—Statute Construed.

1. Subdivision six of section 5352, Rev. Codes 1899, which provides that the plaintiff may have the property of the defendant attached "when the debt upon which the action is commenced was incurred for property obtained under false pretenses," construed. *Held*, that this ground of attachment is available only when the action is commenced upon a debt which has been assented to by the defendant, and that it does not apply in actions to recover damages for torts.

Attachment Vacated, When Affidavit as Foundation Thereof, is False.

2. Under section 5376, Rev. Codes 1899, the court or judge is required to discharge an attachment when, on motion therefore, it appears that the affidavit upon which it was issued is untrue. The plaintiff, in his affidavit, set out the sixth subdivision of section 5352, Rev Codes 1899, above quoted, as ground for the attachment of defendants' property; that is, that his action was commenced upon a debt, etc., whereas, in fact, his action was commenced to recover damages for deceit. It is *held* that the ground of attachment relied upon was not available, and that, because of the falsity of the affidavit in this particular, the attachment was properly vacated by the trial court. and the order vacating the same is affirmed.

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

Action by J. K. Sonnesyn against L. W. Akin and G. M. Babcock. Judgment for defendants, and plaintiff appeals.

Affirmed.

Morrill & Engerud, for appellant.

B. G. Tenneson and *Ball, Watson & Maclay*, for respondents.

YOUNG, C. J. This is an appeal from an order vacating an attachment. The action in which the writ issued was brought to recover damages for a deceit alleged to have been committed by the defendants in connection with the sale by them to plaintiff of 960 acres of farm lands situated in Ransom county. The deceit which is alleged as a cause of action consists of false representations by defendants to plaintiff that they were the owners of the land. The complaint alleges, in substance, that on the 30th day of September, 1902, the defendants, with intent to deceive and defraud the plaintiff, falsely and fraudulently stated and represented to the plaintiff that they were the owners of the land in question, and were legally entitled to make a contract to sell and convey the same; that the plaintiff, relying upon said representations, and believing them to be true, entered into a contract to purchase said lands, and paid to the defendants upon the purchase price thereof, in cash and merchandise, $12,857.33; that defendants were not the owners of said land, and were not legally entitled to enter into a contract to sell and convey the same; that the defendants knew said statements were false and untrue, and they made the same for the purpose of inducing the plaintiff to pay to them the said sum of $12,857.33; that the land in question was owned by other persons—320 acres by George H. Collins, 320 acres by Thomas Jones, 160 acres by N. A. Lundvall, and 160 acres by Annie Frey; "that by reason of the premises the plaintiff has been damaged in the sum of $12,857.33," for which sum he demanded judgment, together with his costs and disbursements. The affidavit upon which the writ was issued stated two statutory grounds for its issuance, and in the following language: "(1) That the debt upon which the action is commenced was incurred for property obtained under false pretenses; (2) that the said defendants are about to sell, assign, transfer, secrete, or otherwise dispose of their property with intent to cheat or defraud their creditors." The affidavit further stated "that said action is commenced for the recovery of money only, and that a duly verified complaint therein has been filed with the clerk of the district court, which said complaint sets forth a proper cause of action for attachment in favor of said plaintiff and against said defendants." An order to show cause why the writ should not be vacated and set aside was issued by the trial court, and, after a hearing at which a large number of affidavits in support of and in

opposition to the motion were presented, an order was made vacating the writ, from which order this appeal is taken.

We are of opinion that the attachment was properly vacated, and the order appealed from must therefore be affirmed.

Section 5356, Rev. Codes 1899, provides that "the warrant shall issue upon a verified complaint, setting forth a proper cause of action for attachment in favor of the plaintiff and against the defendant, and an affidavit, setting forth in the language of the statute one or more of the grounds of attachment enumerated in section 5352," which grounds are eight in number. Formerly—and this is still true in a number of states—the remedy by attachment was not available except in actions upon contract. Our statute (section 5352, Rev. Codes 1899) extends the remedy to actions "for the wrongful conversion of personal property, or for damages, whether arising out of contract or otherwise." Section 5376, Rev. Codes 1899, provides that if, upon a motion to discharge, it shall appear "to the satisfaction of the court or judge that the attachment was irregularly issued, or that the affidavit upon which it was issued is untrue, the attachment must be discharged." It is true, plaintiff's complaint sets forth a cause of action in which an attachment may be had. His cause of action is for damages for a deceit, but, as we have seen, section 5352, Rev. Codes 1899, authorizes the issuance of the writ in actions "for damages, whether arising out of contract or otherwise." The vital question presented to the trial court on the motion to vacate the writ, and to this court on this appeal, is whether the grounds set forth in the affidavit as a basis for the issuance of the writ were true. It appears from an examination of the affidavits that one of the grounds—that is, the claim that defendants were disposing of their property to defraud their creditors—was not seriously urged in the trial court, and it is not urged or relied upon in this court. This ground is clearly not sustained by the evidence.

Counsel for appellant rely entirely upon the allegation in his affidavit that "the debt upon which the action is commenced was incurred for property obtained under false pretenses," which is the sixth ground for atachment under section 5352, Rev. Codes 1899, and the affidavits submitted on the motion are chiefly directed to the question of the defendants' alleged false pretenses of ownership of the land. On the question as to whether they did so represent, the evidence is in square conflict. It is not disputed that the plaintiff contracted to pay the sum of $25,920 for the entire 960

acres, or that he paid thereon the sum of $12,857.33, as alleged by him. Neither is the fact disputed that the defendants did not have the legal title when they entered into the contract. It is shown, however, that they had contracts from the owners of all of it except the Frey quarter section, and that they previously had a contract for this quarter, which had been surrendered for the purpose of obtaining a new one, and that subsequent to the attachment, and at a greatly enhanced price, they purchased the Frey land, and at the hearing of the motion were in a position to convey all of the land to the plaintiff. No formal findings of fact were made by the trial court, but it is apparent from the record that the trial judge was of opinion that the defendants did not represent to plaintiff that they had title, and for this reason vacated the attachment. Counsel for the appellant strenuously urge on this appeal that this was an error, and that the order vacating the writ should therefore be reversed. Their contention is, first, that the clear preponderance of evidence is to the effect that the defendants did in fact commit the deceit alleged (that is, falsely represented that they had title); and, second, that, even if the evidence does not establish that fact clearly, the court should not, in any event, pass upon the question upon affidavits in advance of the trial on the merits, for the reason that "it necessarily involves the issues of the action itself, and that issue must be determined by a jury."

The authorities are divided on the question as to whether it is proper, on a motion to dissolve an attachment upon the ground that it was improperly issued, to pass upon the grounds of the attachment, where they are the same as the issues in the main action. *Newell et al.* v. *Whitwell* (Mont.) 40 Pac. 866; *Kuehn* v. *Paroni,* (Nev.) 19 Pac. 273, and *Olmsted* v. *Rivers,* 9 Neb. 234, 2 N. W. 366, may be cited as holding that it is not. *Bundrem* v. *Denn,* 25 Kan. 430, and *Carnahan* v. *Gustine et al.* (Okl.) 37 Pac. 594, are to the effect that courts should not refuse to determine the truth of the grounds of attachment stated in the affidavit, even when it involves a determination of the facts constituting plaintiff's cause of action. The view that we have taken of this case renders a consideration of both of these contentions unnecessary. For the purposes of this case, we might assume both contentions of appellant's counsel to be true; that is, that the affidavits clearly establish the false representation; or again, we might assume the correctness of their legal proposition, viz., that, when the cause of action and ground

of attachment are the same, the truth of the same should not be inquired into upon affidavits, but left to the determination of the jury at the trial of the action. Nevertheless we would be compelled to sustain the order vacating the attachment. The attachment must fall because of the falsity of the affidavit in another and vital particular, and one which is not affected by either of counsel's contentions. The falsity of the affidavit lies in the statement that his action is commenced upon a debt. It may be conceded that the evidence shows that the defendants used false pretenses, but false pretenses alone do not give the right to attach under the subdivision in question. The fundamental feature of this ground is a cause of action based upon a debt; another is that the debt is for property; and, finally, that the debt shall have been incurred or contracted by the defendant by false pretenses. The plaintiff's action is not commenced upon a debt. On the contrary, his action is based upon a tort. His action is not to enforce the payment of a debt arising out of a contract, either express or implied, but is prosecuted for the purpose of recovering damages for an alleged tort. The greatest latitude of definition would not enable us to say that an action based upon a tort is an action based upon a debt. Blackstone defines "debt" as "a sum of money due by certain and express agreement." This definition has been broadened. Mr. Justice Field, in *Perry* v. *Washburn,* 20 Cal. 318, p. 350, in determining whether a tax is a debt, stated that "a debt is a sum of money due by contract, express or implied. A tax is not a debt. * * * It is not founded upon contract. It does not establish the relation of debtor and creditor between the taxpayer and state. It owes its existence to the action of the legislative power, and does not depend for its validity or enforcement upon the individual assent of the taxpayer." It has been held, "with regard to attachment, that it is such a debt as can be enforced in an action of debt or *indebitatus assumpsit.*" 1 Shinn on Attachment, section 14; *Mills* v. *Findlay,* 14 Ga. 230; *Elliott* v. *Jackson,* 3 Wis. 649. In *Sunday Mirror Co.* v. *Galvin,* 55 Mo. App. 412, it was held that "a conversion of money, though fraudulent on the part of the tort feasor, will not constitute a fraudulent contraction of a debt, within the purview of the statute defining the grounds of attachment." The reasoning of the commissioner, which was upheld, was to the effect that, where "the gravamen of the complaint lies in tort, there can be no debt, within the meaning of the attachment law." The fourteenth subdivision of the Missouri statute

(Rev. St. 1879, section 398) authorizes an attachment "where the debt was fraudulently contracted on the part of the debtor." In the prior case of *Finlay* v. *Bryson,* 84 Mo. 664, in which the plaintiff attempted to waive the tort and sue *in assumpsit,* and thus sustain an attachment under the above subdivision, it was held that "one cannot waive a tort and sue *in assumpsit* if the effect of it is to give jurisdiction over the subject matter to a court which otherwise would not possess it, or to bring the case within the terms of a statute which otherwise would not include it. Nor can one sue *in assumpsit* for the wrongful conversion of personal property, and insist upon such conversion as a basis of a fraud to sustain an attachment in the same suit." The court, after stating that the Missouri statute authorized the remedy by attachment "in all civil actions, whether resting on contract or sounding in tort," said that, "when an attachment is sought upon the grounds contained in the fourteenth subdivision, the misconduct of the defendant, constituting the ground of the attachment, must relate to the same cause of action set forth in the petition; and it is there, as well as in the affidavit of attachment, referred to as an action of debt. The plaintiff must depose in his affidavit that the debt sued for in the petition was fraudulently contracted on the part of the debtor. This language, in its ordinary signification, does not aptly apply to actions sounding in tort. In construing statutes, we are expected to accept the meaning of language as indicated by its ordinary use, unless it is apparent from the context and subject matter that a different meaning must have been intended by the lawmaking power. * * * I think there never was a time in our judicial history when the subject matter of a debt fraudulently contracted on the part of the debtor was not well known in our courts. * * * Debts induced by fraud are common things in our Reports, and, as such, they answer the language of the fourteenth subdivision, without going further. The fraudulent transaction referred to must culminate in a debt. The debtor must have been guilty of some material, deceptive act, word, or concealment, done or suffered by him with the intent to induce the opposite party to consent to the debt. The opposite party must have relied upon such false acts or manifestations of the debtor, and yielded his consent to the contract on the faith thereof. In this manner, alone, results a debt fraudulently contracted on the part of the debtor. * * * The evidence fails to show that any debt was ever contracted at all by the debtor. * * * As a mat-

ter of fact, he agreed to no debt, nor can he lawfully treat it as such. That privilege belongs to the other side, not to him." In the above case it was also contended that the plaintiff was at liberty to waive the tort, and sue *in assumpsit* for money had and received, and thus sustain his attachment. This the court denied, saying that, "so far as the defendant is concerned, this right rests upon a fiction imposed at the plaintiff's pleasure upon the actual facts of misconduct of the defendant, which discloses no elements of a promise, contract, or agreement. But when the gravamen of the transaction sounds in tort, the plaintiff will not be indulged in this fiction, if the effect of it is to give jurisdiction over the subject matter to a court which otherwise would not possess it, or to bring the case within the terms of the statute which otherwise would not include it. If, therefore, the only ingredient of indebtedness distinguishing the ground of the attachments rests on fiction, and is furnished by the plaintiff at his election, my conclusion is that the transaction intended in the affidavit cannot, within the meaning of the statute, answer the description of a debt fraudulently contracted on the part of the debtor." *Goss* v. *Board of Commissioners,* 4 Colo. 468, is to the same effect. See, also, *Jacoby* v. *Gogell,* 5 Serg. & R. 450; *Porter* v. *Hildebrand,* 14 Pa. 129. In this case, however, the plaintiff has not attempted to waive the tort and sue for money had and received. On the contrary, he declares upon the tort. His complaint states a cause of action for damages for deceit. *Clark* v. *Edgar,* 12 Mo. App. 345.

As we have seen, the plaintiff's cause of action is one in which a writ of attachment may issue if proper statutory grounds exist, but it does not follow that all of the eight grounds enumerated in section 5352, Rev. Codes 1899, were available to him. It is apparent that the first ground stated in said section, towit, the non-residence of defendant, and also a number of others, apply indiscriminately to all actions in which a writ may issue, regardless of the nature of the action, whether it is upon a contract, judgment for the conversion of personal property, or for damages. It is also apparent that all of the eight grounds do not apply to all classes of actions. For instance, a writ may be had under the eighth ground "in an action to recover purchase money for personal property sold to the defendant," in which case the writ may be "levied upon such property." No one would seriously contend that this ground when stated in an affidavit, would sustain an attachment in an

action based upon a tort, or any other action than one commenced to recover purchase money for personal property. We think it is equally plain that the sixth ground upon which the appellant relies, which authorizes the issuance of the writ "when the debt upon which the action is commenced was incurred for property obtained under false pretenses," restricts it to actions brought to recover upon debts, and that it has no application to any other actions, such as actions to recover damages for torts, as in the case under consideration.

The order vacating the attachment will be affirmed. All concur.

ON REHEARING.

(November 30, 1903.)

It was strongly urged by counsel for appellant in their petition for a rehearing, and also upon the reargument, that this court, in holding that the sixth statutory ground for attachment, viz., "when the debt upon which the action is commenced was incurred for property obtained under false pretenses," applies only in actions upon a contract indebtedness, and is not applicable in an action to recover damages for torts, "misconstrued the statute, and disregarded the express language of the statute in defining the term 'debt.'" It was argued that "the legislature of this state has specifically defined the word 'debt,' and has adopted the very broadest definition thereof, and has discarded the technical meaning thereof." The conclusion for which counsel contend is that "a 'debt'—that which a debtor owes—is synonymous with 'obligation,' and 'obligation' includes liabilities for torts. In short, then, a debt as the term is used in our statute (except chapter 96 of the Civil Code), is an obligation arising either from contract or tort." Counsel are in error in stating that the legislature has specifically defined the meaning of the word "debt," and also in the contention that the words "debt" and "obligation" are synonymous. The most that can be said is that the terms "creditor" and "debtor" have been defined. The statute nowhere defines the term "debt." The argument that the word "debt," as used in the statute under consideration, should have any other than its ordinary meaning, and should be treated as synonymous with "obligation," has no other basis than the fact that the words "debtor" and "creditor" have been defined by the legislature; and because these words have been extended beyond their ordinary and natural meaning, we are asked

to say that the legislature has also defined the term "debt," and broadened its meaning, although, as already stated, there is no attempt at a legislative definition of the term debt. To make it clear that the legislature has not defined the word "debt," it will be necessary to refer to the several provisions of the statute which are pertinent, and upon which counsel rely. Sections 5047, 5048, Rev. Codes 1899, read as follows:

"Sec. 5047. Debtor Defined. A debtor within the meaning of this chapter is one who by reason of an existing obligation is or may become liable to pay money to another, whether such liability is certain or contingent.

"Sec. 5048. Creditor Defined. A creditor within the meaning of this chapter is one in whose favor an obligation exists by reason of which he is or may become entitled to the payment of money."

Chapter 96, Civil Code, which includes the sections just quoted, relates to fraudulent instruments and transfers. It is not open to question that under the above sections the terms "debtor" and "creditor" have their usual signification; that is, one from whom or to whom a debt is due, using the word "debt" according to its common meaning. The particular provision upon which counsel rely to sustain their contention that "debt" and "obligation" are synonymous is contained in section 5113, Rev. Codes 1899, which is a part of chapter 99 of the Civil Code, devoted to definitions and general provisions. This section reads as follows: "Except as defined and used in chapter 96 of this Code, every one who owes to another the performance of an obligation is called a debtor and the one to whom he owes it is called a creditor." Section 3762, Rev. Codes 1899, defines an obligation as follows: "An obligation is a legal duty by which a person is bound to do or not to do a certain thing." Section 3763, Rev. Codes 1899, defines the manner in which an obligation may arise. It reads as follows: "An obligation arises either from: (1) The contract of the parties; or (2) the operation of law." Chapter 43 of the Civil Code relates to obligations created by contract, and chapter 44 relates entirely to obligations imposed by law. Section 3940 of this chapter provides that "every person is bound without contract to abstain from injuring the property of another or infringing upon any of his rights." The remaining sections of this chapter relate to liabilities for breaches of the duties imposed by the above section; that is, for the various kinds of tort, including deceit. An examination of the several sec-

tions above quoted makes it plain that the legislature has broadened the meaning of the words "debtor" and "creditor" so as to include all persons from whom or to whom obligations are due, whether arising from contract or imposed by law; but none of these provisions define the term "debt," or furnish ground for the contention that "debt" and "obligation" are synonymous. It will be conceded that the common and ordinary meaning of the term "debt," in legal acceptation of the term, is an obligation resting upon contract, either expressed or implied. So, too, it may be said that a debtor is one who owes a debt; and creditor, one to whom a debt is due. The legislature has seen fit to call all persons debtors who owe obligations, instead of all persons who owe debts, and to call all persons to whom obligations are due creditors, instead of all persons to whom debts are due. These statutory definitions, however, do not touch the meaning of the word "debt." They merely enlarge the class of persons who shall be "called" debtors and creditors. They neither enlarge nor restrict the meaning of the word "debt." Aside from the statute, a debtor would be one who would owe a debt. Under the statutory definitions, one would be classified as a debtor if he owned an obligation, whether the obligation be one resting upon contract, and therefore a debt proper, or whether it be one merely imposed by law. In either event he would be a debtor. Under the statutory definitions of a debtor, it is not necessary to owe a debt. It is sufficient if one owes an obligation imposed by law. Every debt, however, is an obligation, but every obligation is not a debt. "Obligation" is the broader term; "debt," the narrower. The term "obligation" includes all debts. The term "debt" does not include all obligations, but only that particular kind of obligations known as "debts." The statement, therefore, that the legislature has specifically defined the term "debt," and that the term "debt" is synonymous with the word "obligations," is not sustained by the statute.

But our conclusion that the sixth ground of attachment does not apply in action to recover damages for torts does not rest wholly upon the fact that the word "debt," standing alone, in its usual and ordinary sense, imports an obligation resting upon contract. This is its common meaning. It was said in *Minga* v. *Zollicoffer*, 23 N. C. 279, "that neither in common parlance nor in legal proceedings is a mere wrongdoer designated as a debtor, nor his responsibility for wrong classed under the denomination of debts. Debt-

are creatures of contract, and the language of these acts must be exceedingly strained to bring within their operation claims arising not from contract, but tort." See, also, *Hart* v. *Barnes,* 24 Neb. 785, 40 N. W. 322. The word "debt," however, also has an uncommon meaning, covering all kinds of obligations, and if it appeared that the word was used by the legislature in an unusual sense, it would be our duty to give it effect according to that intention, for words are to be given the effect which the legislature intended they should have, whether it be their usual or unusual meaning. See *New Jersey Insurance Co.* v. *Meeker,* 37 N. J. Law 282. But we think that it is not at all uncertain, for reasons which will hereafter appear, that the legislature used the word "debt" in its usual sense. The statute provides that the plaintiff may have the defendant's property attached "when the debt upon which the action is commenced was incurred for property obtained under false pretenses." To make this ground of attachment available for seizing defendant's property, it must appear, therefore, not only that his action is commenced upon a debt, but also that his debt is of the particular kind described, namely, a debt "incurred for property obtained under false pretenses." It is not enough that the action is based upon a debt. It must be a debt which answers the requirements of the statute in the descriptive phrase; that is, a debt "incurred for property obtained under false pretenses." If it be not that kind of a debt, the action will not sustain an attachment under the sixth ground. This ground of attachment has been in force in this jurisdiction for over twenty years, and during all this time the debt essential to sustain an attachment has been described as a "debt incurred for property obtained under false pretenses." Chapter 32, p. 36, Laws 1881 first authorized an attachment when "the debt was incurred for property, obtained under false pretenses." This ground was re-enacted without change in the Compiled Laws of Dakota of 1887 (subdivision 3 of section 4995), and later it was embodied in the Revised Codes of 1895 as subdivision 6 of section 5352, in which form it now exists.

Up to the year 1897 the remedy by attachment was not generally available in this jurisdiction in tort actions, upon any ground. Prior to that time a writ could be issued only "in an action on a contract or judgment for the recovery of money only, or for a wrongful conversion of personal property." See section 4993, Comp. Laws Dak. 1887, and section 5352, Rev. Codes 1895. Chapter 30, p. 33, Laws

1897, amended the last named section by adding to the actions in which an attachment might issue actions "for damages whether arising out of contract or otherwise." The amendatory act of 1897, just referred to, also added the eighth ground of attachment, which provides that, "in an action to recover purchase money for personal property sold to the defendant, an attachment may be issued and levied upon such property." The seven grounds for attachment, as found in section 5352, Rev. Codes 1895, including the sixth, now under consideration, were re-enacted without change of any kind.

It will thus be seen that the sixth ground of attachment has been in force in this jurisdiction continuously since 1881, and further, that the word "debt," as used therein, originally meant a debt aris ing from contract and did not include liabilities for torts. This is necessarily true, for, as we have seen, until chapter 30, p. 33, Laws 1897, was enacted, an attachment could issue only in actions on contract, or action upon judgments for the recovery of money or for the wrongful conversion of personal property. It is obvious that this ground of attachment could not apply to the two kinds of actions last named. It was therefore only applicable in actions "on a contract" for the recovery of money only; that is, in an action upon a "debt" proper. This meaning of the word debt has not been changed, and in this connection it is proper to note that all of the provisions above quoted, defining the terms "debtor," "creditor," and "obligation," upon which counsel for appellant rely, have been in force continuously since 1866. Section 5151, Rev. Codes 1899, reads as follows: "Words and phrases are construed according to the context and approved usage of the language; but technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition." The rule of construction announced in this section is, we think, directly applicable. Prior to the adoption of chapter 30, p. 33, of the Laws of 1897, permitting attachments in tort actions, "a debt incurred for property obtained under false pretenses" had acquired a fixed meaning in this jurisdiction. It meant an obligation to pay intentionally incurred and by false pretenses. Fuller, J., in *Finch* v. *Armstrong*, 9 S. D. 261, 68 N. W. 741, in discussing this particular ground of attachment, said: "Indemnity against pecuniary loss occasioned by the dishonest acts or omissions of those to whom credit has been extended appears to be the princi-

pal, though not exclusive, aim and purpose of the remedy which attachment affords; and, to thereby promote more effectually the ends of justice, a number of state legislatures have made the fraudulent contracting of the debt sued upon a ground for an attachment. Obviously, the purpose of all such statutes is to reach and operate upon debtors who intentionally incurred the debt, to recover which the action is brought, by obtaining property under false pretenses. In legal acceptation, the word 'debt' signifies 'a liquidated demand; a sum of money due by certain and express agreement; a sum of money due by contract.' And. Law Dict." The foregoing definition of the word "debt," as used in this subdivision, was again approved by the same court in *Coats* v. *Arthur,* 5 S. D. 279-294, 58 N. W. 675. It is true, the legislature of 1897 increased the classes of actions in which attachments may be issued, and added actions "for damages whether arising out of contract or otherwise," but the seven grounds for attachment as they had theretofore existed were not changed in any particular. The sixth ground was reenacted literally. For more than sixteen years prior thereto it had a fixed meaning, being applicable only in actions upon contract obligations intentionally entered into under the inducement of false pretenses. The legislature did not see fit to change the meaning, and we cannot do so. The plaintiff's action in this case is not based upon a debt or contract obligation, but upon a tort, viz., the defendant's alleged violation of a legal duty, which, as was said in *Rich* v. *New York etc., Ry. Co.,* 87 N. Y. 382, "is a very different thing from a contract obligation." See *Pursley* v. *Wikle,* 118 Ind. 139, 19 N. E. 478.

The cases cited from Minnesota and Iowa, decided under statutes similar to or like our own, do not sustain appellant's contention that an action to recover damages for a tort will sustain an attachment under the sixth statutory ground. In *Cole* v. *Aune,* 40 Minn. 80, 41 N. W. 934, which is chiefly relied upon by appellant's counsel, an attachment was sustained under the statutory ground that "the plaintiff's debt was fraudulently contracted," in an action to recover money which had been embezzled by the defendant. The facts were that the defendant, Aune, had been in the employ of the plaintiff, Cole, conducting a store, at a fixed salary of $60 per month, and for a compensation in addition thereto of one-half of the net profits, payable upon an accounting. The business was conducted under the name Cole & Aune. Defendant drew his fixed

salary, and also appropriated other sums used in the business, and refused to account therefor. The action was brought to recover these sums. It was not an action to recover damages for a tort, as in this case. In that case the attachment was sustained; the court holding that, under a liberal definition of the word "debt," the defendant's obligation to pay plaintiff the money sued for constituted a debt. The court said: "The term 'debt' is differently defined, according to the subject matter and language in connection with which it is used. Strictly, it denotes a sum of money due upon contract arising from the agreement of parties. In a more enlarged sense, it may mean any just claim or demand for the recovery of money; that which one person owes and is bound to pay to another." It is evident that the attachment was sustained in that case upon the ground that the recovery sought was upon the defendant's implied obligation to pay, and therefore upon a debt proper, under the liberal definition adopted by the court in that case. That the Minnesota courts do not extend the statute to actions brought to recover damages for torts is entirely clear, as will be seen by reference to the later case of *Baxter* v. *Nash,* 70 Minn. 20, 72 N. W. 799. This was an action against the directors of a banking corporation to recover damages for receiving deposits, knowing it to be insolvent, and was an action for damages for a breach of legal duty, and therefore a tort action. An order dissolving an attachment which issued upon the ground that "the plaintiff's debt was fraudulently contracted" was affirmed. It was claimed in that case that the attachment was allowable in cases of tort under the authority of *Cole* v. *Aune, supra.* This was denied. The court, speaking through Start, C. J., said: "The language of the statute (Gen. St. 1894, section 5289) allowing an attachment where 'the plaintiff's debt was fraudulently contracted' is to be liberally construed, so as to include debts fraudulently contracted or incurred. *Cole* v. *Aune,* 40 Minn. 80, 41 N. W. 934. The plaintiff's cause of action, however, does not fall within even this liberal construction, for it is founded solely in tort. * * * Such claims cannot be metamorphosed into 'a debt fraudulently' contracted, by the most heroic construction. See Drake on Attachment, section 77." The case of *Stanhope* v. *Swafford,* 77 Iowa 594, 42 N. W. 450, was decided under a statute differing in no material respect from our own. The action, however, was not to recover damages for a tort, but, on the contrary, was based upon an implied contract; and the attachment

was sustained upon the ground that the plaintiff had waived the tort and sued upon an implied promise, "in a civil action as for a debt." In that case the plaintiff had purchased land from the defendant, and paid him therefor the sum of $2,240, without having seen the land, and relying entirely upon the defendant's representations. It was alleged that it was in fact worth but $640. The action was to "recover the difference between the actual value of the land and its value as shown by the defendant's representations," and the basis of the attachment was that the defendant had obtained the $1,600 difference in value by false pretenses. The court sustained the attachment, not upon the ground that it was sustainable in an action based upon a tort, but just the reverse—upon the ground that the tort had been waived, and that the action was "a civil action as for debt." The court, after stating the facts, said: "Plaintiff thus sustained loss and damage to the extent of sixteen hundred dollars if he retained the property purchased, as he is, by the law authorized to do. Under familiar rules of the law, which will be recognized by the profession without the citation of authorities, defendants, having received pecuniary advantage from the misrepresentations and false pretenses, are liable in a civil action as for a debt; the plaintiff being authorized to waive the right to proceed as for a tort, and to sue for the loss and damage he sustained. The defendants in that case are liable for such loss and damage, and their liability is a debt arising on the implied promise which the law raises that they will pay the loss suffered by plaintiff." In this case the plaintiff has not waived the tort and brought his action upon an implied promise, and is not, therefore, within the reasoning of the Iowa case. On the contrary, his action is to recover damages for the tort. It is not upon a debt. His cause of action does not rest upon the defendant's contract, either express or implied, to pay the sum he seeks to recover. It is to recover damages for a wrong, and, as was said in *Day* v. *Bennett,* 18 N. J. Law 288, "damages are no debt till they are liquidated." The sixth ground of attachment upon which he relies will not support the attachment in an action based upon a tort.

The order of the district court, therefore, in dissolving the attachment, was proper, and will be affirmed. All concur.

(97 N. W. Rep. 557.)

RICHARD SYKES *v.* W. H. BECK.

Opinion filed July 3, 1903.

On Transfer of Interest in Subject of an Action, the Case May Proceed in Name of Original or Substituted Party.

1. The equity rule which prohibits a purchaser of the subject-matter of an action *pendente lite* from further prosecuting the action in the name of the original party has been abolished in this state by section 5234, Rev. Codes 1899, which provides that "no action shall abate * * * by the transfer of any interest therein. * * * and that in case of such transfer, * * * the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action * * *"

Purchaser Has Sole Right to Ask for Substitution—Allowance of It Discretionary.

2. The sole right to ask for a substitution, under the section referred to, rests with the purchaser. He may prosecute the action in the name of the original party, or ask to be substituted, at his option. The allowance of a substitution by the court when requested is discretionary. In case there is no substitution, the statute requires that "the action shall be continued in the name of the original party."

A Purchaser After Judgment and Before Appeal, Is a Purchaser Pendente Lite.

3. A purchaser of the subject matter of an action after judgment, and before appeal, is a purchaser *pendente lite.* Section 5739, Rev. Codes 1899, provides that "An action is deemed to be pending * * * until its final determination upon appeal, or, until the time for appeal has passed. * * *"

Dismissal for Such Transfer Will Be Denied.

4. A motion to dismiss an appeal which is based upon the ground that the appellant assigned the subject-matter of the action after judgment, and before the appeal was taken, will be denied, where it appears that the appeal was in fact taken and is being prosecuted in this court by the assignee.

Appeal Will Not Be Dismissed When Statement of the Case Does Not Embody All the Evidence—Power to Review Evidence Only, Affected.

5. The fact that a statement of case, settled for the purpose of a review of the entire case in this court in an action tried under section 5630, Rev. Codes 1899, does not contain all of the evidence offered, will not sustain a motion to dismiss an appeal, which has been regularly perfected. The sufficiency or insufficiency of the statement merely affects the power of this court to review the evidence.

Extension of Time to Settle Statement of Case, Discretionary—Modified Only for Abuse.

6. It is *held,* on a motion to strike out the statement of case on the ground that good cause was not shown as a basis for the order of extension of time for settlement, that, upon the showing made, the court did not abuse its discretion in granting the extension.

The Requirement, That Real Estate Be Assessed in Owner's Name, Is Directory—Disregard Not Fatal to Assessment.

7. The provisions of chapter 126, p. 256, of the Laws of 1897, so far as they require an assessment of real estate to be made in the name of the owner, are directory, and a failure to assess in the name of the owner does not invalidate the assessment. Following *Hertzler* v. *Cass County* (decided at the present term) 96 N. W. 294.

Section 5630, Rev. Codes 1899, Does Not Abolish Rules of Evidence.

8. While section 5630, Rev. Codes 1899, which governs trials to the court without a jury, requires that all evidence offered shall be received into the record, it does not abolish the rules of evidence, or relieve trial courts from resting their findings upon legal evidence. Under said section this court, upon a review, is required "to disregard all incompetent and irrelevant evidence properly objected to."

Evidence.

9. Oral evidence that certain facts are shown by a written record, the original of which is available, is not the best evidence, and is incompetent.

Levy of a Percentage on a Fixed Basis Is Levy of a Specific Sum.

10. Under the maxim that that is certain which can be made certain, it is *held* that the 1897 and 1898 state tax levies, which were made by fixing a percentage upon the aggregate value of the property in the state, as equalized, were, in legal effect, levies of a specific sum. Following *Fisher* v. *Betts* (decided at the present term) 96 N. W. 132.

Certified Copies of Official Records as Evidence.

11. Certified copies of official records are essentially secondary in character, and the right to introduce such written copies as primary evidence exists only by virtue of statute, and, to authorize their admission, they must be certified in the manner required by the statute.

Custodian of Record Can Certify to Copy Only, Not Facts.

12. Section 5700, Rev. Codes 1899, provides that "the certificate must state in substance that the copy is a correct copy of the original or a specified part thereof, as the case may be. * * *" Under this section the authority of the certifying officer is limited to certifying that the copy is a correct copy of an original record, or a specified part of it; and the section does not authorize him to certify that any fact does or does not appear of record, or give him authority to substitute his judgment for that of the court, and certify what the record pertains to.

Same.

13. The plaintiff introduced in evidence a paper for the purpose of establishing the invalidity of a county tax levy. There was attached to it the county auditor's certificate "that the above is a true copy of all that pertains to the county tax levy for 1897 as the same appears on record of the county commissioners in my office." It is *held* that an objection that the exhibit was "not the best evidence and not properly certified," should have been sustained by the trial court, and will be sustained by this court, and the evidence disregarded.

Evidence of the Existence or Non-existence of Record Entries.

14. The best evidence of the existence or non-existence of entries in public records is the records themselves. When, because of the voluminous character of the records to be examined, or for other sufficient reasons, oral evidence is admissible to show the absence of a record or an entry, it should ordinarily be given by the legal custodian, and then only after showing a diligent search. As a rule, the oral evidence of another than the custodian is not the best evidence or competent when the testimony of the legal keeper can be had.

Tax Proceedings Presumed Regular—Burden of Overthrowing Is Upon the Assailant.

15. In this state the settled rule is that the person attacking the validity of taxes and tax sales has the burden of sustaining his attack. The presumption is that a tax is valid, and that presumption continues until overthrown by the party assailing it.

On Failure of Such Assailant, Action Dismissed.

16. In this case plaintiff attacks the validity of taxes upon his lands for the years 1897, 1898, 1899, and 1900, and asks that they be cancelled and declared void, alleging as grounds for such relief that the assessments and levies were void. It is *held,* on a trial *de novo* of the entire case, that plaintiff has failed to sustain the burden of his attack, and the action should be dismissed.

Appeal from District Court, Stutsman county; *S. L. Glaspell,* J.

Action by Richard Sykes against W. H. Beck. Judgment for plaintiff, and defendant appeals.

Reversed.

Marion Conklin and *Ball, Watson & Maclay,* for appellant.

Omission of lands from assessment roll, not fraudulently omitted, will not vitiate the taxes assessed upon other lands in the same taxing jurisdiction. *Shattuck et al.* v. *Smith et al.,* 6 N. D. 56, 69 N. W. Rep. 5.

Conceding that there was competent evidence that a compromise was made, the board of county commissioners had authority to make it under section 1242, Comp. Laws.

The assessment of the lands in name of Francis Logie Pirie et al, and so entering them on the tax list did not vitiate the taxes. In *Sweigle* v. *Gates, et al,* 9 N. D. 538, 84 N. W. Rep. 481, the assessment was for the year 1887, and is controlled by section 1547 and 1548, Comp. Laws; while the assessment in the case at bar was under chapter 126 of the Laws of 1897. Under section 1208 the county auditor makes out a real estate property assessment book, showing all lands and lots for assessment, name of the owner, if known, and if unknown, so stating it. Under a similar statute in Minnesota the Supreme Court of that state held, that the proceedings in taxation thereunder were entirely *in rem,* and the requirement as to making assessment in the name of the owner was directory and not mandatory. *McQuade* v. *Jaffray,* 50 N. W. Rep. 233. Under the revenue law of 1887, in actions brought to set aside taxes, courts were required to render personal judgment against the plaintiff for the amount which the court determined ought to be paid, even though the taxes themselves were set aside. This in effect made the tax a personal one, not a charge on the land alone. Section 1643, Comp. Laws 1887; *Roberts* v. *First National Bank of Fargo,* 8 N. D. 474, 504, 79 N. W. Rep. 993, 1049, was rendered under such statute, which remained in force until repealed by revenue law of 1897, which substituted recovery from county and made real property taxes purely a proceeding *in rem.* The reasoning in these cases does not control the decision of this appeal. In any event the land herein was assessed in the name of one of the owners, and the tax should not be set aside because not made in the name of all. Black on Tax Titles, 131, 132.

Exhibits "S" and "T" (certified copies of certain resolutions of the state board of equalization) were not sufficient to prove that the state taxes of 1897 and 1898 were levied in mills and not in specific amounts; but if the former method were proved, the taxes were not thereby invalidated. The tax certificates introduced by defendant were *prima facie* evidence of all the requirements of law. The exhibits (S and T) are not sufficient to overcome such proof. Exhibit "S" simply shows compliance with subdivision 4 of section 1225, Rev. Codes, and does not establish the fact that levies were not made in a specific amount. The position of the state board's pro-

ceedings as per exhibit "S" may apply to the action taken upon the completion of the equalization and as the board's decision upon the rate of the state tax. The proof does not show that at some other time in the proceedings the state board did set forth the specific amount of money to be raised by taxation in each of the years in question. The burden of proof being upon the plaintiff, no presumption will be indulged in his favor that these were the only proceedings upon the subject of state levies.

Conceding that the proof was sufficient to establish the making of levies in mills instead of specific amounts, such action does not invalidate the taxes. *Fisher* v. *Betts et al,* 12 N. D. 197, 96 N. W. Rep. 132.

The levy of such taxes was legalized by the legislature. Chapter 159, Laws of 1901; *Shattuck et al.* v. *Smith et al,* 6 N. D. 56, 69 N. W. Rep. 5; *Wells County* v. *McHenry et al,* 7 N. D. 246, 74 N. W. Rep. 241.

The county levies were made for the years in question and based upon itemized statements of the county expenses for the ensuing year.

The court below found that for the years 1897 to 1900 the county taxes levied upon the lands in question were based on no itemized statement of the county expenses for the ensuing year, also that the board fixed the expenditures for such years as a basis for the tax levy, but passed no resolution levying a tax; as a conclusion of law that there was no valid levy of the state or county taxes for either year.

The tax certificates were *prima facie* evidence of the regularity of the proceedings. Oral testimony was offered to show that a statement of the county expenses was before the board in the form of a warrant book and a statement of previous year from which an estimate was made, and the levy based upon it. The deputy auditor testified that he was unable to find the statement mentioned. The warrant book was in evidence and showed a condensed statement for the previous year. It was a proper basis for the expenses for the ensuing year. A summary of the statement was carried into the proceedings of the board. But section 1228 does not require that the itemized statement shall appear in the board's proceedings; but in the published proceedings, and it does not appear that such statement did not appear in the published proceedings of the board. The board having taken the legal steps, the proceeding is not void

because a proper record is not kept, or not preserved by the legal custodian. It is here simply a question of a lost record. Contents of a lost record of tax proceedings are subject to parol proof as in other proceedings. *Hilton* v. *Bender,* 69 N. Y. 75.

It is claimed that there was no levy. The language of the record is: "The board fixed expenditures for the year 1898 as a basis for the tax levy of 1898 as follows:" For 1899 it is: "The board unanimously fixed expenditures for 1899 as the basis for tax levy for 1899 as follows:" The court found that the board fixed expenditures, but no resolution was passed to levy a tax, basing this finding on the above language. We think the language sufficient. It would be extremely technical to hold these levies void for lack of formal and exact language. They brought into the record the expenditures proposed for the ensuing year and declared them the basis of the levy for that year. This is sufficient. *West et al* v. *Whitaker et al,* 37 Ia. 598; *Snell* v. *City,* 45 Ia. 564; *Levade* v. *Dean,* 47 Tex. 90.

J. E. Robinson and *S. E. Ellsworth,* for respondent, Richard Sykes.

In the years 1895-6-7-8, 320 sections of land were assessed by taxation and taxes charged against them. On July 3, 1899, the county commissioners accepted a commutation of all said taxes, 73 per cent of the original tax, without interest or penalty. The court found that the rate of taxation against the N. P. R. R. lands was reduced 50 per cent. Sixty-one (61) of these sections were in the township adjoining plaintiff's lands. If this was competent, the board might have received 25 per cent or 5 per cent or no per cent. This cannot be done, unless the commissioners can tax the even numbered sections and exempt the odd. Such arbitrary exemption is essentially fraudulent. An accidental omission does not invalidate a tax, but when the omission is so great as to materially affect the uniformity of taxation it avoids the assessment and tax. *Auditor General* v. *Prescott,* 94 Mich. 190, 53 N. W. Rep. 1058; *Smith* v. *Smith,* 19 Wis. 615; *Kneeland* v. *City of Milwaukee,* 15 Wis. 457 and 691; *Hersey* v. *Supervisors,* 37 Wis. 75; *Marsh* v. *Supervisors,* 42 Wis. 502, 511; *Plummer* v. *Supervisors,* 46 Wis. 163, 174, 175; *Johnson* v. *Oshkosh City,* 65 Wis. 473, 477, 27 N. W. Rep. 320; *State* v. *Brand,* 23 N. J. Law, 509.

There was no assessment of the lands in the name of the owner, as provided by law. If known, assessment must be in owner's

name, or if unknown, so stated. The tax list and assessment book must correspond as to ownership, and description of property, so that notice of redemption can be given to the person *in whose name the land is assessed.* Laws of 1897, chapter 126, sections 31, 52 and 106. The assessment of real estate for taxation in the name of another than the owner, is invalid.

Cooley on Taxation (2d Ed.) 396; Blackwell on Tax Titles, section 257; Black on Tax Titles, section 105; *Sweigle* v. *Gates,* 9 N. D. 539, 84 N. W. Rep. 481; *Whitney* v. *Thomas,* 23 N. Y. 281; *Kelsey* v. *Abbott,* 13 Cal. 609; *Himmelman* v. *Steiner,* 38 Cal. 175; *Stockton* v. *Dunhan,* 59 Cal. 608; *People* v. *Castro,* 39 Cal. 65; *People* v. *Whipple,* 47 Cal. 591; *Brady* v. *Dowden,* 59 Cal. 51; *Hearst* v. *Eggleston,* 55 Cal. 365; *Crawford* v. *Smith,* 47 Cal. 617; *Klumpke* v. *Baker* (Cal.) 10 Pac. 197; *Pierson* v. *Creed,* 78 Cal. 144, 20 Pac. 302; *Hamilton* v. *City of Fon du Lac,* 25 Wis. 496; *Milwaukee Iron Co. et al.* v. *Hubbard,* 29 Wis. 51, 56; *Seymour* v. *Peters,* (Mich.) 35 N. W. Rep. 63; *Pieoter* v. *Whaley* (Mich.) 45 N. W. Rep. 81; *Mansfield* v. *Martin,* 3 Mass. 419; *Desmond* v. *Babbit,* 117 Mass. 233.

The claim sought to be supported by *McQuade* v. *Jaffray,* 50 N. W. Rep. 233, where assessment was not made to owner or unknown owners, will not stand. The holding is only, that a citation and notice to obtain a tax judgment against land need not contain owner's name. *Himmelman* v. *Steiner,* 38 Cal. 175, does not sustain appellant's position. The holding therein is the reverse.

For the years 1897-98, the state taxes are void, because not levied in specific amounts. Laws of 1891, section 6; Laws of 1897, chapter 126, section 50. See *Wells County* v. *McHenry,* 7 N. D. 246, 261, 74 N. W. Rep. 241; *Dever v. Cornwell,* 10 N. D. 123, 84 N. W. Rep. 227.

In the years 1897 to 1900 inclusive, the county taxes were not levied according to law, in that it does not appear that they were based upon an itemized statement of the county expenses for the ensuing year, and a general statement of the outstanding indebtedness of the county. *Shattuck* v. *Smith,* 6 N. D. 56, 69 N. W. Rep. 5.

The tax levies were not legalized by chapter 159, Laws of 1901. *Shattuck* v. *Smith, supra,* held that the legislature of 1891 had power to validate an attempted levy of state tax of 1890, when the state had the power to make the state levy. But after interest and penalties

have accrued it is too late to validate even state levies. *Dever* v. *Cornwell, supra.*

Brief on motion for dismissal:—

The appeal should be dismissed and judgment below affirmed, because the record shows affirmatively that it does not contains all the evidence offered on the trial.

Kipp v. *Angell,* 10 N. D. 199, 86 N. W. Rep. 706; *Little* v. *Phinny,* 10 N. D. 351, 87 N. W. Rep. 593; *Eakin* v. *Campbell,* 10 N. D. 416, 87 N. W. Rep. 991; *Teinen* v. *Lally,* 10 N. D. 153, 86 N. W. Rep. 356; *U. S. Savings & Loan Co.* v. *McLeod,* 11 N. D. 111, 86 N. W. Rep. 110.

YOUNG, C. J. The plaintiff instituted this action in the district court of Stutsman county to determine adverse claims to certain real estate owned by him and situate in that county. The defendant, Beck, purchased all of said lands at the 1898 tax sale for the taxes of 1897, and again at the 1899 sale for the taxes of 1898, and also paid the subsequent taxes thereon for the years 1899 and 1900. The plaintiff alleges "that in said years the said lands were not legally assessed for taxation, and no taxes were legally levied or charged against the same. * * * and that by reason thereof all of said taxes and tax sales are wholly void," and prays "that all of said taxes and tax sales be adjudged void and cancelled." The trial court held that there was no valid assessment of any of said lands for taxes for any of the years in question, and further held that the state and county taxes levied for each of said years were invalid, and entered judgment declaring all of said taxes and tax certificates void. Defendant has appealed from the judgment, and demands a review of the entire case in this court, under section 5630, Rev. Codes 1899.

Prior to the argument on the merits, counsel for respondent made two preliminary motions. Both must be denied. The first motion is to dismiss the appeal. The grounds of this motion are (1) that the appellant, Beck, sold and assigned the tax certificates since the entry of judgment in district court, and prior to taking the appeal; and (2) that the statement of case shows affirmatively that it does not contain all the evidence offered at the trial.

The affidavits submitted upon the first ground of the motion to dismiss the appeal show that subsequent to the entry of judgment, and before the appeal was taken, the defendant sold all of said certificates to Daniel M. Robbins, and that the latter had the

same assigned to one John Wyman; further, that the written assignment, in terms, authorizes the assignee to prosecute this suit and defend his rights under such certificates, by appeal or otherwise, in the plaintiff's name, or in his own name, at his election, but at his own expense. This appeal was taken in the defendant's name, pursuant to such authority, and is prosecuted by the purchaser of the tax certificates in the name of his assignor, with his consent. The notice of appeal was signed by the attorneys for the assignor, also by the attorneys of the assignee, and both of the attorneys for the assignor and the assignee appear in this court. Counsel for respondent contends that as the appeal was taken in the name of the defendant after he had parted with his interest in the tax certificates, which are the subject matter of the action, it was unauthorized and confers no jurisdiction. Counsel relies upon the equity rule which is to the effect that "where a complainant sells his whole right in the suit, or it becomes vested in another by operation of law, whether before or after a decree, if there is to be any further litigation in the case it cannot be carried on in the name of the original complainant by the person who has acquired the right." *Mills* v. *Hoag*, 7 Paige 18, 31 Am. Dec. 271. This rule has been abolished by statute in this state. Section 5234, Rev. Codes 1899, provides that "no action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survives or continues. In case of death or other disability of a party, the court on motion at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued by or against his representatives or successor in interest. In case of any other transfer of interest the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. * * *" In this state a transfer after judgment, but before the right of appeal has expired, is a transfer *pendente lite*, the appeal being regarded as a continuation of the original action. See 2 Enc. Pl. & Pr. 35, and cases cited. Section 5739, Rev. Codes 1899, provides that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." The right to take and prosecute this appeal in the name of the original defendant is given by that part of section 5234, Id., above

quoted, which provides that "in case of any other transfer of interest the action shall be continued in the name of the original party or the court may allow the person to whom the transfer is made to be substituted in the action." This identical provision was a part of section 121 of the Code of 1862 of New York. In *Packard* v. *Wood,* 17 Abb. Prac. 318, the court, in construing it, said: "Section 121 has superseded the practice of the late court of chancery in respect to the manner of conducting an action where a change or transfer of interest has occurred since the commencement of the action. As to the former practice, see *Sedgwick* v. *Cleveland,* 7 Paige 287." In *Emmet* v. *Bowers,* 23 How. Prac. 300, the court said: "The nominal plaintiff being alive and not subject to any disability, the suit can proceed in his name. Code, section 121. If the transferee does not apply to be substituted as plaintiff, the language of the Code is that 'the action shall continue in the name of the original party.'" Again, referring to this section, in *Harris* v. *Bennett,* 6 How. Prac. 220, the court said: "The Code, section 121, directs that in case of a transfer of interest, otherwise than by marriage, death or disability of the party, the action shall be continued in the name of the original party. This is imperative and allows no change, but it adds: 'The court may allow the person to whom the transfer is made to be substituted.' This last is permissive only, and gives a discretion to the court which is intended to be exercised only as the ends of justice may require." It is also well settled that the purchaser *pendente lite* is the person to move for the substitution, and that the order is not to be made as matter of course without imposing conditions. *Howard* v. *Taylor,* 11 How. Prac. 380. "It is not obligatory upon the transferee of an interest to make application for his substitution as a party to the action. If he does not it is continued in the name of the original party." *Platt* v. *McMurray,* 63 How. Prac. 149; *Hirshfeld* v. *Bopp,* 27 App. Div. 180, 50 N. Y. Supp. 676. In *Lawson* v. *Town of Woodstock,* 37 Hun. 352, the court said: "The action may proceed in the name of the original party. That, then, is his privilege, in spite of the transfer. If the assignee desires to come in, he may be substituted; but, if he does not, we think it is not in accord with that section to prevent the original party from proceeding in his own name. The provision that an action must be prosecuted in the name of the party in interest is evidenly modified by the section last cited." See also, *McGean* v. *M. E. R. Co.,* 133 N. Y. 9,

30 N. E. 647; *St. John et al.* v. *Croel,* 10 How. Prac. 253; *Boston, W. H. & R. Co.* v. *Jackson* (Sup.) 55 N. Y. Supp. 573. See, also, Barbour on Parties to Actions, 431, 434.

The statute of California is substantially like our own. It has been uniformly held in that state that, when the subject matter of a pending action is transferred, it is the right of the transferee to prosecute or defend the action either in the name of the original party, or to request a substitution, and further, that the assignor *pendente lite* is, after the assignment, divested of further authority to control the action. *Walker* v. *Felt,* 54 Cal. 386; *Plummer* v. *Brown,* 64 Cal. 429; *Stewart* v. *Spalding,* 72 Cal. 264, 13 Pac. 661; *California Cent. Ry. Co.* v. *Hooper,* 76 Cal. 404, 18 Pac. 599; *Malone* v. *Big Flat Gravel M. Co.,* 93 Cal. 384, 28 Pac. 1063; *Emerson* v. *McWhirter,* 128 Cal. 268, 60 Pac. 774; *O'Neil* v. *Dougherty,* 46 Cal. 576. The assignee has authority to control the action after as well as before judgment, including the right to prosecute an appeal. In *O'Neil* v. *Dougherty, supra,* the appellant had been adjudged a bankrupt before his appeal was taken. The Supreme Court overruled a motion to dismiss the appeal, based upon the ground that he was not the real party in interest, and held that under the statute the appeal might be prosecuted in the name of the bankrupt, or in the name of his assignee. Such, in effect, also, was the holding of this court in *Anheier* v. *Signor,* 8 N. D. 499, 79 N. W. 983, in which we held that "a party who purchases property from a defendant *pendente lite* may, with the permission of a court of equity, and under section 5234, Rev. Codes 1899, appear in the case at any stage of the proceedings to defend his interest." In the case just referred to, counsel for respondent moved to dismiss the appeal basing his motion upon a stipulation of the appellant that it might be dismissed. The motion was resisted by a purchaser from the appellant *pendente lite.* The motion was denied, and the purchaser was permitted to prosecute the appeal in this court in the name of the assignor. As sustaining the right of purchasers after judgment to take and prosecute an appeal, see also, *Ex parte South & North Alabama Railway,* 95 U. S. 221, 24 L. Ed. 355; *Roszell* v. *Roszell* (Ind.) 4 N. E. 423; *Vail* v. *Lindsay,* 67 Ind. 528; *Bowden* v. *Johnson,* 107 U. S. 251, 264, 2 Sup. Ct. 246, 27 L. Ed. 386; *Parker* v. *Taylor* (Neb.) 91 N. W. 537; *Keough* v. *McNitt,* 7 Minn. 29 (Gil. 15). We are of opinion that the appeal in this case was properly taken and is properly prosecuted in the name of the

original defendant. There has been no application for substitution by the purchaser of the certificates. The case at bar is to be distinguished from cases of disability arising from death or similar causes, as well as from cases in which the original party appeared only in a representative capacity, such as administrator, executor, or guardian, and the representative character has terminated. *McCormick Harvesting Machine Co.* v. *Snedigar,* 3 S. D. 625, 54 N. W. 814, cited in support of the motion, belongs to the latter class.

The second ground of the motion to dismiss the appeal, to wit, that the statement of case does not contain all the evidence offered, if true, in point of fact, furnishes no ground for dismissing the appeal. It is conceded that the appeal was regularly taken. The objection, if well founded, would only affect the appellant's right to secure a review of the evidence in this court under section 5630, Rev. Codes 1899. Errors assigned upon the judgment roll proper would still be reviewable. The statement is not, however, open to the objection urged against it. Counsel's claim is that he offered in evidence a certified copy of the county tax levy for the year 1900. The record conclusively negatives this contention. The record of his offer is as follows: "The plaintiff now offers in evidence certified copies of the county tax levies for the years 1897, 1898, 1899, and 1900, so far as the same pertain to the land in question, and certified copies of the state tax levy for the years 1897 and 1898, and a certified copy of the resolution pertaining to the publication of the delinquent tax list in 1898, marked Exhibits M to U, inclusive." Each one of the several exhibits referred to as having been identified and offered are contained in the statement. A certified copy of the tax levy for 1900 is not one of them. Counsel doubtless intended to offer a certified copy of the tax list for 1900, but it is clear that he did not do so. Exhibits M to U were the only exhibits identified and included in his offer, and they are in the statement. Counsel also claims "that a certain book, called 'Register of Warrants Issued and Claims Filed,' was offered, and that the same has been omitted from the statement." No such book is contained in the statement. The abstract shows that the defendant's counsel attempted to introduce the book referred to, and that counsel for plaintiff repeatedly objected to its introduction, stating that it must either be read to the court, or a certified copy filed, insisting that "the law provides that certified copies of the book must be offered in evidence, unless it is filed with the clerk." The record

shows that counsel for defendant yielded to the objection, and asked leave to file certified copies of the portions of the book he desired to introduce, that leave was granted, and that the certified copies were thereafter filed. In short, the record shows a withdrawal of the offer, and a substitution of certified copies. The motion to dismiss the appeal will be denied.

The second motion is to strike out the statement of case upon the ground that when it was settled the time for settling it had expired, and good cause was not shown for extending the time. This motion must also be denied. Notice of entry of judgment was served on March 13, 1902. Within the thirty days allowed by law for settling the statement, and on April 10th, the defendant obtained an order extending the time for thirty days. On May 10th, thereafter, a second order was obtained, extending the time for fifteen days from May 10. The statement was settled within the last extension. Both orders extending time were made against plaintiff's objection. The orders were based upon the affidavits of Marion Conklin and Oscar J. Seiler, counsel for defendants. The affidavit of Oscar J. Seiler states, among other alleged grounds for the extension, the fact "that there are a large number of exhibits in the case to be copied, and that it requires a great amount of work to prepare such statement of the case. * * *" The affidavit of Marion Conklin is to the same effect. The trial judge had knowledge of the extent of the record, and the amount of labor required to prepare the statement. The record was voluminous, and required much difficult copying. This was known to the trial judge, and is apparent to us from the record filed in this court. The extension allowed, forty-five days, was not unreasonable, under the circumstances, and we do not think the trial court abused its discretion in granting the same upon the showing made. It is only in case of an abuse of discretion that such an order will be reversed.

We now turn to the merits. The fact that plaintiff is now the sole owner of the several tracts of land involved, as alleged by him, is not in dispute. Neither is there any controversy over the fact that defendant purchased said land at the tax sales, and paid taxes thereon, as hereinbefore stated. The controverted questions, both of law and fact, upon which the case must be determined in this court, are all embraced in the following findings and conclusions of the trial court:

"(1) That in the years 1897, 1898, and 1899, and 1900, the said property was not assessed for taxation in the name of the owner, and it was not assessed to unknown owners. It was assessed in the name of 'Francis Logie Pirie et al,' and the said Francis Logie Pirie never had more than an undivided one-third interest in the said lands, and in the said years the record shows that Richard Sykes had an undivided one-third interest in the said lands.

"(2) That in July, 1899, there was in Stutsman county 320 sections or more of Northern Pacific railroad lands on which all taxes for the preceding five years remained delinquent; and the said lands had been assessed for taxation in said years on the same basis of valuation as the other lands in Stutsman county; and by resolution of the county commissioners passed in July, 1899, all taxes charged against said Northern Pacific railroad lands were canceled on the payment of 73 per cent of the original tax, without either penalty or interest, and in that manner the rate of taxation against the said Northern Pacific railroad lands was reduced to 50 per cent of the rate charged and levied against the other lands in Stutsman county.

"(3) And the court finds that in the years 1897 and 1898 the state taxes which were levied and charged against the said lands of the plaintiff were levied in mills, and not in specific amounts, as required by section 50 of the revenue laws of 1897 (Sess. Laws, p. 275, c. 126).

"(4) And the court finds that in the years 1897 to 1900, inclusive, the county taxes levied and charged against said lands were not based on an itemized statement of the county expenses for the ensuing year, or on a statement of the outstanding indebtedness of the county. In 1897 the county tax levy was as follows:

"On motion the county auditor was instructed to make a levy for the year 1897 as follows:

County fund	$20,000
Sinking fund	5,000
Road fund	8,000
Bridge fund	5,100

"In the year 1898 the county commissioners passed a resolution fixing the expenditures as a basis for the tax levy, but there was no resolution to levy a tax either in mills or a specific amount. In 1899 the board met, and by resolution fixed the expenditures for

that year as a basis for the tax levy, but the board passed no resolution to levy a tax; and the same is true of the year 1900.

"As a conclusion of law, the court finds that in the years 1897 to 1900, inclusive, the said lands were not legally assessed for taxation, and that there was no valid levy of the state and the county taxes charged against said lands, and that all of said taxes, and the sales based thereon, were illegal and void, for the reason that the said lands were not assessed for taxation, and that said taxes were not levied according to law; that the plaintiff is entitled to judgment that all of said taxes and tax sales and tax certificates be canceled, annulled, and adjudged void, and that he recover from W. H. Beck the costs of this action. * * *"

The appellant does not challenge the correctness of the first finding of fact above quoted. His attack is upon the conclusion of law based upon it. The evidence shows that, when the several assessments were made, the lands in question were owned by Francis Logie Pirie, Richard Sykes, and Finley Dunn, each having an undivided one-third interest. The assessment in each year was in the name of "Francis Logie Pirie et al." The appellant contends that the falure to assess the lands in the names of the three owners did not render the assessments void, and that the trial court erred in so holding. We agree with this contention. The assessments in question were laid under chapter 126, p. 256, Laws 1897. The validity of an assessment of real estate in the name of one not the owner thereof was involved in the case of *Hertzler* v. *Cass County,* 96 N. W. 294, in which the opinion has just been handed down. We held in that case that the provisions of the 1897 act, so far as they require an assessment of real estate to be made in the name of the owner, are for the guidance of the taxing officers, for the purpose of securing system in the tax proceedings; that they are not vital to a valid assessment, and are therefore directory. *Sweigle* v. *Gates,* 9 N. D. 538, 84 N. W. 481, is cited by counsel for plaintiff in support of his contention that the assessments are void. The decision in that case turned upon the provisions of the Compiled Laws. The later case of *Roberts* v. *Bank,* 8 N. D. 504, 79 N. W. 1049, is also relied upon. The Roberts case was based upon chapter 132, p. 376, Laws 1890. The statutes upon which both of these cases were based created a personal liability, and authorized personal judgments for real estate taxes. See section 1643, Comp. Laws Dak. 1887, and section 1273, Rev. Codes 1895.

Tax proceedings under the 1897 act, under which the assessments here in question were made, are strictly against the land itself, and involve no personal liability. Further, section 81, p. 287, of this act provides that no "sale of real estate for taxes shall be considered invalid on account of the same having been charged in any other name than that of the rightful owner." Following the construction announced in the case of *Hertzler* v. *Cass County,* we must hold that the assessments were not invalid because not made in the names of the three owners.

Appellant contends that there is no competent evidence to sustain the second finding, to wit, that the county commissioners canceled five years' taxes on 320 sections or more of Northern Pacific railroad lands upon payment of 73 per cent of the original tax. We fully agree with this contention. The evidence shows that the receivers of the railroad company petitioned for a rebate of the taxes, and that the county commissioners passed a resolution authorizing the treasurer to accept payment of 73 per cent, and upon such payment to cancel said taxes. There is no competent evidence, however, that any payments were made or taxes canceled. The evidence offered for that purpose was clearly incompetent. It was furnished by plaintiff's counsel, who testified, over objection, as follows: "I am an attorney at law, and as such I am in the habit of examining records, titles to lands, and tax records, and in this case I have examined the records pertaining to this land, and the tax levies against it for the years in question, and the records pertaining to the cancellation of the taxes for 1895, 1896, 1897, and 1898 against the Northern Pacific railroad lands in this county, and, on such examination, I find, without exhausting and without going all over the books, I counted 320 sections of Northern Pacific railroad lands on which the taxes had been canceled, under this resolution of the county commissioners, on payment of 73 per cent of the original taxes. On the tax lists for those years there is a stamp opposite the description of each tract of land, the words: 'Canceled by resolution of board of county commissioners July 3rd, 1899, on payment of 73 per cent of the original taxes for the years 1895, 1896, 1897 and 1898.' * * *" A motion was made to strike out all of the foregoing testimony on the ground that it was incompetent, irrelevant, and immaterial. The objection was well taken. The testimony is clearly incompetent, and should have been disregarded by the trial court,

and must be disregarded by this court. This case was tried under section 5630, Rev. Codes, 1899. That section requires that all evidence offered shall be received into the record. It does not abolish the rules of evidence, however, and it is just as essential as it ever was that findings of fact shall be based on legal evidence. Upon a review in this court of a case tried under said section, the requirement is that "all incompetent and irrelevant evidence properly objected to in the trial court shall be disregarded." This oral testimony relates to the contents of written records. It is not the best evidence, and is incompetent. Oral testimony that certain facts are shown by a record, whether given by the officer in charge of the records or any other party, is not the best evidence of which the case is in its nature susceptible, and therefore not competent. 1 Greenl. Ev. section 82; *Bemis* v. *Becker,* 1 Kan. 226; *Cooper* v. *Armstrong,* 4 Kan. 30; *City of Leavenworth* v. *Laing,* 6 Kan. 274; *Manley* v. *City of Atchison,* 9 Kan. 358; *Downing* v. *Haxton,* 21 Kan. 178. See 1 Jones on Evid., sections 197-199, and cases cited. This testimony must be rejected. There is therefore no legal evidence that any Northern Pacific taxes were paid under the resolution referred to. We do not wish to be understood as intimating that, if legal evidence of payment and cancellation had been offered, it would invalidate the plaintiff's taxes. See section 1242, Rev. Codes 1899.

There is no conflict in the evidence as to the state tax levies for 1897 and 1898 referred to in the third finding of fact. For the purpose of showing their invalidity, plaintiff introduced as an exhibit a certified copy of a portion of the proceedings of the state board of equalization which is as follows: "August 11th, 1897. Mr. Cowan moved that the state tax levy to defray the expenses of the state for the current year be fixed at three and eight-tenth mills on the dollar of the assessed valuation of all taxable property in the state, as equalized by the state board of equalization, and that the state levy to pay interest on the state debt for the current year be fixed at five-tenths of one mill on the dollar of the assessed valuation of all taxable property in the state as equalized by the state board of equalization. Which motion prevailed." A certified copy of the proceedings for the year 1898 was also introduced, corresponding in all respects to that for 1897, above set out. Counsel for plaintiff contends that the evidence furnished by these exhibits establishes the fact that the levies for

both years were not by specific amounts, and are therefore void. Appellant's counsel contend, on the other hand, that the certified copies do not go far enough to show that levies were not in fact made in specific amounts. Their contention is that the action of the board, as shown by the certified copies, was required by statute to be taken by it, and it should not be presumed that the resolution contained in the certified copies represents all the action taken by the board, and that they did not, in fact, make a levy in a specific amount in dollars and cents. It is urged that the resolution adopted was in strict conformity to the duty required of the board after completing the equalization by subdivision 4, section 1225, Id., which provides that, "upon the completion of such equalization and determination of the aggregate valuation of all the property of the state, the said board shall then decide upon the rate of the state tax to be levied for the current year, together with any other general or special state taxes required by law to be levied." And it is urged that it cannot be assumed that the board did not, in fact, literally comply with section 1228, Id., which section, after providing that state taxes shall be levied by the state board of equalization, provides that "such levy shall be made in a specific amount and the rate shall be determined by the state auditor." It will be noted that subdivision 4, section 1225, requires the board to fix the rate of the state taxes. This subdivision was added to the revenue laws by the adoption of chapter 126, page 256, Laws 1897. The pre-existing statute, requiring the levy to be made in a specific amount (section 1228, *supra*), was retained. It is not necessary to enter upon a construction of these apparently conflicting provisions, or to pass upon counsel's contention that there is no evidence that the board did not make a levy in a specific amount. We may assume that it did not, and that the only levy made was that set out in the resolution. The board did, however, what was its exact equivalent: It levied a fixed percentage upon a definite aggregate sum. Under the maxim that that is certain which can be made certain, such a levy is in legal effect a levy of a specific sum. We have just held, in the case of *Fisher* v. *Betts*, after argument upon rehearing, that the state tax levies for 1889 and 1891, which were made by percentages instead of specific amounts, were valid. The controlling distinction between state levies and county, township and school district levies is pointed out in that case.

The fourth finding of fact, which relates to the county levies for 1897, 1898, 1899, and 1900, is not supported by the evidence. No evidence whatever was introduced as to the county levy for the year 1900. Counsel for plaintiff attempted to prove that the county levies for the three remaining years, 1897, 1898, and 1899, were void, and for the purpose of establishing the acts of the board of county commissioners relative thereto, introduced in evidence three separate papers, known as Exhibits M, N, and Q, which exhibits, as appears by the auditor's certificate thereto attached, relate to the tax levies for those years. These exhibits were objected to by counsel for the appellant upon the ground that they were incompetent, irrelevant, and immaterial, not the best evidence, and not properly certified; that the certificates state conclusions instead of facts." Under the statute under which the case was tried, the exhibits were received into the record notwithstanding the objection, and although no ruling appears to have been made by the trial court, it is evident that they furnished the foundation upon which the findings as to the county levies are based. The certificates attached to the exhibits are the same in form. That for the year 1897 is as follows: "State of North Dakota, Stutsman county. I hereby certify that the above is a true copy of all that pertains to the county tax levy for 1897 as the same appears on record of the county commissioners in my office. Dated January 8, 1902. L. B. Niemeyer, county auditor, By G. A. Lieber, deputy." The objection of appellant's counsel should have been sustained by the trial court, and must be sustained by this court. The copies are not properly certified, and are therefore not admissible.

The right to make proof of official records and documents primarily by copy does not exist independent of statute. Such evidence is essentially secondary. The rule and the reasons upon which it is founded are well stated in 1 Wharton on the Law of Evidence, section 60, as follows: "Whenever an original document can be brought into court, secondary evidence of its contents is, as a rule, inadmissible. * * * The policy of the law, independent of other reasons, requires that its original, if practicable, should be produced. For (1) *lex scripta manet,* while memory as to words is treacherous; and even though not memory, but a written copy, be offered, such copy has between it and the original the possibility of mistake or of falsification. Then, (2) if a party be permitted to hold back the original, when he could produce it, and substitute

for it a secondary proof, a door would be opened to fraud. And (3) unless such a rule be inexorably applied, an end would be put to that accurate and thorough presentation of facts which is essential to the administration of justice. If no evidence is to be rejected because it is secondary, a single witness would be sufficient to swear, either primarily or secondarily, either by firsthand or second-hand impressions, to a whole case, documentary and oral. The testimony of a witness in such a case would be a mere conclusion of law, derived from his own notions of facts, with this peculiarity —that the law would be made by himself for the occasion, and the functions of both judge and jury would be dispensed with." The rule of evidence which prohibits the use of copies is superseded by statute in this state, to the extent that proof of certain official records or documents may be made by copies certified by the legal keeper. Subdivision 5, section 5699, Rev. Codes 1899, provides that proof may be made of "acts of a municipal corporation of this state, or of a board or department thereof, by a copy of the official record of such acts, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such corporation and to contain a record of such acts." It is patent that, as copies of official records and documents are admissible as primary evidence only by virtue of the statute, they must be certified in the manner required by the statute. The manner of certification is governed by section 5700 Id., which reads as follows: "Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. * * *" Neither of the certificates attached to the papers by which the plaintiff attempts to prove the acts of the board of county commissioners relative to the county tax levies comply with the statute. The certificates do not state, in substance, that they are true copies of the entire record and proceedings of the board of county commissioners, or that they are true copies of any specified part thereof; that is, true copies of the proceedings of any particular meeting or of any particular page or pages of the original record of their proceedings. Each certificate states that the paper to which it is attached "is a true copy of all that pertains to the county tax levy," etc. In other words, the certifying officer, by his certificate, represents that he has passed judgment upon the records of the county commissioners, and has determined what parts of

the same relate to the county tax levies, and that he has included in the paper certified by him true copies of all of such parts of the record as he judged pertinent and relevant to the county tax levies. We know of no case where such a certificate has been sustained. The authority of an officer authorized to certify to copies of records and documents is limited to establishing *prima facie* that the paper which he certifies is a true copy of another writing. When so certified, if the record or document be one which under the statute may be proved by copy, it is admissible in evidence under the statute, but not otherwise. He is not clothed with authority to determine what the record or document relates or pertains to, or to pass judgment upon it in any way. The authorities are unanimous upon this point. In *McGuire* v. *Sayward,* 22 Me. 230, the court, in rejecting the certification of an official record as incompetent upon the ground that it was merely the statement of the certifying officer of what appeared in the record, said: "The law does not permit a recording or certifying officer to make his own statement of what he pleases to say appears by the record. What the record itself does declare is to be made known to the court by a duly authenticated copy of it; and upon it, and not upon what the officer may say that it declares, does the law authorize a court of justice to rely The certificate in this case states the existence of a record; and yet, instead of a duly authenticated copy, there is only a statement of what the officer says will appear by an inspection of it. The law requires that the court before which it is produced should inspect and decide what it contains and proves, and not intrust that duty to a certifying officer." Similar language was used in *Doe ex dem. Foute* v. *McDonald,* 27 Miss. 610. The court said: "It is a mere certificate of the register that certain facts appear by the books in his office—a statement of his own conclusions from the facts stated in the books, and not a certified copy of the entry itself from the books." The certifying officer cannot certify that there are no other records, or to the nonexistence of facts. Under a statute of Georgia authorizing the use of certified copies, it was held that "an officer cannot certify to a fact. He can only certify a copy or transcript. His certificate to the nonexistence on his records of certain facts is therefore not admissible. He cannot show the absence of a particular fact from his records by a certificate to that effect. He must be sworn as any other witness. *Martin* v. *Anderson,* 21 Ga. 301; *Dillon* v. *Mattox,* 21 Ga. 113;

Lamar v. *Pearre,* 90 Ga. 377, 381, 17 S. E. 92; *Walker* v. *Logan,* 75 Ga. 759; *Miller* v. *Reinhart,* 18 Ga. 239; *Hines* v. *Johnson,* 95 Ga. 644, 23 S. E. 470." *Greer* v. *Fergerson* (Ga.) 30 S. E. 943. In *English* v. *Sprague,* 33 Me. 440, the court said: "A magistrate in order to say what a record contains, is not merely to certify what his construction of the record is. He must give a copy of it, that the court may judge of its import. His certificate that it contains any particular fact is never receivable as proof." In *Jay* v. *East Livermore,* 56 Me. 107, a paper certified to be a "true extract from the record" was rejected. A similar certificate of a deputy comptroller was condemned in *Wood* v. *Knapp* (N. Y.) 2 N. E. 632. The court said: "It is not the province of the deputy comptroller to determine what is or is not material to a question pending in a legal tribunal. He has power to certify to the correctness of copies of papers in the comptroller's office so as to make them evidence, but beyond this his certificate has no more effect than the opinion of any other person." In *Hanson* v. *South Scituate,* 115 Mass. 336, a certified copy of records was rejected on the ground that it "was simply a statement of what the certifying officer, under whose hand it was, deemed to be shown by them." The following authorities will be found to fully sustain the rule as stated in the cases already cited, and we know of none to the contrary: *Oakes* v. *Hill,* 14 Pick. 442; *Robbins* v. *Townsend,* 20 Pick. 345; *Wolfe* v. *Washburn,* 6 Cow. 261; *Jackson* v. *Miller,* 6 Cow. 752; *Childress* v. *Cutter,* 16 Mo. 24; *Byers* v. *Wallace,* 87 Texas 503, 28 S. W. 1056, 29 S. W. 760; *Drake* v. *Merrill,* 47 N. C. 368; *Goodrich* v. *Conrad,* 24 Iowa 254; *Davis & Co.* v. *Gray,* 17 Ohio St. 331; *Adams* v. *Weight,* 14 Wis. 442; *Tessman* v. *United Friends,* 103 Mich. 185, 61 N. W. 261; *Owen* v. *Boyle,* 15 Me. 147, 32 Am. Dec. 143; *Cooper* v. *Armstrong,* 4 Kan. 30; *Bemis* v. *Becker,* 1 Kan. 226; *Billingsley* v. *Hiles,* 6 S. D. 445, 61 N. W. 687; 1 Wharton's Law of Evid., sections 80, 120, 121; I Greenl. on Evi. (16th Ed.) section 498; 2 Jones' Law of Evi., sections 555, 556.

The reason for the rule which prohibits the custodian of public records from including in certified copies only such portion of the record as, in his opinion, are pertinent to a particular official act or fact, is, of course, that the relevancy of the parts of the record is for the court to determine. To hold otherwise would be to substitute the judgment of the certifying officer for that of the judicial tribunal in which the fact in controversy is to be determined. The

danger of any other rule is well illustrated by this case. The trial court, as will be noticed by reference to the fourth finding of fact, found that in 1897 there was a county levy in fact. It further found that the levy for that year was not based upon an itemized statement of county expenses for the ensuing year, or a statement of the outstanding indebtedness of the county, and was therefore void. Now, the only evidence offered to show that a statement of expenses and a statement of indebtedness were not made as required by law is the fact that no such statements appear in the certified copy offered in evidence, coupled with the auditor's certificate that the copy contains all that pertains to the county tax levy for 1897, and the oral testimony of plaintiff's counsel hereafter referred to. It is fair to assume that the absence of the statements from the certified copy controlled the trial court in its finding that the levy, which is complete in itself, was not based upon a statement of expenses and indebtedness. Accepting the copies as properly certified, the trial judge necessarily concluded, that if statements had been made, they would be in the copy, inasmuch as the certifying officer certified that it contained all that pertained to the county tax levy. In making the certificate the auditor merely expressed his opinion as to what pertains to a county tax levy. The fact is the county tax levy was complete in itself, as will appear by reference to the finding. If the levy is invalid, it is not because of the form in which it was made, but simply because of the failure of the board to perform an anterior act, namely the preparation of the statements. But the statements are no part of the levy. This was made clear by Bartholomew, J., in *Shuttuck* v. *Smith*, 6 N. D. 71, 69 N. W. 5, 10, in which he said: "While the levy must be based upon the itemized statement, such statement is no part of the levy. The two things are entirely distinct. They need not be made at the same sitting, or at the same session. The only part of the commissioners' record here introduced pertains to one sitting, and to the levy proper. I find nothing to negative the idea that a complete and technical itemized statement of county expenses for the ensuing fiscal year may not be found elsewhere in their records." Possibly the county auditor, in making these copies, was also of opinion that a copy of the record of the county tax levy would not properly include copies of the statements, and therefore did not include them. At any rate, the copy is no more than the opinion of the certifying officer. It hardly need be said that the

judgment of the county auditor cannot be substituted for that of the court. The copies were not certified as required by law. The exhibits must be rejected and the testimony disregarded. There is, then, no proof whatever tending to show the invalidity of the county tax levies for the several years in question. It is proper to say that in case the certificates showed that the copies were true copies of a specified part of the commissioners' record, or all of it, properly identifying the part of the original record copied, the exhibits would be admissible, and would not be rejected merely because the certifying officer had, after making a proper certificate, expressed his opinion as to what the record related to, and as to what facts did or did not appear in the record. As, for example, had the auditor certified that the copy was a true copy of pages 27 and 28 of the record, Book A of the County Commissioners' Record of Stutsman county for the year 1897, or by other suitable description, and then added a statement of his opinion as to the subject that the record related to, and that there was no other record or matter relating to that subject, in that event the extraneous recitals in the certificate would be suppressed, and the contents of the exhibit received as a true copy of the original record. But that is not this case. These certificates identify no part of the original record by book, page, or otherwise. The auditor merely certifies that the papers are true copies "of all that pertains to" the county levies. If, however, it were conceded that these copies are so certified that they may be properly admitted in evidence as proof of any part of the commissioners' proceedings, yet their admission would not avail the plaintiff, for the reason that after rejecting the opinion of the auditor as to what they pertain to, and his opinion that they contain all that relates to the county tax levies, there is no competent evidence that the records of the board do not elsewhere show a literal compliance with the statute. See *Shuttuck* v. *Smith, supra.*

The oral evidence of plaintiff's counsel as to the contents of the records of the county commissioners is equally objectionable. He testified, over objection, as follows: "I have carefully examined the records of the county commissioners pertaining to the levy of taxes in the years 1897, 1898, 1899 and 1900, and that those records do not contain anything in their matter pertaining to the levy of taxes in these years, except so far as the same appears from the certified copies of the tax levies which have been offered in evidence. The records do not contain anything to show that the

county tax levies in those years were based on an itemized statement or estimate of county expenses, or on a general statement of outstanding indebtedness of the county in those years, except so far as the same appears from the certified copies put in evidence." Defendant's counsel moved to strike out all of the above evidence "in regard to the record of the county commissioners on the ground that the same is incompetent, irrelevant, immaterial, and not the best evidence." The objection was well taken, and the evidence must be disregarded in this court. The evidence was objectionable on the ground that it was not the best evidence; that is, it is not the kind of evidence required to prove that facts which are required to be officially recorded do or do not exist. The witness was not the official custodian of the records. The records themselves are the best evidence both of what they do contain and what they do not contain. As we have seen, it was not competent for plaintiff's counsel to testify to what they contain, and it was equally incompetent for him to testify to what they do not contain. The rule stated in 2 Jones' Law of Evidence, section 556, is that where "it is necessary to prove facts collateral to the record, or that no document of a public character exists or is on file, or similar facts, the proper mode is not by statements in official certificates, but by the testimony of the officer." The rule which requires that proof of the absence of a record entry or document shall be furnished by introducing the record itself, or by the oral testimony of the custodian, is founded upon reasons of public policy, which require that the best evidence reasonably available to prove the fact shall be produced. The records themselves are, of course, the best evidence, and were available in this case. If they do not in fact contain the record of the proceedings which are essential to the validity of the tax sales, that fact could be made certain by a production of the records themselves. Where the records are of such a voluminous character (or other sufficient reason exists) that oral testimony is admissible to show the absence of any particular record or entry, it must ordinarily be given by the custodian or keeper of the records, and not by a stranger; and then only after a diligent examination is shown to have been made. The rule quoted from Jones' Law of Evidence appeals to us as sound, and it has the support of judicial opinion. In *Bullock* v. *Wallingford*, 55 N. H. 619, the court said: "When a party desires to prove the negative fact that there is no record, he must do so in the usual

way—by the deposition of the proper officer, or by producing him in court so that he may be sworn and cross-examined as to the thoroughness of the search made." *Stoner* v. *Ellis,* 6 Ind. 152, is to the same effect, and sustains the rule that proof of the absence of a record is to be made by the custodian's testimony "that upon diligent search the fact did not appear." See also, *Burton* v. *Driggs,* 20 Wall. 125, 22 L. Ed. 299; and *Smith* v. *Richards,* 29 Conn. 232.

The plaintiff has wholly failed to show the invalidity of the county or state tax levies, as well as the invalidity of the assessments. In this state it is the settled rule that the person attacking the validity of a tax or a tax sale must sustain the burden of his attack, or fail in his action. The presumption is that the tax is valid. In *Farrington* v. *Investment Company,* 1 N. D. 102, 45 N. W. 193, the court used this language: "Respondent attacks the validity of the tax, and the burden is upon him to establish its invalidity; and it is not enough, for the purposes of the case, that the court cannot be able to say from the evidence that the tax is valid. The presumption is that the tax is valid, and this presumption necessarily extends to every act upon which the tax in any measure depends. The court must be able, upon the evidence, to pronounce judgment against its validity." *Shuttuck* v. *Smith,* 6 N. D. 71. The rule established by the cases referred to is reinforced by section 78, c. 126, p. 286, Laws 1897. The result in this case does not involve a miscarriage of justice. Plaintiff is merely required to bear his share of the public burden.

The district court will reverse its judgment and enter judgment dismissing the action. All concur.

(96 N. W. Rep. 844.)

GEORGE H. BALDING *v.* A. C. ANDREWS AND J. E. GAGE.

Opinion filed July 31, 1903.

Negligently Setting Fire to Building—Burden of Proof.

1. Where a shingle from a burning building, carried by a high wind, set fire to plaintiff's property, and he sought to recover from the owner of the burned building, alleging that the fire originated through the negligent use of dangerous machinery, causing friction and intense heat, communicating fire to combustible material negligently permitted

to accumulate in contact with such machinery, the burden of proof was on plaintiff to establish both the cause of the fire and the negligence of defendant.

Admission of Agent as Part of Res Gestae.

2. An exclamation or statement of an agent made contemporaneously with the principal act or transaction, and forming a natural and material part of it, is competent as being original evidence in the nature of *res gestae,* but not an abstract or narrative statement of a past transaction.

Agent's Account of Past Transactions Incompetent.

3. A statement of an elevator agent while the elevator was burning, made in answer to an inquiry as to the cause of the fire, that "I tightened up the chain; the fire must have come that way," is incompetent because it relates to a past occurrence, and is a mere statement of opinion.

Lack of Fire Extinguishing Appliances When Their Employment Would Be Unavailing, Not Negligence.

4. Defendant cannot be held liable for neglecting to have on hand, for immediate use, proper appliances and equipments to extinguish fires, when the evidence shows that the fire could not have been extinguished, no matter what equipment had been furnished.

Submission to Jury Not Justifiable.

5. Evidence *held* insufficient to justify submission of the case to the jury.

Appeal from District Court, Stutsman county; *Glaspell,* J.

Action to recover for the negligent burning of hay and straw, by George H. Balding against A. C. Andrews and J E. Gage, partners under the firm name of Andrews & Gage. Judgment for plaintiff and defendants appeal.

Reversed.

Ball, Watson & Maclay, for appellants.

Statements of elevator agent as to his acts done several hours prior to fire, and his opinion as to cause thereof, inadmissible to bind principals. *Short* v. *N. P. Elevator Co.,* 1 N. D. 159, 45 N. W. Rep. 706; *Luby* v. *Ry. Co.,* 17 N. Y. 131; *Whitaker* v. *Ry. Co.,* 51 N. Y. 595; *Ryan* v. *Gilmer,* 2 Mont. 517.

The statements were mere expressions of opinion, and not admissible. *Ohio & M. Ry. Co.* v. *Stein,* 31 N. E. Rep. 180. Where it appears that efforts to extinguish fire were useless, it was error to instruct the jury, implying that defendants were negligent in not

seeking to extinguish the fire, after it started. *Welter* v. *Leistikow*, 9 N. D. 283, 83 N. W. Rep. 9; 2 Thompson on Trials, section 2315.

S. E. Ellsworth and *John Knauf*, for respondents.

Each transaction is to be characterized by its own facts, without regard to fixed interval of time, and with more regard to the question whether the declarations or admissions seem to have been voluntarily and spontaneously made under the immediate influence of the principal transaction and are so connected with it as to characterize or explain it, and made under such circumstances as to exclude the possibility of a design to misstate a fact. *Short* v. *N. P. Elevator Co.*, 1 N. D. 159, 45 N. W. Rep. 706; Wharton on Evidence, section 259; *Alsever* v. *Minn. & St. L. Ry. Co.*, 88 N. W. Rep. 841; *O'Connor* v. *C. M. & St. P. Ry. Co.*, 27 Minn. 166, 6 N. W. Rep 481; *Pierce* v. *Van Dusen*, 78 Fed. 693; *Hermes* v. *Ch. & N. W. Ry Co.*, 50 N. W. Rep. 584; *Louisville & C. R. Co.*, v. *Berry*, 28 N. E. Rep. 714. The *res gestae* are not limited to any specific time; according to the circumstances of the case, the time occupied may be a moment, a day or even a month. Gillett on Indirect and Col. Ev., section 253; Wharton on Evidence, section 258; *Trav. Ins. Co.* v. *Sheppard*, 85 Ga. 751, 12 S. E. Rep. 18; *Denver and R. G. Ry. Co.*, v. *Spencer*, 52 Pac. 211.

The events leading up to and culminating in the principal transaction, i. e. the fire that destroyed plaintiff's property, occupied several hours in performance. There were the tightening of the belt, subsequent operation of the machinery, heating of the bearings in the boot, inception of the fire, burning of the elevator, communication to plaintiff's property and its destruction. The declaration of Longbolle, defendant's agent, is therefore closely connected in time and place with the general transaction and made under its immediate influence. *Shafer* v. *Lacook*, 168 Pa. St. 497, 35 Atl. 44; *Yazo & C. R. Co.* v. *Jones*, 19 So. Rep. 91; *Elledge* v. *Nat'l City & O. Ry. Co.*, 34 Pac. Rep. 720; *Linderberg* v. *Crescent Mining Co.*, 33 Pac. Rep. 692; *Homan v. Boyce*, 19 N. W. Rep. 590; *N. Y. and Col. Min. Syndicate & Co.* v. *Rogers*, 16 Pac. Rep. 719; *Durkee* v. *Cen. Pac. R. Co.*, 9 Pac. Rep. 99; *Hanover R. Co.* v. *Coyle*, 55 Pa. St. 396; *Pierce* v. *Van Dusen*, 78 Fed. 693. Admissions of Longbolle were not the only testimony relied on as showing negligence. The inflammable character of the building, and the fact that it might be reasonably anticipated that fire would

break out, made it defendant's duty to provide such means and appliances as an ordinarily prudent man would supply, having due regard for the safety of his property and that of his neighbors. *McNally* v. *Colwell,* 52 N. W. Rep. 70; *Hanch* v. *Hernandez,* 6. So. Rep. 783.

There was no hose or any appliance for extinguishing fire about the building, no well on the premises, and water had to be carried 210 feet. These circumstances fairly presented the question of further negligence, in not providing adequate fire protection, and case should have gone to the jury.

COCHRANE, J. Plaintiff's action is to recover damages for the destruction, by fire, of certain hay and straw stacked near the elevator of defendants. The fire caught from cinders blown into the stacks from the burning elevator of defendants.

The evidence does not disclose the cause or origin of the fire which destroyed appellant's elevator. This is left entirely to speculation and conjecture. At 2 o'clock on the day of the fire, defendant's agent, Longbolle, mended the elevator chain. He operated the machinery from 2 until 5:30 p. m. The fire was discovered in or near the elevator pit about 6:30 or 7 o'clock p. m.

The plaintiff relied upon the declaration of the servant, Longbolle, to establish how the fire started, and that it was the result of negligence. Nels Peterson, a witness for the plaintiff, testified, in effect, that during the burning of the building he had a conversation with Mr. Longbolle, the agent, as to how the fire occurred. "Q. You may state that conversation to the jury." This question was seasonably and properly objected to. The objection was overruled, and the witness, over exception, answered: "A. I asked the agent how this fire come; he answered me. He said, 'I tightened up the chain; the fire must have come that way.' So I said what he done it for. 'Well,' he said, 'the chain would not stay on; it makes me mad'; so he tightened it up, maybe too tight." The objection to this testimony should have been sustained. It was hearsay, and not a part of the *res gestae.*

It is contended by counsel for respondent that the declaration of the agent in this case was made while the fire was burning, and was to the effect that the fire was caused by his negligence; that the act to be illustrated was the cause of the fire, and, if the fire was caused by friction induced by the negligence of Longbolle in operating the machinery with the elevator chain at extraordinary tension,

it must have ignited before 5:30 p. m., when the elevator stopped running; that the declaration was made in view of the conflagration produced by his negligence, and that the fire was a part of the main fact or transaction; therefore proof of this declaration was proper as accompanying the main transaction, and as part of the *res gestae,* within the rule laid down in *Railway Co.* v. *Coyle,* 55 Pa. 396; *Shafer* v. *Lacock* (Pa.) 32 Atl. 44, 29 L. R. A. 254.

Declarations of an agent, to bind the principal, must have been made during the continuance of the agency in regard to a transaction then depending, *et dum fervet opus.* It must be in the nature of a verbal act. To be received in evidence, such declarations must appear to have been voluntarily and spontaneously made under the immediate influence of the principal transaction, and be so connected with it as to characterize or explain it, and made under such circumstances as to exclude the possibility of a design to misstate the facts. *Short* v. *Elev. Co.,* 1 N. D. 163, 45 N. W. 706. In *Lund* v. *Tyngsborough,* 9 Cush. 36, the Supreme Court of Massachusetts discussed at some length when declarations may be considered as part of the *res gestae* and are admissible as original evidence. It is there said: "When the act of the party may be given in evidence, his declarations, made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. The credit which the act or fact gives to the accompanying declarations as a part of the transaction, and the tendency of the contemporary declarations, as a part of the transaction, to explain the particular fact, distinguish this class of declarations from mere hearsay. Such a declaration derives credit and importance as forming a part of the transaction itself, and is included in the surrounding circumstances, which may always be given in evidence to the jury with the principal fact. There must be a main or principal fact or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it." This language was cited with approval by the New York Court of Appeals in *Waldele* v. *Ry. Co.,* 95 N. Y. 278, 47 Am. Rep. 41, and was cited by this court to sustain its conclusion in *Short v. Elev. Co.,* 1 N. D. 164, 45 N. W. 706. What, then, is the principal transaction, or, in the language of Justice Harlan, in *Pierce* v. *Van Dusen,* 24 C. C. A.

280, 78 Fed. 693, "the fact necessary to be explained," the *res gestae* of this controversy? We answer, the cause of the fire, with a view to determining whether it was due to the negligence of defendants' agent or servant. Here the *res gestae* was not the fact that plaintiff's grain was destroyed by fire, or that the fire was communicated from defendants' burning elevator. These facts were apparent and undisputed. *Waldele* v. *Ry. Co.*, 95 N. Y. 274, 47 Am. Rep. 41; *Thayer's Cases on Evi.* 664. Nor was it the act of tightening the elevator chain, for the tightening of the chain was an antecedent and independent fact, which should have been proved by legal evidence before it could be made available to plaintiff. *Ehrlinger* v. *Douglas*, 81 Wis. 59, 50 N. W. 1011, 29 Am. St. Rep. 863; *McDermott* v. *Ry. Co.*, 87 Mo. 300. With a proper foundation laid, the fact that the chain was tightened by Longbolle before he started the machinery in operation was competent evidence in the case as tending to show that he knowingly operated the machinery when the chain was at unusual tension, but only after evidence tending to some extent to show that the fire was caused by friction, as alleged, had been received in the case. Such declaration of the agent could not be received for any other purpose than that of showing the knowledge of Longbolle that the chain, when operated, was at an unusual tension, and it could not be considered as tending to establish the fact of tightening the chain. Borrowing an illustration from Chief Justice Henry of Missouri: "If one were offered to testify that he heard another inform the superintendent of facts showing the incompetency of an employe, it would be admissible as showing that the superintendent had knowledge of those facts, if the facts themselves were otherwise proved; but it would certainly be inadmissible to prove those facts. It would be but hearsay evidence, as to the existence of those facts. It is upon the same principle that the admission of an agent of his knowledge of facts is competent to prove his knowledge of the facts, if the existence of such facts is otherwise proved, but it is incompetent to prove the existence of the facts. What an agent says is but hearsay as against the principal, unless a part of the transaction he is engaged in at the time." *McDermott* v. *Ry. Co.*, 87 Mo. 285, 300; *Chapman* v. *Ry. Co.*, 55 N. Y. 584.

Longbolle's declaration was not a part of the *res gestae*. At the time it was made he was not transacting the business of the principal. It did not relate to a transaction depending at the very time.

It did not immediately precede or accompany the act which led to the catastrophe, or constitute any part of the act. It was a narrative only of a transaction then past. *Luby* v. *Ry. Co.,* 17 N. Y. 133; *Adams* v. *Ry. Co.,* 74 Mo. 553, 41 Am. Rep. 333; *Smith* v. *Ry. Co.,* 91 Mo. 58, 3 S. W. 836; *Vicksburg Ry. Co.* v. *O'Brien,* 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299; *Tennis* v. *Ry. Co.* (Kan.) 25 Pac. 876; *Alabama, etc., Ry. Co.* v. *Hawk* (Ala.) 47 Am. Rep. 403; *Durkee* v. *Ry. Co.* (Cal.) 11 Pac. 130, 58 Am. Rep. 562; *Hawker* v. *Ry. Co.,* 15 W. Va. 628, 36 Am. Rep. 825; *Wormsdorf* v. *Ry. Co.,* 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453; *McDermott* v. *Ry. Co.,* 87 Mo. 299; *Lane* v. *Bryant,* 9 Gray 247, 69 Am. Dec. 282; *Whitaker* v. *Ry. Co.,* 51 N. Y. 295; *Barnes* v. *Inhabitants* (Me.) 52 Atl. 844; *Blackman* v. *Ry. Co.* (N. J. Sup.) 52 Atl. 370; *Ryan* v. *Gilmer,* 2 Mont. 517, 25 Am. Rep. 744; *Ehrlinger* v. *Douglas,* 81 Wis. 59, 50 N. W. 1011, 29 Am. St. Rep. 863; *State* v. *Montgomery,* 8 Kan. 351; *Short* v. *Elev. Co.* 1 N. D. 159, 45 N. W. 706. If, while Longbolle was engaged in running the elevator with the chain at unusual tension, so as to cause heat in the bearings through the consequent friction, the elevator building had caught fire from this cause, a declaration then made, such as the one received in this case, would have been competent. But here the running of the elevator had ceased more than an hour before the fire was discovered, and Longbolle knew no more as to the cause of the fire than the person in whose hearing the declaration was made or the jury who tried the case. That the declaration was made while the fire was burning, and under the impulse excited by a view of the probable consequences of his negligent act, is not significant. In *Hawker* v. *Ry. Co.,* 15 W. Va., 639, the court, on this point said: "The fact that the engine which had been thrown from the track when the accident occurred was still off the track when these declarations were made, it seems to me, has no bearing on the question, for the throwing of the engine off the track was not the principal fact to be shown. Indeed, it had nothing to do with the subject of inquiry before the jury, the manner in which the cattle had been killed." In that case the declaration was made within an hour after the accident by the engineer on the engine which had caused the accident, and in view of the consequences of the declarant's negligent act. The case of *Hanover Ry. Co.* v. *Coyle,* 55 Pa. 402, cited by respondent, is distinguishable from the one at bar. In that case the declaration of the engineer

was made in view of the goods strewn along the road by the breaking up of the boxes, the result of the accident. It was made immediately after the happening of the fact. But there was no doubt, under the proofs in that case, that the train ran into the peddler's cart while it was under the control of the engineer who made the declaration. This case has been much cited, and is otherwise in point in sustaining respondent's contention; but this court, early in the history of the state, declared squarely in favor of the doctrine that declarations must accompany the act they characterize and be a part of it. "Sound public policy requires that the established rule as to this class of evidence should be strictly adhered to and not extended. It is a species of evidence liable to abuse, and often, as in this case, the party making the declaration is a witness at the trial, testifying to the facts, his declarations made at any time, however short, after the occurrence has ended, in regard to the occurrence itself, are merely narrative, and should not have the force of evidence, unless they are strictly and unquestionably a part of the *res gestae*. They are not so in this instance." *State v. Maddox* (Me.) 42 Atl. 790. "It is enough, where the object is to visit the consequences of a wanton act upon a party who, for aught that appears, believed its servant to be free from the wantonness imputed to him, that it did not appear affirmatively that the declarations were made when they could properly be regarded as made at the time the injury was inflicted." *Whitaker* v. *Ry. Co.*, 51 N. Y. 295. Longbolle was a witness in this case, and, if the matters he stated in answer to the question of Nels Peterson were of evidential value to plaintiff, they could have been proven by competent, and not by hearsay, evidence. In *Adams* v. *Ry Co.*, 74 Mo. 559: "The servants who made the declarations offered in evidence were competent witnesses for plaintiffs to prove that her husband was seen on the trestle by the servants managing the train, and that the train could have been stopped before it reached him. If the train could have been stopped after deceased was discovered on the trestle by defendants' servants, that fact could have been proved by legitimate testimony. It is no answer to this that plaintiff could not rely upon them because they were in defendants' employment. We are not to assume, in order to admit incompetent evidence, that the only person to whom the facts to be proved is known would commit perjury. If plaintiff cannot prove by competent testimony a fact essential to

her recovery, we cannot establish a rule in her favor which, in a hundred other cases, would probably lead to manifest injustice."

We conclude that the part of the declaration of Longbolle concerning the tightening of the chain could not be proven in this way. So far we have considered only that part of the declaration as to the tightening of the chain. This was not the entire declaration received in evidence. Its concluding part, to the effect that the fire "must have come that way," either taken by itself or in connection with what preceded and followed it, was incompetent as a mere expression of opinion, guess, or conjecture of the declarant. *Ohio & Miss. Ry. Co.* v. *Stein* (Ind. Sup.) 31 N. E. 180, 19 L. R. A. 751; *Lane* v. *Bryant,* 9 Gray 245, 69 Am. Dec. 282; 24 Am. & Eng. Cyc. L. 664; *Baxter* v. *Ry. Co.* (Minn.) 75 N. W. 1114; *Montague* v. *Ry. Co.,* (Wis.) 72 N. W. 41; *Megow* v. *Ry. Co.,* 86 Wis. 466, 56 N. W. 1099; *Gainsville, etc., Ry. Co.* v. *Edmonson* (Ga.) 29 S. E. 213. In *Ohio, etc., Ry. Co.* v. *Stein* (Ind. Sup.) 31 N. E. 180, 19 L. R A. 751, the engineer of the train causing the injury exclaimed, "If that man last night would have fixed that cylinder cock, you would never have been hurt." The court said concerning it: "This declaration related to the past, and was a narrative of what had been done at an entirely different time and place. It was, indeed, a combination of an opinion and a narrative of the things that had passed, for it was a statement of the engineer's opinion that if, on the night before, something had been done which he had then directed, the collision could not have taken place. It is too well settled to excuse the reference to authorities that neither narratives of past occurrences nor matter of opinion can be placed before a jury by proving the declarations of an agent or servant." In *Lane* v. *Bryant,* 9 Gray 247, there was a collision between plaintiff's and defendant's carriages. Defendant's driver, at the time of the accident, while plaintiff was being extricated from his carriage, and while the crowd was about, said that the plaintiff was not to blame for what had occurred; but this evidence was declared incompetent, for one reason, because it was only the expression of opinion about a past occurrence, and not a part of the *res gestae.* The cause of the fire was not to be proven by opinion evidence, because, from anything appearing in the case, the jury were as capable of forming an opinion on the subject as was Longbolle. *Rogers, Exp. Test.* Section 5; *Kent* v. *Miltenberger,* 15 Mo. App. 480; *Railroad Co.* v. *Schultz,* 43 Ohio St. 270, 1 N. E. 324;

Crane v. *Northfield,* 33 Vt. 126; *Parkhurst* v. *Mastcller,* 57 Iowa 476, 10 N. W. 864. And no attempt was made to prove any facts on which such opinion could rest, or which would justify the taking of non-expert opinion as to the cause of the fire. *Southern Ry. Co.* v. *McLellan* (Miss.) 32 South. 283, is not an authority against this position. The expression of opinion there was received as a declaration against his interest made by the party plaintiff. It was not the declaration of a third party for which the litigant sought to be held or bound by it was in no way responsible.

Appellants assign error upon the denial of the court of their motion for a directed verdict. The burden of proof was on the plaintiff to establish the cause of the fire, and that it was the result of want of ordinary care on the part of defendants or their agent. The court so instructed the jury.

Plaintiff in his complaint alleged, as defendants' negligence, that they operated their elevating machinery when, because of the defective character, improper adjustment, and unusual tension of the elevator chain upon the roller, and the neglect to lubricate the bearings of the same, an intense heat was generated in the bearings by the friction thereon, and the chaff and other inflammable material that defendants had allowed to accumulate about the bearings, coming in contact with the heated part, took fire. Plaintiff assumed to prove, in support of this allegation, that the fire originated from the friction of the shaft or axle in its bearings igniting inflammable materials negligently permitted to come in contact with the bearings. Aside from some evidence that the fire was first seen near to or in the pit, and the incompetent conjecture of the agent as to its cause, no evidence was produced by plaintiff as to how the fire started. When plaintiff rested his case he had not furnished any evidence which would have warranted the jury in finding that the elevator chain was operated when it was defective in any way, when it was at an unusual tension, or when it was improperly adjusted; nor was any evidence offered at all that the bearings were not properly lubricated, or that inflammable matter had accumulated around the bearings, or that the fire started in this way. His allegations as to negligence were wholly without support. The defendants offered evidence showing that the bearings were lubricated; no accumulations of any kind of combustible material in the pit; that there was nothing combustible in contact with the bearings, although the babbitt was encased in wood; that the elevator chain was not

tighter than usual; and that conditions were the same as they had been for four years before. In rebuttal, plaintiff offered evidence that when shafting was out of plumb it resulted in greater friction and the generation of heat; also that a tightening of the elevator chain too much would raise the bottom shaft to the top of the boxing, causing pressure on top of the boxing, and lack of lubrication, because the oil would be in the bottom of the box, but no evidence was offered that these conditions did in fact exist. This was the condition of the proofs when the case was submitted. The verdict in this condition of the proofs, was speculative, resting upon the declarations of the agent as to his conjectures.

The proofs do not establish by any competent evidence facts sufficient as to the cause of the fire to make a question for the jury's consideration. The proofs are not inconsistent with or contradictory of any other cause for the fire. If an incendiary had caused the destruction of the elevator building by lighting a fire under it after the agent had gone to supper, the proofs harmonize with this hypothesis as well as with the one assumed by plaintiff. The evidence does not exclude this possibility; neither the chance of accidental fire. On November first there may have been a fire in the elevator, and a coal or cinder may have escaped, causing the destruction of the building; a lighted match or cigar thoughtlessly dropped; a spark from a passing engine; the evidence does not exclude these possibilities.

It is not asking too much of a plaintiff, when he alleges negligence, that he be required to prove it. When he claims damages because of fire, which he avers was started through the neglect to observe due care and caution, his proofs must establish the charge. Mere speculation or possibility will not do. *Sheldon* v. *Ry. Co.*, 29 Barb. 228; *Longabaugh* v. *Ry. Co.*, 9 Nev. 296; *Smith* v. *Ry. Co.*, 37 Mo. 295; *Omaha Ry. Co.* v. *Clark* (Neb.) 53 N. W. 970, 23 L. R. A. 509; *Kilpatrick* v. *Richardson* (Neb.) 56 N. W. 481; *White* v. *Ry. Co.*, 1 S. D. 330, 47 N. W. 146, 9 L. R. A. 824. In *Sheldon v. Ry. Co.*, 29 Barb. 228, the court say: "The plaintiff must show that the act or omission of which he complains was the act or omission of the defendant, and also that such act or omission was a negligent one. It is not enough for him to show that the defendant used fire to generate steam; that the locomotive engines running upon the road occasionally emitted sparks of fire and cinders; that his mill was within sixty-seven feet of the track of the road,

with some of the west windows and those next the road left open and carpenters' shavings and other combustible matter upon the floor; that no business was carried on at the mill and no one employed about it at the time; that the west wind was blowing stiffly when the fire was discovered, and that the company's trains passed to and fro several times each day. These circumstances are quite material and essential, but, without something in addition, they do not establish the principal fact alleged in the complaint, because they do not exclude the idea that the fire may have originated in some other source. Standing alone, these circumstances do no more than make out a possible case that possibly the fire proceeded from the defendant's locomotives. It is not enough for the plaintiff to show a possibility that the fire was communicated to the mill by sparks emitted by defendant's locomotives. He cannot recover upon a possibility. Even if the evidence went further and brought the facts sought to be proved within a probability, still the plaintiff must fail, because, to justify a verdict, the law requires, not positive proof, it is true, but such proof as will leave no reasonable doubt of the existence of the fact upon which it must rest. The rights of property, and all claims to its possession and enjoyment, are dependent upon the existence of the facts, and when they are disputed and become the subjects of judicial investigation, if juries could assume their existence without sufficient evidence, and render verdicts upon possibility, probability, and conjecture, the courts would be shorn of their legitimate authority, and the wise and just rules of the common law, as they have been recognized and applied from time immemorial would lose their principal value." James McDonald testified in rebuttal to statements made by Longbolle in his presence as to the cause of the fire. This evidence was properly received only as impeaching Longbolle, and could not be considered as evidence of the matters narrated. *Barnes* v. *Rumford* (Me.) 52 Atl. 844.

One other point remains to be mentioned. Plaintiff alleged negligence in that defendants knew that their elevator was built of inflammable material and was liable to fire, and it negligently omitted to provide buckets, hose, water, and appliances for its extinguishment should fire break out in said building. There was evidence that a barrel about two-thirds full of water was on the lower floor, and another barrel about two-thirds full of water was upstairs in the elevator. There was no well about the building,

no hose or other appliance for extinguishing fire. One of plaintiff's witnesses testified: "I did not make any effort to extinguish the fire. I did not think there was any possible chance. There was no water or hose, or any appliance for extinguishing a fire of that kind that I could see. I did not look around to try and find something. If we had a regiment of men we could not put it out. There was no well about the elevator. No attempt was made to put the fire out after it got above the floor. We did not attempt to put out the fire in the elevator. I thought it was useless to try." It also appeared that when the parties got to the elevator after the fire was discovered it was impossible to get into the room where the fire was, because of the fire. There was no evidence to the contrary in the record. If fire extinguishers had been provided they could have been of no possible use in extinguishing the fire. The failure to provide such extinguishers or appliances could not, therefore, render defendants liable.

We do not decide that defendants were under duty to keep on hand water, hose, and appliances to extinguish fire. Neither do we decide whether, in this case, the circumstances justified the submission of that point to the jury. If, as the uncontradicted evidence shows, the fire could not have been quenched or controlled, nor the burning shingles stopped from falling upon and igniting plaintiff's stacks, had every reasonable precaution for the arrest and putting out of the fire been provided and employed, it follows that plaintiff was not in any way damnified by the failure of defendants to keep such appliances on hand, so that what duty defendants were under to maintain fire extinguishers it is unimportant to decide. In *McNally* v. *Colwell* (Mich.) 52 N. W. 70, 30 Am. St. Rep. 494, the fire must have run down the docks extending from the mill to the lake, and on which dock the lumber was burned. A fire in the mill would naturally burn the dock and lumber, unless arrested. Under the conditions there shown, and with the ample supply of water at hand, had a means of throwing it upon the dock been provided, the spread of the fire along the dock and to the lumber might have been easily prevented, from anything appearing to the contrary. In that case the facts fairly presented the question for the jury whether, had proper appliances been provided, the fire could have been extinguished. In neither this case nor the Louisiana case cited (*Hanch* v. *Hernandez,* 41 La. Ann. 992, 6 South. 783) did the proofs show that fire extinguishers would have been un-

availing if there. The McNally case is authority for our conclusion. It was there held error to submit to the jury the question whether the defendant was negligent in knowingly employing an engineer and fireman at his mill who were incompetent to perform their duties because addicted to the use of intoxicating liquors, when their intoxication was not shown to have had any bearing upon the origin of the fire or the failure to extinguish it; and had the evidence been in the same condition as to fire extinguishers, and not only failed to show but negatived the fact that extinguishers of any kind could in any way have been made available to prevent the injury complained of, the court would have held, as we do, that there was nothing for the jury on such point. *Hawker* v. *Ry. Co.*, 15 W. Va. 642, 36 Am. Rep. 825; *Flattes* v. *Ry. Co.*, 35 Iowa 191; *Illinois Central Ry. Co.* v. *Phelps*, 29 Ill. 447; *Galena, etc., Ry. Co.* v. *Loomis*, 13 Ill. 548, 56 Am. Dec. 471.

Exceptions were reserved to the court's instructions to the jury, but in view of the conclusion at which we have arrived, it is unnecessary to consider them. Our conclusion is that the court erred in overruling defendant's motion for a directed verdict.

Since the filing of this opinion, counsel for respondent, within rule time, filed a petition for rehearing. It has been carefully considered. Upon suggestions contained in it, we have modified one statement and incorporated in this opinion some additional considerations to what was originally written; but, as the changes do not affect the result, a rehearing is denied. The judgment of the district court is reversed. That court is directed to reverse its judgment and to enter a judgment of dismissal. Appellants will recover costs of both courts. All concur.

(96 N. W. Rep. 305.)

STATE EX REL BOARD OF UNIVERSITY AND SCHOOL LANDS *v.* MCMILLAN, STATE TREASURER.

Opinion filed August 6, 1903.

Grant of Land to the State by Congress, for Educational Purposes, Is a Trust to Which the Faith and Honor of the State Is Pledged.

1. The lands granted to this state by congress for educational purposes, and the proceeds of the sale thereof, constitute a permanent trust fund, the interest and income of which alone may be used by the state, and then only for the support of such schools as are designated

by the enabling act and the state constitution; and to the maintenance of the permanent trust fund and the faithful administration of the trust the faith and honor of the state is pledged.

Normal School Not a School Corporation. Its Board Can Only Contract Debts From Legislative Appropriation, and Such Debts Are State Debts.

2. The state normal school at Valley City is not a school corporation, or a legal entity. It is merely one of the instrumentalities of the state, through which it promotes its educational interests. The power of its trustees to contract debts is limited by legislative appropriations, and, when contracted, such debts are debts of the state.

Constitution Restricts Investment of School Fund to Four Classes.

3. Section 162 of the state constitution restricts the board of university and school lands to four classes of securities as investments for the permanent school fund, one of which is "bonds of the state of North Dakota." The state obligations designated by this section as "bonds of the state of North Dakota" include only such state bonds as are valid and constitutional within the constitutional debt limit, and so certified by the state auditor and the secretary of state, and the payment of which is secured by a provision for an irrepealable tax levy in the act authorizing their issuance.

Chapter 49, p. 54, Laws 1903, Is Unconstitutional.

4. Chapter 49, p. 54, Laws 1903, which authorizes the issuance of $60,000 in bonds for the purpose of procuring funds to erect and equip buildings for the state normal school at Valley City, and appropriates a sufficient portion of the interest and income dedicated to the support of that institution to repay the principal and pay the interest on the sum so borrowed, is unconstitutional and void for the following reasons: (1) It authorizes the creation of a state debt in excess of the state debt limit, in violation of section 182 of the state constitution; (2) it authorizes the creation of a state debt and does not provide for a tax levy to pay the principal and interest, as required by said section; (3) it diverts the interest and income dedicated to the support of this institution to the payment of a state debt, in violation both of the enabling act and of the state constitution.

Bonds Issued Under Such Act Are Void.

5. Under the authority of this act bonds to the amount of $60,000 were issued, and the same were purchased by the board of university and school lands as an investment for the permanent fund belonging to the common schools. It is *held,* on an application to compel the state treasurer to pay a warrant drawn for the purchase price of said bonds, that said bonds are void because of the invalidity of the act authorizing their issuance, and for the further reason that they are not certified to be within the debt limit, as required by section 187

of the constitution, and that in refusing to pay said warrant the state treasurer acted in accord with his legal duty as the custodian of the trust fund.

Original application for mandamus by the state of North Dakota, on the relation of the Board of University and School Lands, against D. H. McMillan, as state treasurer.

Writ denied.

Newman, Spalding & Stambaugh, for defendant.

The act of the legislature authorizing the issue of the bonds in question is unconstitutional and void, being in conflict with section 159 of constitution, in that it diverts a portion of the funds inviolably appropriated and applied to the support of the normal school, to the payment of interest and discount. It is immaterial that the interest is only four per cent, or that there is no danger of the bonds being sold at a sacrifice. If the power to dissipate the fund exist, it is unlimited. *Newell* v. *People*, 7 N. Y. 9.

The act is also in violation of section 11 of the Enabling Act. The state took the fund as a trust for the sole purpose of expending its income for "the support of the schools," and not to divert it to the payment of interest and discount on borrowed money. The state is trustee and its power must be strictly construed in favor of the United States and against the state.

Rice v. *Minnesota & Northwestern R. R. Co.*, 66 U. S. 358, 17 Law. Ed. 147; *Ohio Life Ins. & T. Co.* v. *Debolt*, 16 How. 435, 14 L. Ed. 1005; *Ashburner* v. *People of the State of California*, 103 U. S. 575, 26 L. Ed. 415; *Cornell University* v. *Fiske*, 136 U. S. 152, 34 L. Ed. 427; *State* v. *Ruth*, 68 N. W. Rep. (S. D.) 190.

The position that the state is powerless to carry out the mandate of the constitution, to establish a system of free public schools throughout the state, "beginning with the primary and extending through all grades up to and including the normal and collegiate course," is untenable. It is true the constitution restricted the power of taxation, but it has placed a limitation upon the restriction. For twelve years the state has proceeded upon the theory that the restriction did not apply to money raised for school purposes and has levied two mills on the dollar for the support of common schools; and for two years pursued the same course with regard to higher institutions. The legislature was left with a free hand; it was to sustain a system of free public schools, from

primary up, in a uniform manner by a general state tax, and not on a four mill levy, which should besides, supply the "expenses of the state government."

The purpose for which the bonds were issued involves the use of the income of the permanent school fund for a purpose in conflict with section 11 of the Enabling Act and with section 159 of the constitution. The act provides "a fund for the erection and equipment of additional buildings and other needed improvements." The bonds are to be paid from the income of that portion of the "permanent school fund" belonging to that school; while section 11 of the Enabling Act provides that such "income shall be expended in the *support* of said school." Section 159 of the constitution shall provide that it "shall be inviolably appropriated and applied to the specific objects of the original grant." The purpose of the act is the support of the normal school. The word "support" does not include erection and equipment of buildings, and the making of improvements. Support does not mean create; it implies the previous existence of the thing supported. In early acts of congress making similar grants, the word "use" had a broader significance. The words "for the use of the institutions" cannot warrant the employment of funds "in the erection of buildings." *Mitchell et al.* v. *Colgan,* 54 Pac. 905 (Cal.). The building of new school houses and purchase of sites do not come within the well defined exception of "support of common schools." Sheldon v. *Purdy,* 49 Pac. 228.

The act is unconstitutional and void, and the bonds issued under it void, so far as they create a contingent liability of the state for the payment of any portion of the interest thereon.

The state is the guarantor of the interest. The appropriation is void, in that it diverts taxes levied for other purposes to the payment of such interest. Under existing laws, there can be no "unappropriated" funds in the treasury. The tax levy must be based upon the aggregate of appropriations, permanent and temporary, and cannot exceed that sum. *Houghton* v. *Austin,* 47 Cal. 646; *Savings and Loan Association* v. *Austin,* 46 Cal. 416. The tax must be preceded by a law authorizing it, and stating the purposes to which it shall be applied, and the amount of the tax must necessarily be determinable before the tax can be lawfully levied. Section 175, Constitution.

The provision in question attempts to appropriate the money, without a levy of a tax to meet the appropriation. The amount of tax necessary cannot be levied, until a specific appropriation of a definite sum is made for the purpose, and the amount necessary for the purpose cannot be determined until the payment is due. But if the act is insufficient as an appropriation, the state must enact further laws to pay the deficiency of interest. The obligation is precisely the same as to pay any other debt. But it is conceded that the state debt already equals the constitutional limit. The obligation is, therefore, forbidden by the constitution. Section 182 Constitution.

The school fund cannot be invested in obligations of the state in excess of debt limit. *Re Loan of School Funds,* 32 Pac. 273. *Newell* v. *People,* 7 N. Y. 9.

The state treasurer may in his discretion refuse to pay any warrant that he is satisfied is drawn for an unlawful purpose, and it is always a sufficient answer in a mandamus proceeding for him to establish such unlawful purpose.

Bailey v. *Lawrence Co.,* 51 N. W. Rep. 331; *Keller* v. *Hyde,* 20 Cal. 594, High Ex. Leg. Rem. sections 354 and 360. *Dempsey* v. *Board,* 20 S. E. Rep. 811; *State* v. *Yeatman,* 22 Ohio St. 546; *State* v. *Langlie,* 5 N. D. 594, 67 N. W. Rep. 958; *State* v. *Heard,* 18 So. Rep. 746; *First National Bank of Topeka* v. *Hefflebower State Tr.,* 51 Pac. 225; *Wilson* v. *Bradley,* 48 S. W. Rep. 166; *State ex rel. Wiles* v. *Albright,* 11 N. D. 22, 88 N W. Rep. 729.

C. N. Frich, attorney general, and *Guy C. H. Corliss,* for relators.

Section 156 of the constitution makes certain officers the Board of University and School Lands, and declares that such board shall have control of such lands, and direct the investment of the funds arising therefrom, in the hands of the state treasurer. The legal control of the funds is in this board, and the treasurer is the mere custodian of the uninvested money. The treasurer is merely a trustee. The board has absolute control over the fund with power to invest the same; when it has decided upon an investment, directed the auditor to draw a warrant, the duty of the treasurer is simply unescapable. He must pay the warrant. The treasurer cannot set up his judgment as to the legality of a contemplated investment as against the judgment of the board, when

the law has entrusted such matter to the board's control. An officer is protected in executing a process fair on its face, although he may know facts outside of the process that render it void.

Webber & Hand v. *Gay & Eysamen,* 24 Wend. 485; *The People* v. *Warren,* 5 Hill. 440; *Watson* v. *Watson,* 9 Conn. 140; *Taylor* v. *Alexander et al.,* 6 Ohio 147; *Wall* v. *Trumbull,* 16 Mich. 234; *Erskine Collector,* v. *Hohnbach,* 14 Wall. 613, 81 U. S. 1570, 20 L. Ed. 745; *Orr* v. *Box,* 22 Minn. 485; *Brown* v. *Harris,* 52 Mo. 306; *The Mayor, etc., of City of Jefferson to use of Pacific R. R.* v. *Opal et al.,* 49 Mo. 190; *Stutsman County* v. *Wallace,* 142 U. S. 293, 12 Sup. Ct. Rep. 227; *Harding* v. *Woodcock,* 137 U. S. 43, 11 Sup. Ct. Rep. 6; *Wilmarth* v. *Burt,* 7 Metc. 257, 23 Am. & Eng. Enc. L., 379; Mechem on Public Officers, sections 768, 769; Throop on Public Officers, section 759; *Thurston* v. *Martin,* 5 Mason 300.

A ministerial officer cannot be held liable in such a case, where the precept or order under which he acts comes to him from the proper source, and is within the apparent authority of the body or officer issuing it.

Savacool v. *Boughton,* 5 Wend. 170; *Bennet* v. *Burch,* 1 Denio 141; *Abbott* v. *Yost,* 2 Id. 86; *Sheldon* v. *Van Buskirk,* 2 N. Y. 477; *Watson* v. *Watson,* 9 Conn. 140; *Prince* v. *Thomas,* 11 Id. 472; *Neth* v. *Crofut,* 30 Id. 580; *Fox* v. *Wood,* 1 Rawle 143; *Waldron* v. *Lee,* 5 Pick. 323; *Donahoe* v. *Shed,* 8 Metc. 326; *Slomer* v. *Peo,* 25 Ill. 70; *Hill* v. *Figley,* Id. 156; *Dwinnels* v. *Boynton,* 3 Allen 310.

If the officer had knowledge of facts outside of his certificate it would not affect the rule of protection.

Watson v. *Watson,* 9 Conn. 140; *Wilmarth* v. *Burt,* 7 Metc. 257; *Brainard* v. *Head,* 15 La. Ann. 489; *Peo* v. *Warren,* 5 Hill. 440; *Brown* v. *Harris,* 52 Mo. 306; *Barr* v. *Combs,* 45 Pac. Rep. 776; *Erskine* v. *Hohnbach,* 14 Wall. 613, 81 U. S. 570, 20 L. Ed. 745; *Tyler* v. *Cass County,* 1 N. D. 369, 48 N W. Rep. 232; *Stutsman County* v. *Wallace et al.,* 142 U. S. 293, 12 Sup. Ct. Rep. 227; *State* v. *Obert,* 36 Pac. Rep. 64, 23 Am. & Eng. Enc. Law (2d Ed.) 379.

The bonds are bonds of the state within the meaning of section 162 state constitution, and proper securities in which to invest the school fund.

The debt created by the issue of these state obligations is not within the prohibition of section 182 of the constitution. The debt contemplated by this section is one that must be met by general taxa-

tion. The meaning of this provision of the constitution is, that there shall be no state indebtedness in excess of $200,000, to pay the principal and interest of which a state levy of taxes shall be necessary. The bonds issued by the trustees of the Normal School could never become a state debt in the sense of the constitution, for the taxable property of the state can never be held liable for their payment. They are payable from the interest and income fund accumulating from the sale, rental or lease of lands granted to the Normal Schools. The interest and income accumulating from the sale, rental or lease of such lands is amply sufficient to pay the interest, and create a sinking fund to extinguish the principal, during the time that bonds are to run, and their payment can in no event burden the taxpayers of the state.

The authorities are unanimous that no debt is created, within the meaning of the constitutional prohibition fixing a debt limit, unless the municipality or state enters into an obligation, which becomes a charge on its taxable property to be enforced by a general tax levy. *City of Clinton* v. *Walliker,* 68 N. W. Rep. 431; *Tuttle* v. *Polk,* 60 N. W. Rep. 734; *Fort Dodge Elec. etc., Co.* v. *City of Fort Dodge,* 89 N. W. Rep. 7; *Kelly* v. *City of Minneapolis,* 65 N. W. Rep. 115; *Quill* v. *City of Indianapolis,* 23 N. E. Rep. 788, 7 L. R. A. 681; *Swanson* v. *Ottumwa,* 91 N. W. Rep. 1048; *Davis* v. *City of Des Moines,* 32 N. W. Rep. 470; *Baker* v. *City of Seattle,* 27 Pac. Rep. 462; *Little* v. *City of Portland,* 37 Pac. Rep. 911; *Salem Water Co.* v. *City of Salem,* 5 Ore. 29; *Koppikus* v. *Commissioners,* 16 Cal. 248; *People* v. *Pacheco,* 27 Cal. 175; *City of East St. Louis* v. *Flannigan,* 26 Ill. App. 449; *Faulkner* v. *City of Seattle,* 53 Pac. 365; *Winston* v. *City of Spokane,* 41 Pac. Rep. 888; *Addyston Pipe & Steel Co.* v. *City of Corry,* 46 Atl. Rep. 1035.

A contingent liability is not within the meaning of the constitution fixing the debt limit. *Fort Dodge etc.* v. *Fort Dodge,* 89 N. W. Rep. 7, and cases cited.

YOUNG, C. J. Upon the petition of the members of the board of university and school lands an alternative writ of mandamus was issued by this court directed to D. H. McMillan, as state treasurer, and commanding him to pay a certain warrant for $60,000 drawn upon him by the state auditor, and payable to the treasurer of the Valley City normal school or show cause why he has not done so. The warrant is payable out of that portion of

the permanent school fund dedicated by the enabling act and the state constitution to the support of the common schools, and was drawn to pay the purchase price of certain "bonds of the state Normal School at Valley City," purchased by said board as an investment for the fund upon which the warrant was drawn. The bonds were authorized by and issued under chapter 49, p. 54, Laws 1903. It it not questioned that there was and is a sufficient sum of money in the treasurer's hands belonging to said fund to cover the warrant. The treasurer's refusal to pay is based entirely upon the contention that the board is without legal authority to invest this fund in the kind of obligations proposed as an investment, and, as a consequence, he cannot, as the constitutional custodian of the fund, legally pay the warrant. The allegations of the petition embodied in the writ are as follows:

"Thet petition of the superintendent of public instruction, the governor, attorney general, secretary of state, and state auditor of the state of North Dakota, constituting, under section 156 of the state constitution, the board of university and school lands, respectfully shows to the court: (1) That the defendant is the duly elected, qualified, and acting treasurer of this state. (2) That under the provisions of chapter 49, p. 54, Laws of 1903, entitled 'An act authorizing the board of trustees of the state normal schools to issue bonds to provide a fund for the erection and equipment of necessary additional buildings and for other improvements for the normal schools at Valley City and Mayville,' the board of trustees of the State Normal School at Valley City issued bonds to the amount of sixty thousand dollars, which bonds were issued under the seal of the board of trustees of the said State Normal School, and were signed by its president and secretary. That they were in denominations of two thousand dollars each, and were to draw interest at the rate of four per cent per annum, payable annually. (3) That said bonds were offered for sale to the board of university and school lands at par, and that the said board of university and school lands decided to purchase the said bonds as an investment for that portion of the permanent school fund dedicated by the enabling act and Constitution to the support of the common schools. That there was then on hand belonging to the said fund, in the hands of this defendant, as state treasurer, the sum of $322,413.44. (4) That in pursuance of said resolution to purchase said bonds, and for the purpose of consummating said purchase, the

board of university and school lands duly authorized the state auditor to draw his warrant on the defendant, as such state treasurer, payable out of the said fund, and that said warrant was, by the state auditor, drawn on the defendant, as such state treasurer, payable out of the said fund for the purchase of the said bonds, and was, previous to delivery thereof, duly registered by the state treasurer in a book provided for that purpose. That the said warrant on this defendant, as such state treasurer, was payable to the treasurer of said State Normal School at said Valley City, N. D., and was duly presented to the defendant, as such state treasurer, for payment, but that defendant refused to honor said warrant, or to pay out any moneys thereon, assigning as the sole and only reason for such refusal that the said contemplated investment of said fund in said bonds is not authorized by the Constitution of the state of North Dakota, but is unlawful. (5) That at the time of the sale of the said bonds, and at all times subsequent to January 1, 1903, the interest and income accumulating from the sale, rental, or lease of the lands granted to the said normal school were sufficient to pay the interest upon the said bonds for sixty thousand dollars, and also for the creation, in addition thereto, of a sinking fund with which to pay said bonds at maturity, and that the interest and income accumulating from the sale, rental, or lease of the said lands will continually increase for some years to come, so that not only will the said interest and income be adequate to the payment of the interest on said bonds at all times, but that the surplus of said interest and income, which must be used for the purpose of creating said sinking fund, will be larger each year for some years to come, and that from said surplus a sinking fund more than sufficient to discharge the said bonds at maturity will be created. (6) That ever since January 1, 1903, the debts of the state of North Dakota (within the meaning of section 182 of the Constitution) have been equal in the aggregate to the sum of two hundred thousand dollars, exclusive of the indebtedness of the state of North Dakota at the time of the adoption of the said Constitution; and that, if the said bonds for sixty thousand dollars, so sold by the board of trustees of the said normal school to the board of university and school lands, create a state indebtedness, within the meaning of said section 182 of the Constitution, they would exceed the debt limit fixed by said section, and would be void. (7) That said bonds so issued as aforesaid are ready

for delivery. That said proposed investment is authorized by the Constitution.

The defendant, in his return, admits that there is in his hands the sum of $322,413.44, belonging to that part of the permanent school fund dedicated to the support of the common schools, and subject to investment as alleged by the relators. Defendant alleges that he has no knowledge or information sufficient to form a belief whether the interest and income accumulating from the sale, rental, or lease of the Valley City Normal School lands will continually increase, or as to whether said interest and income would be adequate to the payment of the interest on said bonds at all times, or whether said interest and income will be sufficient to provide a sinking fund for the payment of the principal of said bonds at maturity, and alleges that: "In the year 1891 said normal school at Valley City issued bonds of the same character as those described in said petition, which were payable, principal and interest, out of the interest and income accumulating from the sale, rental, or lease of the lands granted to the said normal school; and that said interest and income is not sufficient to pay the interest of said bonds, issued as aforesaid, for the sum of twenty thousand dollars, and to create a sinking fund therefor, as provided by the act authorizing such issue, and to pay the interest on the said sum of sixty thousand dollars and create a sinking fund as aforesaid by the act authorizing the issue thereof; and that at its session in the year 1903 the legislature passed 'An act authorizing the State Board of Equalization to include in the annual levy for bond interest and bond sinking fund a sufficient amount to pay the interest and provide a sinking fund for the state normal school bonds issued under the provisions of section 10, chapter 89, Session Laws of 1891,' for the purpose of creating a fund to meet the deficiency of said principal and interest, and this defendant has no knowledge or information other than the facts stated in said act with reference to the sufficiency of said interest and income to pay the interest on said bonds and create a sinking fund for the payment of the principal thereof."

Defendant further alleges that the bonds in question are not bonds of the state of North Dakota, but are "bonds of the State Normal School at Valley City." A copy of one of said bonds is attached to the answer as an exhibit, and is as follows:

"United States of America.
"Number 1.
"State of North Dakota.
"$2,000.00 $2,000.00
"Bonds of the State Normal School at Valley City.

Bismarck, N. D., May 1, 1903.

"Know all men by these presents, that the board of trustees of the state normal schools of the state of North Dakota, for the Normal School at Valley City, acknowledges itself indebted and for value received hereby promises to pay to the state of North Dakota or bearer, the sum of two thousand dollars on the first day of May, A. D. 1904, together with interest on said sum from the date hereof until paid at the rate of four per centum per annum, payable annually on the first day of July of each year, upon presentation and surrender of the interest coupons hereunto attached as they severally become due. Both principal and interest are payable at the office of the state treasurer, in the city of Bismarck, state of North Dakota.

"This bond is one of a series of thirty bonds, numbered consecutively from one to thirty inclusive, each of like amount, becoming due on the first day of May of each succeeding year for thirty years, and is issued by the board of trusteees of the state normal schools of the state of North Dakota for the State Normal School at Valley City, for the sole purpose of providing funds for the erection and equipment of necessary additional buildings, and for other necessary improvements for the State Normal School at Valley City. This bond is authorized by an act of the eighth legislative assembly, approved February 13th, 1903, and entitled 'An act authorizing the board of trustees of the state normal schools to issue bonds to provide a fund for the erection and equipment of necessary additional buildings and for other necessary improvements for the normal schools at Valley City and Mayville.'

"In witness whereof, the board of trustees of the state normal schools of the state of North Dakota has caused this bond to be signed by the president of said board, and to be attested by the secretary, and has caused the seal of said board to be hereunto affixed this 1st day of May, A. D. 1903.

"[Seal.] W. L. Stockwell, President.

"Attest: E. J. Taylor, Secretary."

The act (chapter 49, pp. 54, 55, Laws 1903) under which the bonds were issued, is printed on each bond, and is as follows:

"An act authorizing the board of trustees of the state normal schools to issue bonds to provide a fund for the erection and equipment of necessary additional buildings and for other necessary improvements for the normal schools at Valley City and Mayville.

"Section 1. The board of trustees of the state normal schools, in order to provide a fund for the erection and equipment of the necessary additional buildings and other needed improvements at the normal schools at Valley City and Mayville are hereby authorized and empowered to issue bonds for such sum or sums of money as is actually needed for the purposes herein specified not exceeding sixty thousand dollars for each of said normal schools.

"Sec. 2. Said bonds shall be designated as the 'Bonds of the State Normal School at Valley City' and 'Bonds of the State Normal School at Mayville.' They shall be issued under the seal of the board of trustees of the state normal schools and signed by its president and secretary. They shall be in denominations of two thousand dollars each, shall bear four per cent interest and shall mature at such times as may be deemed advisable by said board of trustees and in not to exceed thirty years.

"Sec. 3. The interest shall be paid annually on the first day of July from the interest and income accumulating from the sale, rental, and lease of the lands granted by the state to the respective state normal schools; provided if there shall not be sufficient money in each of said funds to pay such interest there is hereby appropriated a sufficient amount to meet such deficiency.

"Sec. 4. The state treasurer is hereby authorized and required to retain out of the interest and income fund of each of said normal schools each year, first a sufficient amount to pay the annual interest upon the bonds issued for the benefit of the respective normal schools, and second, for the sinking fund to be used to pay off the bonds as they mature, an amount equal to one-thirtieth of the total of the bonds issued for the benefit of the respective normal school. He is further authorized and required to pay over and transfer quarterly to the maintenance fund of the respective normal schools any and all balances there may be remaining in said interest and income fund over and above the reservations above provided for.

"Sec. 5. These bonds shall first be offered for sale to the board of university and common school lands at par, and if not purchased

by said board the board of trustees of state normal schools shall receive sealed proposals for the purchase of the same, and shall give public notice of the sale for at least thirty days preceding such sale, and the bonds shall be sold to the highest bidder. The proceeds of such sale shall be delivered to the treasurers of the respective normal schools to be used exclusively in pursuance of the provisions of this act.

"Sec. 6. Emergency. Whereas an emergency exists in that the proceeds from the sale of these bonds will be needed before the first day of July in order that the buildings be completed before the opening of the next school year, therefore this act shall take effect and be in force from and after its passage and approval.

"Approved February 13th, 1903."

This case presents but a single question for determination. That question is whether the board of university and school lands may lawfully, under the enabling act and under the state Constitution, purchase these bonds as an investment for the permanent school fund. If it may lawfully do so, the treasurer's refusal to pay the warrant was without legal excuse, and he will be coerced by mandamus to pay the same. If, on the other hand, the board is without lawful authority to invest the permanent school fund in these securities, it will be conceded that the treasurer properly refused to pay the warrant, and the writ must be denied. While the question of the legality of the proposed investment is the decisive question in the case, its determination depends upon the solution of certain preliminary questions, namely, the character of the fund proposed to be invested, the limitations upon the authority of the board of university and school lands and of the legislature over the same, the constitutional limitations upon the power of the legislature to contract debts, and, finally, the character of the bonds proposed as investments.

The moneys which it is proposed to invest in these bonds constitute a part of the permanent fund derived from the sale of lands granted by Congress to this state upon its admission into the Union "for the support of common schools." Section 10 of the enabling act (Act Feb. 22, 1889, c. 180; 25 Stat. 676) granted "for the support of common schools" sections numbered 16 and 36 in every township in the state; and, where such sections or parts thereof had been sold or otherwise disposed of, provision was made that other lands equivalent thereto might be selected. The exact number

of acres covered by this grant is at present not known. As reported by the Land Department, it now amounts to 2,418,291 acres. In addition to the grant of land "for the support of common schools," Congress also granted to the state 668,080 acres for other purposes; making a total grant of 3, 086,371 acres. Of the 668,080 acres just referred to, 498,080 acres were apportioned by Congress in the enabling act, and for specific purposes named therein. The remaining 170,000 acres were granted to the state "for such other educational and charitable purposes as the legislature may determine." This apportionment was made by the Constitution. The entire grant of lands for all purposes, as divided by the enabling act and the Constitution, is as follows: Capitol buildings, 82,000 acres; State University, 86,080 acres; School of Mines, 40,000 acres; Agricultural College, 130,000 acres; Normal School, Valley City, 50,000 acres; Normal School, Mayville, 30,000 acres; Deaf and Dumb Asylum, 40,000 acres; Hospital for Insane, 20,000 acres; Soldiers' Home, 40,000 acres; Blind Asylum, 30,000 acres; Industrial School, 40,000 acres; Scientific School, 40,000 acres; Permanent School Fund, 2,418,291 acres—total, 3,086,371 acres. The grant of lands in aid of the common schools was supplemented by a further grant. Section 13 of the enabling act provides: "That 5 per centum of the proceeds of the sales of public lands lying within said states which shall be sold by the United States subsequent to the admission of said state into the Union, after deducting all the expenses incident to the same, shall be paid to the said states, to be used as a permanent fund, the interest of which only shall be expended for the support of common schools within said states respectively." Section 11 of the enabling act provides: "That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than $10 per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only." It is entirely clear from the provisions of the enabling act just quoted that the entire grant of lands to the state for educational purpose-

was in trust, and that the express terms of the grant require the state as trustee to maintain the permanency of the funds so granted; and further, that it limits the state to the use of the interest of the permanent fund, and requires that such interest shall be used "only for the support of 'schools.' "

We now turn to the provisions of the Constitution relating to the grant and the trust thereby imposed. Section 205 reads as follows: "The state of North Dakota hereby accepts the several grants of land granted by the United States to the state of North Dakota, by an act of Congress entitled 'An act to provide for the division of Dakota into two states, and to enable the people of North Dakota, South Dakota, Montana and Washington to form constitutions and state governments, and to be admitted into the Union on equal footing with the original states, and to make donations of public lands to such states,' under the conditions and limitations therein mentioned; reserving the right, however, to apply to Congress for modification of said conditions and limitations in case of necessity." Section 153: "All proceeds of the public lands that have heretofore been, or may hereafter be granted by the United States for the support of the common schools in this state; all such per centum as may be granted by the United States on the sale of public lands; the proceeds of property that shall fall to the state by escheat; the proceeds of all gifts and donations to the state for common schools, or not otherwise apppropriated by the terms of the gift, and all other property otherwise acquired for common schools, shall be and remain a perpetual fund for the maintenance of the common schools of the state. It shall be deemed a trust fund, the principal of which shall forever remain inviolate and may be increased but never diminished. The state shall make good all losses thereof." Section 154: "The interest and income of this fund, together with the net proceeds of all fines for violation of state laws, and all other sums which may be added thereto by law, shall be faithfully used and applied each year for the benefit of the common schools of the state, and shall be for this purpose apportioned among and between all the several common school corporations of the state in proportion to the number of children in each of school age, as may be fixed by law, and no part of the fund shall ever be diverted even temporarily, from this purpose or used for any other purpose whatever than the maintenance of common schools for the equal benefit of all the people of the state; provided, however, that if any portion of the

interest or income aforesaid be not expended during any year, said portion shall be added to and become a part of the school fund." Section 155 prescribes the conditions upon which lands granted for the support of common schools may be sold, and also the time when they may be sold. Section 159: "All lands, money or other property donated, granted or received from the United States or any other source for a university, school of mines, reform school, agricultural college, deaf and dumb asylum, normal school or other educational or charitable institution or purpose, and the proceeds of all such lands and other property so received from any source, shall be and remain perpetual funds, the interest and income of which, together with the rents of all such lands as may remain unsold, shall be inviolably appropriated and applied to the specific objects of the original grants or gifts. The principal of every such fund may be increased but shall never be diminished, and the interest and income only shall be used. Every such fund shall be deemed a trust fund held by the state, and the state shall make good all losses thereof." Section 160: "All lands mentioned in the preceding section shall be appraised and sold in the same manner and under the same limitations and subject to all the conditions as to price and sale as provided above for the appraisal and sale of lands for the benefit of common schools; but a distinct and separate account shall be kept by the proper officers of each of said funds: provided, that the limitations as to the time in which school land may be sold shall apply only to lands granted for the support of common schools."

Perhaps it is not necessary to state that by the acceptance of the grant for educational purposes—and it is with that grant we are concerned in this case—a trust was created, the character of which was fixed by the terms of the grant. By the mere acceptance of the grant the honor of the state was pledged to the observance of the obligation of the trust; that is, to maintain the permanency of the trust fund and to use the interest thereof only for the support of the several schools to which it was dedicated. There was no attempt on the part of the framers of the Constitution to shrink from this obligation, or avoid its restrictions. On the contrary, the Constitution declares and reiterates the declaration that all of the lands granted by Congress for educational purposes, including "all the proceeds of such lands, shall be and remain perpetual funds, the interest and income of which 'shall be inviolably appropriated and

applied to the specific objects of the original grants or gifts." They went further, and included grants for charitable purposes; declaring that all grants to the state for educational or charitable institutions or purposes, from whatever source, shall constitute a perpetual fund, "the interest and income of which shall be inviolably appropriated and applied to the specific objects of the original grants or gifts."

What we have said in reference to the limitations imposed by the enabling act and the Constitution upon the power of the legislature, has no application to what is known as the "capitol land grant." The funds derived from this grant are not required to be kept permanent; on the contrary, under the terms of the grant, they may be used at such times and in such manner as the legislature may determine. This grant was made expressly "for the purpose of erecting public buildings at the capitol, for legislative, executive and judicial purposes." Sections 12 and 17 of the enabling act. The only limitation upon the power of the legislature is that the proceeds of this grant shall be used for the purposes for which it was made, to wit, the erection of buildings at the state capital.

The people of the state were not content to merely declare the character and nature of the trust. They went further, and in plain language made provisions for its safe administration. Section 156 of the state Constitution provides: "The superintendent of public instruction, governor, attorney general, secretary of state and state auditor shall constitute a board of commissioners, which shall be denominated the 'Board of University and School Lands,' and, subject to the provisions of this article, and any laws that may be passed by the legislative assembly, said board shall have control of the appraisement, sale, rental and disposal of all school and university lands, and shall direct the investment of the funds arising therefrom in the hands of the state treasurer, under the limitations in section 160 of this article." Section 162: "The moneys of the permanent school fund and other educational funds shall be invested only in bonds of school corporations within the state, bonds of the United States, bonds of the state of North Dakota, or in first mortgages on farm lands in the state, not exceeding in amount one-third of the actual value of any subdivision on which the same may be loaned, such value to be determined by the board of appraisers of school lands." Section 165 of the state Constitution is as follows: "The legislative assembly shall pass suitable laws for the safe keep-

ing, transfer and disbursement of the state school funds; and shall require all officers charged with the same or the safe keeping thereof to give ample bonds for all moneys and funds received by them, and if any of said officers shall convert to his own use in any manner or form, or shall loan with or without interest or shall deposit in his own name, or otherwise than in the name of the state of North Dakota, or shall deposit in any banks or with any person or persons, or exchange for other funds or property any portion of the school funds aforesaid, or purposely allow any portion of the same to remain in his own hands uninvested, except in the manner prescribed by law, every such act shall constitute an embezzlement of so much of the aforesaid school funds as shall be thus taken or loaned, or deposited, or exchanged, or withheld, and shall be a felony; and any failure to pay over, produce or account for the state school funds or any part of the same entrusted to any such officer, as by law required or demanded, shall be held and be taken to be *prima facie* evidence of such embezzlement." Thus it is seen that the people of this state, in their solicitude for a faithful administration of the trust, have removed the control of the trust fund from legislative control, and permanently lodged it with elective officers, towit, the superintendent of public instruction, governor, attorney general, secretary of state, and state auditor. Further, they have deprived the legislature, and the board as well, of the power of determining the kind of securities the trust fund shall be invested in, and for a dereliction of duty by the officers charged with the safe-keeping of the funds in any of the particulars named in section 165 they attached the punishment of a felony.

The spirit of public integrity which prompted the provision relating to the trust funds and their safe administration is equally manifest in the constitutional provisions relating to the creation of state debts. These provisions are controlling in this case. Section 182 reads as follows: "The state may, to meet casual deficits or failure in the revenue, or in case of extraordinary emergencies contract debts, but such debts shall never in the aggregate exceed the sum of $200,000, exclusive of what may be the debt of North Dakota at the time of the adoption of this Constitution. Every such debt shall be authorized by law for certain purposes to be definitely mentioned therein, and every such law shall provide for levying an annual tax sufficient to pay the interest semi-annually, and the principal within thirty years from the passage of such law, and shall

specially appropriate the proceeds of such tax to the payment of said principal and interest, and such appropriation shall not be repealed nor the tax discontinued until such debt, both principal and interest, shall have been fully paid. No debt in excess of the limit named shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the state in time of war, or to provide for public defense in case of threatened hostilities; but the issuing of new bonds to refund existing indebtedness, shall not be construed to be any part or portion of said $200,000." Section 186: "No money shall be paid out of the state treasury except upon appropriation by law and on warrant drawn by the proper officer, and no bills, claims, accounts or demands against the state or any county or other political subdivision, shall be audited, allowed or paid until a full itemized statement in writing shall be filed with the officer or officers, whose duty it may be to audit the same." Section 187: "No bond or evidence of indebtedness of the state shall be valid unless the same shall have endorsed thereon a certificate, signed by the auditor and secretary of state, showing that the bond or evidence of debt is issued pursuant to law and is within the debt limit."

We now turn to the question whether the bonds here in question belong to any one of the four classes to which the people of the state, by section 162 of the state Constitution, have restricted the board for the purposes of investment. That they are not bonds of the United States is apparent. Neither are they first mortgages on farm lands. It only remains, then, to inquire whether they are bonds of a school corporation or bonds of the state of North Dakota; for, if they are not included within the two classes of securities last named, clearly they are prohibited investments. It must be admitted that these bonds are of such a nondescript character that it is difficult to classify them with any instruments with which we are familiar or to which our attention has been called. That they are not bonds of a school corporation is perfectly clear, and this is frankly conceded by counsel for the relator. The act provides that they should be designated as the "bonds of the State Normal School at Valley City," and further provides that they "shall be issued under the seal of the board of trustees of the state normal schools and signed by its president and secretary," instead of "under the great seal of the state by the governor and treasurer, and attested by the secretary of state," as is usual in acts authorizing the issuance of state bonds. See chapter 133, p. 307. Sess. Laws 1897; also

section 1355h, Rev. Codes 1899, and chapters 27, 46, pp. 31, 51, Laws 1903. The act also requires the proceeds of the loan to be deposited with the treasurer of the normal school instead of with the state treasurer; further, the board of trustees is granted power, within the limitations of the act, to determine the amount of the issue, and to fix the time when the bonds shall mature. These provisions indicate a legislative intent to authorize bonds which would constitute obligations of the normal school, and thus be "bonds of the state normal school" both in form and effect, and not bonds of the state. That the board of trustees so interpreted the act is shown by the form of the bonds which they prepared and issued. The copy of the bond above set out recites "that the board of trustees of the state normal schools of the state of North Dakota for the Normal School at Valley City acknowledges itself indebted and for value received hereby promises to pay" the principal of the bond, with interest. The character of the bonds, however, is not to be determined by provisions which relate to mere matters of form or to the manner of their execution, or to the name assigned to them by the legislature, but must be determined by those provisions of the act authorizing their issuance, and upon which their validity rests, which go to the substance of the obligation. Judged by this test, it will, we think, be readily seen that they are state obligations masquerading in the name of "normal school bonds." This must be true if they have any validity whatever, for bonds of the State Normal School at Valley City are a legal impossibility. This institution is not a school corporation or a legal entity. It cannot levy and collect taxes; it owns no property; its trustees cannot contract debts except within the limits of the appropriations made by the legislature for its support; and when such debts are contracted they are not debts of the institution, but are the debts of the state. The state is charged with its support and maintenance as one of the educational institutions of the state. This institution and the other state educational and charitable institutions are not legal and independent entities, but are mere agencies or instrumentalities through which the state promotes its educational and charitable interests, and for the support of which all of the taxable property of the state is chargeable; and the power of their trustees to contract debts is limited by legislative appropriations. As was said by the Supreme Court of Wisconsin in *State* v. *Mills,* 55 Wis. 229, 12 N. W. 359: "It cannot be said too emphatically, or repeated too often, that the vari-

ous boards of trustees and managers of the benevolent and penal institutions of the state have no power to contract debts beyond the appropriation made by the legislature for the support and operation of their respective institutions. A debt against one of these institutions is a debt against the state; and, if such boards could contract debts *ad libitum*, the constitutional limitations of state indebtedness to $100,000 (article 8, section 6) might become utterly inoperative. See *Sloan* v. *State*, 51 Wis. 623, 8 N. W. 393." See also, *Jewell Nursery Co.* v. *State*, 4 S. D. 213, 56 N. W. 113; *Weary* v. *State University*, 42 Iowa 335; *Neil* v. *Board*, 31 Ohio St. 15; *State ex rel.* v. *White*, 82 Ind. 278, 42 Am. Rep. 496. We therefore agree with counsel for the board that the "bonds in question are bonds of the state, or bonds of no one."

We now turn to the decisive question in the case, that is, whether these instruments are bonds of the state of North Dakota, and, of course, by that we mean valid and constitutional bonds, such as the board is authorized by section 162 to purchase as an investment for the permanent school fund. It is proper first to inquire—and the answer to this question is decisive of this case—whose obligation is evidenced by them. This question must be answered by the act authorizing their issuance. As we have seen, they are not the obligations of the normal school, for there is no such legal entity. It is apparent, therefore, that they evidence the obligations of the state, if they evidence any obligation whatever. That they are state obligations is, we think, entirely apparent, and for these reasons: First, the state authorizes their issuance; second, they are given for money borrowed by the state; third, the money to be procured from the loan is for state purposes—that is, to erect buildings for the state for one of its educational institutions; and, finally, the promise to repay the loan, both principal and interest, is made by the state. It is strenuously urged by counsel for the treasurer that "the instruments under consideration are not 'bonds' in any sense of the word, either as understood, when the Constitution was adopted, in financial exchanges and markets, or by the common people, or at common law, or under the statutes of this state; that they are merely contracts, whereby the board of trustees of the school, under the authority of the legislature, undertakes to hypothecate the income of the institution." What merit there may be in this contention we shall not undertake to determine. Of course, if the obligations in question are not bonds within the meaning of section 162 of the

state Constitution, they are prohibited investments, for that section restricts the board to investing in "bonds" of the state of North Dakota, and does not authorize the purchase of any other kind of state obligations. For the purposes of this case we shall assume that these instruments are bonds of the state of North Dakota, so far as the legislature had power to make them so, and shall direct our inquiry to the validity of the act authorizing their issuance. Is the act constitutional? This question must be answered unhesitatingly in the negative. It would seem that the invalidity of the bonds, and the unconstitutionality of the act upon which their validity rests, must be apparent to the legal mind as well as to the mind of the average layman from a mere statement of the constitutional provisions which we have previously quoted. It should require no argument to show that the act is invalid. Its violations of the following provisions of the Constitution are manifest: (1) It authorizes the creation of a state debt in excess of the debt limit and contrary to section 182 of the Constitution; (2) it authorizes the creation of a state debt, and contains no provision "for levying an annual tax sufficient to pay the interest semi-annually and the principal within thirty years," contrary to the requirements of the section last referred to; and (3) it appropriates for the payment of the principal and interest of a state debt the interest and income of the permanent fund of the normal school, which was dedicated to the support of said school by Congress and by the state Constitution, and thus diverts such interest and income from the purpose for which it was dedicated. Finally, the bonds themselves are invalid because the act authorizing them is invalid, and for the further reason that they are not certified by the auditor and secretary to be within the debt limit, as is essential to the validity of all state bonds under section 187, above quoted.

Whether the debt authorized to be created by this act is to meet a casual deficit or failure in the revenues of the state or to meet an "extraordinary emergency," so that its creation would be authorized in any event under the debt-limit section of the Constitution (section 172, before quoted), we do not determine. It is sufficient for the purposes of this case that the act authorizes a state debt in excess of the state debt limit.

We would rest the decision of this case at this point, were it not for the fact that thus far we have not considered the theory—and it is an ingenious one—upon which counsel for the board seeks to

sustain the legality of the proposed investment. Counsel broadly contends—and it is the only argument possible in support of the legality of the proposed investment—that the section of the Constitution which limits the state debt to $200,000, and requires every act authorizing the creation of a state debt to provide an annual levy to pay both principal and interest, and the section which requires as an essential prerequisite to the validity of a state bond that it shall be certified to be within the debt limit, have no application whatever to these instruments. He contends, first, that the instruments are "bonds of the state of North Dakota," and are, therefore, proper investments for the permanent school fund under section 162 of the state Constitution, which authorizes the investment of such fund in such bonds; and, second, that bonds issued under this act do not create a state debt. His argument is this: They are "bonds of the state"; therefore the board is authorized to buy them. They do not create a state debt; therefore the debt-limit section of the Constitution does not apply to them. Briefly stated, counsel contends that they are bonds of the state for the purpose of sustaining them as a constitutional investment of the permanent school fund under section 162, and contends they are not state bonds or evidences of a state indebtedness for the purpose of avoiding the condemnation of section 182, which limits state indebtedness to $200,000. This contention cannot be sustained. The contention that the framers of the Constitution, and the people of this state when they adopted it, by authorizing the investment of the permanent school fund in "bonds of the state of North Dakota" (section 162), did not designate bonds of a particular kind, and that the term "bonds of the state of North Dakota" is general, and was intended to include all kinds of obligations which the ingenuity of subsequent legislatures might devise, regardless of the character or extent of the state's obligation to pay the same, finds no support in a single word or sentence of the Constitution. Indeed, such an interpretation of the Constitution does violence to its plain language. There is no ambiguity or obscurity of meaning in the several sections relating to the creation of state debts. The phrase "bonds of the state of North Dakota" imports a state debt. The common mind understands that it is a state obligation, a state debt, for the payment of which the faith and credit of the state is pledged; and it would be an insult to the intelligence of the framers of the Constitution and to the people of this state for this court to say that, when they

restricted the board of university and school lands to investing the permanent school fund in "bonds of the state of North Dakota," they did not in fact restrict them to state bonds such as, so far as their essential features are concerned, were known to the framers of the Constitution and to the people at that time; that is, bonds regularly issued, within the debt limit, and so certified, and the payment of which is secured by an irrepealable tax levy. If this argument of counsel be meritorious, it is equally applicable to the other classes of investments to which the Constitution restricts the board, and there is then in fact no restriction. If an investment in "bonds of the state of North Dakota" authorizes an investment in bonds other than those known when the Constitution was adopted, then "bonds of the United States" may be extended to include instruments entirely lacking in the essential elements of such bonds. "Bonds of school corporations" may include obligations wholly unknown to the framers of the Constitution, and "first mortgages on farm lands" may be extended to include instruments wholly devoid in their essential nature of the security which such obligations afford as known to the framers of the Constitution and to the people when they adopted it. This contention is, from its mere statement, manifestly unsound. Moreover, the contention that this act does not authorize the creation of a state debt, and that these instruments do not evidence a state debt, is utterly fallacious. It is argued that both the principal and interest of these bonds are to be repaid from a special fund—that is, from the interest and income fund of the state normal school—and that their payment is not, therefore, and cannot become, a charge upon the state or its taxpayers. With this as a premise, counsel contends that there is not state debt; that the debt is paid from a special fund, towit, the interest and income fund; and that the state's obligation is merely to appropriate this fund, and apply it to the payment of the bonds. A vast array of cases is cited which hold that bonds issued by a municipality for improvements payable solely out of special assessments upon property benefited are not within the debt limit provision. In such cases it is quite generally held that no debt is contracted by the municipality to be paid by it. The debt is to be paid by the property benefited; that is, from the funds of individuals, and not from the funds of the municipality. The loan in such cases is really to the owners of the property benefited. The municipality acts merely as an assessing and collecting agent. A full performance of the obligation

of the municipality under such a law involves it in no financial liability. The individual property owner who is benefited pays the debt. It is through a breach of its obligation, and not by a performance of it, that the municipality incurs a financial liability. There is no analogy between the principle upon which these cases are founded and the case at bar. Under the act here in question, the state itself is the borrower. It borrows for its own use, and it promises to repay the sum borrowed, with interest, and from its own funds. This act provides for payment by the state, and not payment by individuals, as in the case of special assessments. Sections 3 and 4 of this act appropriate from the interest and income fund dedicated to the support of the state normal school a sufficient sum to meet the obligations authorized, and, further, appropriate "out of any funds in the state treasury not otherwise appropriated" a sufficient amount to make the payment in case the interest and income is not sufficient. It requires no argument to show that this is a promise of the state to pay the principal and interest; and, as we shall hereafter see, it is a promise to pay out of state resources, and a promise which can only be discharged by a resort to taxation. The fact that all or a portion of the debt may be paid from the interest and income fund does not change the character of the obligation, or alter its effect upon the state. The important fact is that it is paid by the state. It is not important from what fund it is payable. That is a mere matter of bookkeeping. The payments, in either event, are made by the state, and from its resources. The result would be in every respect the same if all the payments were made directly from funds derived from general taxation, and the act would be open to no more constitutional objections than it now is if the disguise were removed, and it authorized the issuance of state bonds, recognizable in form and in substance as such, and requiring the levy of an annual tax, as required by section 183 of the Constitution. Without attempting to classify these instruments, it is entirely apparent that they evidence a state debt, every dollar of which, both principal and interest, must inevitably be repaid by a resort to general taxation. The theory is that the interest and income fund will pay these bonds and the interest on them, and that they cast no burden upon the taxpayer. Our answer is that the taxpayer is compelled to pay them.

In order that the answer to so vital a question may not rest upon a mere arbitrary assertion, we may be permitted to illustrate the

reasons for our answer from the practical operation of the several legislative acts which have adopted this plan. This scheme of financing state institutions had its origin in the legislature of 1891. Chapter 89, p. 246, Laws 1891, authorized the issuance of $40,000 bonds upon this plan; $20,000 for each of the normal schools. No further bonds were authorized until the session of 1901, when $120,000 were authorized and issued. See chapters 38, 127, and 173, pp. 48, 160, and 228, of the Session Laws of 1901. The plan has evidently grown in favor, however, for the recent legislature authorized the issuance of bonds payable upon this plan to the amount of $581,000. Now, it is assumed by counsel for the board that the obligation of these bonds will be met from the interest and income fund solely, and that no necessity can or will arise for a resort to the other funds of the state. The assumption that the interest and income fund will pay the obligations as they mature may be unwarranted, in view of the history of the loan of $20,000 made for the benefit of this institution in 1891, and payable upon this plan. The recent legislature, prior to the passing of the act authorizing the present $60,000 issue, passed an act (chapter 125, p. 165, Laws 1903) declaring, in effect, that the former $20,000 issue should therefore constitute a state debt, requiring the interest and principal of that loan to be paid from general taxation, authorizing a state levy for that purpose, and reciting in the act that the interest and income was not sufficient to pay the interest and principal upon the $20,000 and upon the proposed issue of $60,000. It may be said that this recital was true in point of fact. During the twelve years prior to that time there had been paid by the state treasurer upon the interest on this loan the sum of $14,400. But $2,400 of this sum was paid directly from the interest and income fund. The remaining $12,000 was paid from other state funds, which were derived directly from taxation. Under the terms of the repudiating act above referred to, there is no pretense that any further portion of the interest or principal of the 1891 loan will be paid from the interest and income fund, for the act requires that the remaining eight years' interest and the entire principal shall be repaid by general taxation. It may, therefore, well be doubted whether the proposed issue of $60,000 authorized by the act under consideration can be met from the interest and income fund. It is true this fund has recently increased, and necessarily will largely increase in the future; but whether it will be adequate to meet the obligations as

they mature is necessarily speculative. We shall assume, however, for the purpose of this case, that the fund will be at all times sufficient. Nevertheless, that assumption does not change the character of the obligations as a state debt, and a state debt payable by state taxation. It is still payable from state resources, and, in the last analysis, by taxation. By way of further illustration, we will consider the loan authorized by the act under consideration. The act authorizes the issuance of $60,000 four per cent, thirty-year bonds. The board of trustees has divided the principal into thirty parts, one bond maturing annually each successive year. The amount of interest which will accrue and must be paid during the thirty years, amounts to $37,200. This, with the principal, makes a total sum of $97,200, which, under the terms of the act, must be paid from the interest and income of the fund dedicated by the enabling act and the Constitution to the support of this institution. It must be apparent to every one that, if the sum of $97,200 of the funds which are available and provided for the support and maintenance of this school for the next thirty years is diverted, it will be necessary, in order to maintain the school, that this amount shall be replaced, and, of course, this can be done only by general taxation. That no doubt may exist, let us further illustrate. Assume that the sum of $97,200, diverted and withheld, as it necessarily must be if this act is valid, is sufficient to maintain the school during the thirty-year period. Is it not apparent that when this sum is withdrawn from the support of the school it will be compelled to close its doors for want of funds to sustain it, or, if it does not, that the exact sum diverted, towit, $97,200, must be restored by general taxation for its support? Again, assume that the cost of maintenance will be double the amount of diversion; that is, $194,400. For this purpose the state has an existing income of $97,200, derived from the interest and income dedicated to the support and maintenance of the school. The remaining $97,200 must be raised by general taxation, and that is the extent of the taxpayer's burden. Now, divert the amount necessary to pay the interest and principal of these bonds, towit, $97,200, and what is the result? The taxpayers of the state, to meet the expense of maintaining the institution, are compelled to increase their burden to the exact amount diverted. A more forcible illustration of the true character and underlying falsity of this financial scheme will be afforded by a complete state-

ment of the bonds authorized to be issued by the legislature upon this plan up to date.

Year Authorized	Name of Institution	Mature in	Interest—Per Cent	Amount
1891	Valley City Normal	20 years	6	$ 20,000
	Mayville Normal	20 years	6	20,000
1901	State University	20 years	4	50,000
	Agricultural College	20 years	5	50,000
	Reform School	20 years	6	20,000
1903	Industrial School	20 years	4	40,000
	Normal School, Valley City	30 years	4	60,000
	Normal School, Mayville	30 years	4	60,000
	Blind Asylum	20 years	6	20,000
	Reform School	20 years	4	20,000
	Deaf and Dumb Asylum	20 years	4	66,000
	State University	20 years	4	150,000
	Agricultural College	20 years	4	135,000
	Academy of Science	20 years	4	30,000
	Total	.....	....	$ 741,000

The principal of these bonds, together with the interest contracted to be paid, will amount approximately to $1,300,000; all of which under the terms of the several acts authorizing them, must be paid from the interest and income fund of the several state institutions for whose benefit they are issued. We will assume that the interest and income fund will be sufficient to meet the obligations, and again it is proper to say that this may be a questionable assumption, when we consider that the aggregate interest and income fund of all the institutions above named, from statehood to July 1st of the present year, amounted to but $94,959.04. But we shall assume that these funds will be adequate to pay the indebtedness of $1,300,000 represented by these bonds. Does it not follow necessarily that, when you withdraw this sum from the support and maintenance fund of these state institutions, you must restore it? And this can be done only by taxation. It is not important how you name the purpose of the tax so exacted. It may be termed a tax to maintain the institution, or a tax to replace moneys diverted from the interest and income fund. In its effect upon the taxpayer it is a tax imposed to pay the principal and interest on money borrowed by the state—a state debt, and one contracted in plain violation of the constitutional debt limit. The only plan—and it is one which in no way argues for the validity of the act—upon which it can be said that the interest and income of these institutions will pay the obligations of these instruments without a resort to taxation involves the

closing the institutions after the loans are made until such time as the debt and interest have been discharged from the interest and income fund. So long as the institutions are maintained and supported by the state, and taxation is resorted to, every dollar of the interest and income fund which is diverted must be restored by taxation. It is not suggested that it is a part of the policy of this legislation to close the doors of these institutions. This particular scheme of finance, while indigenous in the state, is not without its parallels. The state of New York at an early date engaged largely in works of internal improvement. It built and owned the Erie canal, and in doing so incurred a large state indebtedness, with the result that the entire subject was placed under constitutional control in 1846. The net annual revenue from the canal amounted approximately to $800,000. The Constitution required that the net revenues should be applied as follows: First, a fixed sum to pay the interest and apply on the principal of what was known as the "canal debt"; second, another fixed sum to apply upon the state debt known as the "general fund debt"; third, a definite sum to the general revenue fund of the state. It was then provided that, after satisfying the above requirements, "the remainder of the revenues of the said canal shall in each fiscal year be applied in such manner as the legislature shall direct to the completion of the Erie canal enlargement and the Genesee valley and Black River canals until the said canals shall be completed." In order to hasten the completion of the canal, the legislature of 1851 passed an act authorizing the comptroller to issue canal revenue certificates to the amount of $9,000,000, payable out of the surplus revenue of the canals above the amounts required by the constitutional provisions above referred to, and required that said certificates "shall purport on their face to be issued by virtue of this act and without any other liability, obligation or pledge on the part of the state than such as is contained in this act." Elsewhere the act provided that "the state shall in no event be liable to make up any deficiency in the canal revenue or to redeem the certificates from any other source than the canal revenues, as directed by the act." The question as to whether this act was in violation of the provisions of the Constitution forbidding the creation of a state debt in excess of $1,000,000 was presented to the Supreme Court of New York in the case of *Rodman* v. *Munson*, 13 Barb. 63, and to the Court of Appeals in *Newell* v. *People*, 7 N. Y. 9. In both cases it was held, after careful consideration, and upon

cogent reasoning, that the act authorized the creation of a state debt within the meaning of the Constitution, and this although the act in terms attempted to exempt the state from liability for any deficiency that might arise in the fund pledged for its payment. In addition to other reasons, the act was held to violate the Constitution in two respects: (1) It applied a part of the revenues to the payment of interest, instead of to the completion work, and (2) it authorized the contracting of a debt by the state in excess of the state debt limit. Ruggles, C. J., in discussing the question whether it created a state debt, used the following language, which meets our full approval: "It makes no difference whether the debt is contracted on the general credit of the state or on the credit of a fund belonging to the state. When the interest on a loan is raised by a tax it comes from the pockets of the people individually, when it is paid out of a fund belonging to the people, it is paid out of their common purse. In respect to the profit and loss of the transaction, the objection is as great to the one mode of borrowing as to the other. The chief object of the restraint imposed by the twelfth section of article 7 of the Constitution (the debt-limit section) upon the contracting of public debt was to protect the people against the exhausting burthen of paying interest." Johnson, J., in a concurring opinion, said: "If language has any meaning, the legal effect of the act, if valid, is at least to devote so much of the surplus revenues of the canals as shall actually be received after 1854 to the creation of a fund to pay the canal revenue certificates and the interest thereon. If this can be done in regard to one source of revenue, we see no reason why the same thing may not be done in regard to every source of revenue of the state, including not only all revenue which may arise from property, but also all which may be realized by the exercise of the power of taxation. Such an anticipation of revenue would no more create a debt than this bill does. It may be objected that there is a distinction between a pledge of the revenues of property owned by the state and of the revenues to be derived from taxation; but the distinction does not affect the question. Whatever consumes the revenues of the property of the state tends to render a resort to taxation necessary just to the extent to which the revenues from property have been consumed. It is, therefore, a matter of entire indifference whether one or another part of the resources of the state is drawn upon; for the substantial effect upon the financial condition of the state is the same in

either case. If the constitutional provision against incurring debts permits such a scheme as this to be effectual, it is of small moment to inquire what it prohibits, for it provides no practical restraint whatever upon the power of the legislature. To attribute such an intention to the convention or to the people as to permit the one and prohibit the other is to attribute to them an entire incapacity to comprehend the subject on which they were acting, and the effect of their own language. * * * State obligations assume every form which can tempt the possessor of money to part with it to the government, and are varied from time to time as one or the other seems most likely to accomplish the purpose of putting out promises and getting money in return. In all these forms one common attribute is found, and one only, towit, that, in consideration of money advanced to the state, the state promises whatever it is that will be most likely to procure money to be advanced, it matters not what; and that which is thus promised is debt. It may relate only to the income of particular property, or it may embrace the whole resources of the state. The extent of the obligation does not affect or qualify its nature. So long as there is an obligation assumed by the state, it constitutes a debt; something due from the state." We also quote from the concurring opinion of Edmunds, J. Upon this point he said: "It is said that it is not a debt, but merely anticipating the resources of the state as derived from the canals. Now, it seems to me that all debt, whether by individuals or states, is merely an anticipation of resources. Then, again, it is said that it is no debt because only a portion of the resources of the state are devoted to the repayment. Does the fact that every householder has certain property that is not liable for the payment of his debts destroy, or even change, the character of the obligation that rests upon him to repay money that he has borrowed? These, and such like suggestions, which were made to us on the argument, have not had the effect to persuade me that borrowing money is not contracting a debt." The views of Brown, J., who wrote the opinion in *Rodman* v. *Munson, supra,* in which the same act was involved, are expressed in language equally clear: "I cannot do otherwise than regard it as a loan—a loan of money to be repaid at a future day; not from the taxable property of the people of the state, or from the resources and revenues of the state generally, but qualifiedly and specially from that portion of its resources known as the 'remainders of the canal revenues.' There cannot be a loan of

money without a lender and a borrower, and there cannot be a contract of lending without creating a debt and an obligation to repay in some form and to some extent. The time of payment may be postponed to a distant day. The contract may provide that payment may be made in property, in current coin, or in a depreciated currency. It may be payable, as in the case of the canal certificates, from the proceeds of the income of certain specific property, but it remains a debt notwithstanding. The particular form or medium of payment, or the specific source from whence the means of payment is to be derived, may lessen or circumscribe the obligation of the debtor, but it cannot efface the obligation, or transform it into something which is to be recognized by another name, until the source from whence it is to proceed has failed, and the means of its payment is extinguished."

The same principal was involved in *City of Joliet* v. *Alexander* (Ill.), 62 N. E. 861. The city of Joliet owned a system of waterworks which netted an annual income of about $10,000. It desired to extend and improve the system. The city indebtedness was up to the constitutional debt limit, and the city council authorized the issuance of water fund certificates to the amount of $240,000, to be paid out of the waterworks fund, to which they were in terms limited; that is, it pledged the revenues of the plant, and mortgaged the plant itself to secure the loans evidenced by the certificates. It was held that the ordinance violated the constitutional debt-limit provision. It was said that, although no action could be maintained against the city, still, in common understanding, the certificates constituted a debt. "Where one party occupies the position of creditor and another of debtor, there is, in the common understanding, a debt. The state is not liable to be sued by its citizens upon any of its obligations, but no one would think of saying that the state is not indebted where it has issued bonds or certificates of indebtedness, and where there is a legal, moral, or equitable obligation to pay. * * * One who pawns or pledges his property, and who will lose the property if he does not pay, is indebted, although the creditor has nothing but the security of the property; and so, also, is a mortgagor who is liable to lose his property if he does not pay the money secured by the mortgage. No one would agree to the proposition that a city could obtain money by mortgaging the city hall, the buildings of the fire department, or other property of the city, without a promise to pay, but so as to enable

the creditor to take them in satisfaction of the loan, under a statute authorizing such action, and yet not create any indebtedness of the city. We see no difference between mortgaging the public buildings and property of the city and mortgaging its system of waterworks. * * * The ordinance proposes to take the income now derived from it, amounting to about $10,000 a year, and devote it to the payment of the certificates. This is existing property and income of the city, derived annually from the present system of waterworks, independent of the extension, and in no manner resulting from or depending upon it. The city is to lose property in the form of established income for the purpose of paying the certificates. If the city, being indebted beyond the constitutional limit, can issue certificates payable out of that fund without creating a debt, it would be equally within its power to issue obligations by pledging the fund derived from dramshop licenses, or licenses from hackmen, peddlers, theatres, or amusements, or any other funds of the city. All of the revenues of the city, except such as would be derived from general taxation, might in that way be pledged or mortgaged for long years to come; and we apprehend that no one would be found to say that such a scheme would not be a mere evasion of the Constitution. * * * It does not make any difference that the certificates are payable out of the special fund, if the city is the owner of the fund. All of its obligations are payable out of some particular fund. The city council is required, in raising money by taxation, to make appropriations, specifying the objects and purposes for which they are made, and the amount appropriated for each object and purpose. The money and appropriation raised for one purpose cannot be applied to any other, and the accounts of each fund and appropriation, and the debits and credits, belonging thereto, must be kept in a separate account. The debts chargeable to a particular fund are payable only out of that fund, and it makes no difference what fund they are chargeable to or payable out of, if the fund is one which belongs to the city. * * * The principle involved in special assessments, under which the warrants issued by a city do not constitute indebtedness of a city, cannot be applied to this case. The city is in no way liable for their payment, and never owns the fund out of which they are paid. *Quill* v. *City of Indianapolis*, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681. The improvement, when made, becomes the property of the city, but the cost and expense fall upon the property holder.

If more should be collected than will pay the warrants, it is rebated to the property owners. If the warrants are not paid, the remedy is confined to the property of individuals. A special assessment is a lien upon individual property, and not upon property of the city; but in this case the holders of certificates would have a right to take and appropriate a pre-existing income of the city for the payment of the certificates, and also to enforce payment by a sale of property of the city. The certificates would be in no sense chargeable upon the property of individuals, but solely upon the income and property of the city, including property already owned by the city." The case of *Mayor of Baltimore* v. *Gill,* 31 Md. 375, 390, is to the same effect, and we know of no cases in which the soundness of the reasoning of these cases has been questioned.

It was contended by counsel for the board "that the contemporaneous construction of all the departments of the state government settles the legality of the issue of these bonds and the investment of these funds in them." To this we cannot assent. The rule of construction which permits courts to resort to contemporaneous construction by nonjudicial officers has no application here. It is only when the language of the law or of the Constitution which is to be construed as ambiguous and doubtful that courts are authorized to resort to such extrinsic sources of interpretation. To follow the practical construction placed upon their authority by the legislature and by the officers charged with the duty of administering this trust would be to abolish the plain provisions of the Constitution without the formality of taking a popular vote. The true rule is stated in Cooley's Const. Lim. 83, as follows: "Contemporary construction * * * can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries. * * * Acquiescence for no length of time can legalize a clear usurpation of power where the people have plainly expressed their will in the Constitution, and appointed tribunals to enforce it."

The question whether the interest and income dedicated by Congress "to be expended in the support of" this and the other educational institutions of the state can lawfully be used to erect buildings and make permanent improvements, or whether it can only be used for current expenses, was discussed at considerable length by counsel. On this point the Supreme Court of Washington, in reference to the interest and income fund belonging to the common

schools, in *Sheldon* v. *Purdy*, 49 Pac. 230, said: "This fund, under the Constitution, is devoted to the support of the public schools. That portion coming from the irreducible common school fund is devoted to the payment of current expenses. The building of new schoolhouses and the purchase of schoolhouse sites do not come within any authorized signification of 'current expenses.' Neither do they come within any well defined acceptation of 'support of the common schools.' Both the terms 'support' and 'current expenses,' when applied to the common schools of this state, mean continuing regular expenditures for the maintenance of the schools. Building a new schoolhouse and purchasing a site, while at times necessary and proper, are, as a rule, unusual and extraordinary expenditures." Whether this construction should govern in this state we shall not determine. This question is not involved in this case. The act under consideration does not appropriate the interest and income of the normal school to erect buildings. On the contrary, under the terms of this act, the state borrows money and erects the buildings from the borrowed funds, and the act appropriates the interest and income of the institution, not to erect the building, but to pay the debt which the state has contracted for the borrowed money. Under this act the state proposes to borrow $60,000, and invest it in buildings and equipments, and to meet the obligations of the loan it appropriates from the interest and income fund of this institution, dedicated to its support, the sum of $97,200, to pay the debt thereby contracted. It does not appropriate the funds, either to erect buildings or to pay current expenses, but to pay the principal and interest of a state debt. The people of this state, in their Constitution, in plain language limited the authority of the legislature to contract state debts to $200,000, and in language equally plain they restricted the board of university and school lands to four kinds of securities for investing the permanent educational funds. If, as is contended, securities of the kind designated by the Constitution cannot be had in sufficient amount to absorb the funds available for investment, the people alone can furnish the remedy by an amendment to the Constitution. Indeed, an amendment was proposed by the recent legislature, and referred to the next legislature, which, if approved by the people, will authorize the board of university and school lands to invest the moneys of the permanent school funds and other educational funds in bonds of counties, townships, and municipal bonds, in addition to these classes now

authorized. So, too, if the debt limit is in fact too low, the people alone can remove the limitation. The legislature cannot repeal it, or amend it, or nullify it by evasion. The question of the state debt limit was the subject of extended consideration by the members of the constitutional convention. Some favored placing no restriction upon legislative power; others favored a limitation as low as $50,000. As a result of compromise, the amount to which the legislature might contract was limited to $200,000, and for the further protection of the credit of the state it was required that the act authorizing the creation of the debt should make provision for payment of the principal and interest by an irrepealable tax levy; and, further, that "no bond or evidence of indebtedness by the state shall be valid" unless the same shall have indorsed thereon a certificate showing that it is within the debt limit. The fixing of the state debt limit was and is a matter for the people to determine for themselves as a matter of state policy. They saw fit to fix it at $200,000, and until it is altered by them it must be respected by the legislature. The three states admitted into the Union with this state under the same enabling act fixed their debt limits as follows: Montana and South Dakota at $100,000, Washington $400,000. California, Nebraska, and Wisconsin each have a debt limit of $100,000, Minnesota $250,000, and Michigan $50,000. By a comparison of population and resources, it can hardly be said that the framers of our Constitution were ungenerous in the limit placed upon legislative power.

It is patent that the board of university and school lands, in purchasing these bonds, merely followed the financial policy of the legislature. The act under consideration, while it does not command the board to purchase the bonds, for the legislature has no such power under the Constitution, commands that they "shall first be offered for sale to the board." Indeed, it is not too much to say that it was the legislative purpose, in authorizing the issuance of this class of bonds, to have the permanent educational funds invested in them. In yielding to this legislative policy, the board was clearly in error, and in doing so violated the plain provisions of the Constitution, which mark the limit of their authority and prescribe their duty. When the Constitution speaks, its voice is supreme, and its mandates are to be obeyed by all departments and all officers of the state government.

The members of this court are not unmindful of the embarrassment to this and other state institutions which are looking to moneys derived from these proposed loans for buildings and improvements which will follow our decision. This will be temporary, however, and is of small consequence compared with the permanent injury which would be done to the people of the state if the courts, to which they have committed the preservation of their constitutional rights and the integrity of the Constitution itself, should fail in the performance of their duty. It follows from what we have said that the state treasurer, as the custodian of the permanent school fund, acted in accord with his legal duty in refusing to pay the warrant drawn for the proposed illegal investment.

The writ prayed for will be denied. All concur.

(96 N. W. 310.)

FREDERICK D. WELLS AND MARY DREW WELLS *v.* JACOB GEYER AND MARIAN GEYER.

Opinion filed August 8, 1903.

Deed As Mortgage.

1. An absolute deed and a contemporaneous agreement to sell and reconvey lands between the same parties for equal considerations, repayment to be made in future payments at 8 per cent interest, time being of the essence of the contract to reconvey, construed, and *held* to constitute a mortgage.

Surrender of Right of Redemption.

2. A subsequent agreement by the mortgagor in possession to surrender possession and relinquish right to redeem, made by mutual mistake, and without adequate consideration, *held* not enforceable.

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

Action by Frederick B. Wells and another against Jacob Geyer and another. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Guy C. H. Corliss, for appellants.

The evidence is not of such conclusive character as is required to change an absolute deed into a mortgage. *Lee* v. *McGuin*, 10 N. D. 160, 86 N. W. 714. The release of a vendor from further obli-

gation to pay the purchase price under the contract, is a sufficient consideration for a release by the vendee of the obligation to convey the land. *Kevello* v. *Taylor,* 5 N. D. 76, 63 N. W. Rep. 889; Bishop on Contracts, Sec. 812-813; Clark on Contracts, 192; Anson on Contracts, 338; Lawson on Contracts, 392; Rev. Codes 3931-3932. The obtaining of an undisputed right in place of a controverted right, constitutes ample consideration, even if it afterwards turns out that the right was entirely with one of the parties; that he had really given away something of value. 6 Am. & Eng. Enc. Law, 713; *McGlynn* v. *Scott,* 4 N. D. 18, 58 N. W. Rep. 460. The release given by Geyer to Wells being not an executory agreement, but an executed cancellation, no consideration is necessary to support it. It is only executory agreements in respect to which a consideration is necessary. This is apparent from the very nature of the case. 1 Parsons on Cont. 6; *Sturgis* v. *Crowningshield,* 4 Wheaton 197, 4 L. Ed. 118; Bishop on Cont., Sec. 22; 1 Chitty on Contracts, 7; Clark on Cont., 2. The only way in which Geyer and wife could get rid of the release was by a proceeding to set it aside as void. *Och* v. *Missouri, etc., R. R. Co.,* 31 S. W. Rep. 962; *Vandervelden* v. *R. R. Co.,* 61 Fed. Rep. 54; *George* v. *Tait,* 102 U. S. 564, 26 Law Ed. 232; *Hormith* v. *Ry. Co.,* 129 Mo. 629; *Papke* v. *Hammond Co.,* 61 N. E. 910. Equity will not relieve for a mistake of law. *Benson* v. *Bunting,* 127 Cal. 532, 59 Pac. Rep. 991; *Kirschener* v. *New Home, etc., Co.,* 135 N. Y. 182, 31 N. E. Rep. 1104; *Kleimann* v. *Gieselmann,* 114 Mo. 437; *Snell* v. *Atlantic Ins. Co.,* 98 U. S. 85, 25 L. Ed. 52; *Robinson* v. *Smith,* 11 Tex. 211, 2 Pom. Eq. Jur. 842, 846, 847.

Campbell & Radcliffe and *Templeton & Rex,* for respondents.

Upon offering to pay full amount of the debt due the plaintiff with interest, defendants were entitled to be relieved from forfeiture. Rev. Codes, Sec. 4970; *Barnes* v. *Clement* (S. D.), 81 N. W. Rep. 301; *Frank* v. *Thomas,* 25 Pac. Rep. 717. It is doubtful if a stipulation for retention of payments as liquidated damages can be enforced in this state. Rev. Codes, Sec. 3923, 3924; *Barnes* v. *Clement, supra.* The vendee is held to as strict compliance with the conditions of the contract by him to be performed as the vendor to his. 2 Warvelle on Vendors, 815; *Case* v. *Walcott,* 33 Ind. 5, 20, 22, Rev. Codes 3776. Accepting payments subsequent to mailing notice of intention to forfeit, was a waiver of the right to rely

upon such attempted forfeiture. *Pulman* v. *Cheney,* 25 N. W. Rep. 495; *White* v. *Atlas Lumber Co.,* 68 N. W. Rep. 359; *Hutchins* v. *Munger,* 41 N. Y. 155; *O'Rourke* v. *Hadcock,* 114 N. Y. 541, 22 N. E. 33; *Stewart* v. *Cross,* 66 Ala. 22; *Allen* v. *Woodruff,* 96 Ill. 11, 20; Warvelle on Vendors, Sec. 819; *Ross* v. *Page,* 11 N. D. 458, 92 N. W. Rep. 822. Tender of a deed is unnecessary when the vendee forfeits for an installment, and there are other payments not due at time of forfeiture; but if all the installments are then due, such attempted forfeiture is of no effect, unless a tender of deed has been made. *Eddy* v. *Davis,* 116 N. Y. 247, 22 N. E. 362; *McCroskey* v. *Ladd,* 31 Pac. 558; *Underwood* v. *Tew,* 34 Pac. 1100; *Tronson* v. *Colby University,* 9 N. D. 559, 84 N. W. Rep. 474; Black on Modern Law of Contract, Sec. 913. The attempted forfeiture was ineffectual, as plaintiffs did not offer to return defendants' notes until long after the latter had tendered the full amount due under the contract. *Frank* v. *Thomas,* 25 Pac. 717; *Luaboda* v. *Cheney,* 28 Fed. 500; *Comstock* v. *Brosseay,* 65 Ill. 39; *Staley* v. *Murphy,* 47 Ill. 24. Plaintiff could not forfeit the contract without returning the payment on the contract, as the latter contained no stipulation that in case of default all payments might be retained as liquidated damages. *Staley* v. *Murphy, supra,* Rev. Codes, Sec. 3934, Sub. 2; *Barnes* v. *Clement,* 81 N. W. Rep. 301, Rev. Codes 4970, 3923, 3924. The release was without legal effect, the same having been executed under a mutual mistake of the law, Rev. Codes, sections 3836, 3841, 3843, 3844, 3852, 3854; *Arnett* v. *Smith,* 11 N. D. 55, 88 N. W. Rep. 1037, 1042; *Wheeler* v. *Smith,* 9 How. 55, 13 L. Ed. 44; *Gregory* v. *Clabrough Ex'rs,* 62 Pac. 72; *Benson* v. *Markoe,* 37 Minn. 30, 33 N. W. 38; *Lane* v. *Holmes,* 55 Minn. 379, 57 N. W. Rep. 132. Under the facts of the case the order of the court permitting the service and filing of the second answer was not error. *Martin* v. *Luger Furn. Co.,* 8 N. D. 220, 77 N. W. 1003; *Bowers* v. *Thomas,* 22 N. W. Rep. 710; *Whipple* v. *Fowler,* 60 N. W. Rep. 15; *Neale* v. *Neale,* 9 Wall. 1 (U. S.) 19 L. Ed. 590; *Wiggins Ferry Co.* v. *O. & Miss. R. Co.,* 142 U. S. 396, 35 L. Ed. 1055; *Barnes* v. *Heklo Ins. Co.,* 39 N. W. Rep. 122; *Wells* v. *World's Dispensary,* 120 N. Y. 630, 24 N. E. Rep. 276; *Fowler* v. *Bowery Savings Bank,* 113 N. Y. 450, 21 N. E. Rep. 172.

The release was without legal effect because it was not based upon an adequate consideration. So far as this proposition is concerned, it is immaterial whether the original transaction was a con-

ditional sale or mortgage. If a conditional sale, defendants were equitable owners of the land and their equitable rights were similar to those of a mortgagor. *Shelly* v. *Mikkelson,* 5 N. D. 22, 63 N. W. Rep. 210; *Nearing* v. *Cook,* 6 N. D. 345, 70 N. W. Rep. 1044; *Plummer* v. *Kelly,* 7 N. D. 88, 73 N. W. Rep. 70; *St. Paul & T. Lumber Co.* v. *Bolton,* 32 Pac. 787; *Church* v. *Smith,* 39 Wis. 492; *Northrup* v. *Trask,* 39 Wis. 515; *Superior, etc., Land Co.* v. *Nichols,* 51 N. W. Rep. 878; *Wells* v. *Francis,* 4 Pac. 49; *Connor* v. *Banks,* 52 Am. Dec. 209; *Moses Bros.* v. *Johnson,* 16 Am. St. Rep. 58; *Moor* v. *Anders,* 60 Am. Dec. 551; *Strickland* v. *Kirk,* 51 Miss. 795; *Miller* v. *Miller,* 25 N. J. Eq. 354.

Deed, and a contemporaneous agreement to reconvey, on payment of debt due from grantor to grantee, at time of conveyance, is conclusively presumed to be a mortgage. *Clark* v. *Landon,* 90 Mich. 83, 51 N. W. Rep. 357; *Watkins* v. *Williams,* 31 S. E. Rep. 388; *Kelly* v. *Leachman,* 29 Pac. 849; *Snow* v. *Pressey,* 82 Me. 522, 20 Atl. 78; Jones on Mortgages, 5th Ed. 244; Gunn's Appeal, 10 Atl. 498; *Weisham* v. *Hocker,* 54 Pac. Rep. 464; *Frey* v. *Campbell,* 3 S. W. Rep. 368.

When the evidence leaves the mind of the court in doubt, the transaction should be held a mortgage. *Jeffrey* v. *Robbins,* 167 Ill. 357, 47 N. E. Rep. 725; *Book* v. *Beasley,* 40 S. W. Rep. 101; *Niggeler* v. *Maurin,* 34 Minn. 118, 24 N. W. Rep. 369. The latter case approved in *O'Toole* v. *Omlie,* 8 N. D. 444, 79 N. W. Rep. 849.

GLASPELL, J. The plaintiffs bring this action to recover the possession of certain lands, of which they claim to be owners. The defendants present, as an equitable defense, the contention that the deed by which such lands were conveyed by the defendants to the plaintiffs, and the contemporaneous agreement by which it was agreed that they were to be reconveyed to defendants, constitute merely a mortgage, which authorized them to retain possession and to redeem. The defendants have not waived their right to a jury trial upon the issue respecting plaintiffs' right to possession; still the determination of the equitable issues in favor of the defendants has put an end to the litigation, and obviates the necessity of trying the legal issues involved. *Arnett* v. *Smith* (N. D.), 88 N. W. 1037. This action was tried to the court without a jury, and is brought to this court for trial *de novo,* under section 5630, Rev. Codes 1899.

The defendant Geyer was in possession, and farmed the lands in question as a tenant during the farming season of 1899 and for a number of years prior thereto. During the fall of that year he had so far concluded negotiations with the then owner of the land for its purchase at an agreed price of $6,000 that a deed had been executed running to Geyer and wife, and deposited in Grand Forks, to be delivered upon payment of the purchase money. The land was then worth between $8,000 and $10,000, and at the time of the trial it was probably worth $12,000. Geyer did not succeed in securing the money necessary to pay the purchase price until he applied to one McWilliams, who represented the plaintiff Wells, and the latter agreed on or about December 13, 1899, to furnish Geyer the money necessary to pay his vendors, upon the condition that Geyer and wife would execute and deliver to him an absolute deed of the premises. Wells at the same time, and as part of the same transaction, agreed to make a separate written contract to reconvey to Geyer upon payment of $5,750, with 8 per cent interest, in certain future payments. Wells furnished $6,000 to pay the former owners, of which sum of money Geyer contributed and paid Wells $250. The former owners then conveyed to Geyer, and he conveyed to Wells, and the latter agreed to reconvey upon the payment of $5,750. Geyer failed in making payment at the time stipulated, and, time being stated as of the essence of the contract, Wells attempted to declare a forfeiture and to recover possession. After receiving notice declaring a forfeiture and to vacate the premises, Geyer and wife executed, on January 21, 1902, in consideration of the plaintiffs permitting them to occupy the said premises until April 1, 1902, an agreement in writing, wherein they admitted failure to pay a note for $500, due November 1, 1900, and other defaults, and agreed to remove from said premises and to surrender the possession thereof and to abandon the further occupancy, use, or control thereof. The defendants contend that the deed and contract to reconvey constitute a mortgage, and that the later agreement stipulating for a surrender of the premises was made by mutual mistake of law, and without consideration.

The first question for consideration is whether the original transaction between these parties constituted a loan of money merely, or an absolute conveyance of title. To declare the deed and contract to reconvey a mortgage requires a showing that is clear, satisfactory, and specific. *Jasper* v. *Hazen,* 4 N. D. 1, 58 N. W. 454,

23 L. R. A. 58; *McGuin* v. *Lee,* 10 N. D. 160, 86 N. W. 714. The evidence and circumstances in this case satisfy us beyond hesitation or substantial doubt that it was the intention of these parties to make and receive a loan of money. The transaction created the relation of mortgagor and mortgagee between Geyer and Wells. Supporting this view is the positive testimony of Geyer, who began oral negotiations about September 20, 1890, with McWilliams, the authorized agent of Wells. Geyer swears that McWilliams told him that Mr. Wells would let him have the money at 8 per cent straight, provided he would give a deed of the farm, as security. It was understood by and between Geyer and McWilliams, who represented Wells, that the deed and contract to reconvey were intended merely as security. This evidence is uncontradicted. McWilliams does not testify, nor is his silence explained. A similar omission was said in *O'Toole* v. *Omlie,* 8 N. D. 444, 79 N. W. 849, to be significant and important. Wells claims that he bought the land. He was seeking for investment, "not only for interest, but for prospective profit." He says further: "Q. Did you expect, at the time you put your money in it, to get control of that land? A. I felt practically certain of it, although I was perfectly willing to give the man a chance to pay for his land. Mr. McWilliams, in laying the proposition before me, stated that the chances were nine out of ten in favor of my getting the land sooner or later; otherwise I should not have felt inclined to make a contract to sell the land to Mr. Geyer at identically the price which I paid for it." In answer to another question he replies, "I felt that, if I did not get the land, I would get the interest on the money." He apparently knew that Geyer regarded the transaction as a loan. In writing to Geyer on November 14, 1899, he said, "As you know, I have volunteered to assume the indebtedness of $5,500 on your farm." Again, on November 22d, he writes that the interest must be 8 per cent per annum, and says: "I am taking this deed as an accommodation to you, as well as an investment for myself, and I do not care, after I have carried you for four or five years, to have some other parties step in and take the deal off my hands by shading the interest rate a trifle. I am willing to carry you through until the farm is paid for in accordance with the contract, at this rate, and I cannot see how it will work any hardship against you." Before the execution of the contract for a deed, Geyer had paid Wells $250, leaving the amount to be advanced by the latter $5,750. It

is plain that Wells himself considered his deed as a security at the time it was executed and delivered, however much he then may have thought that he would ultimately acquire title to the property. Such being the mutual understanding, the case is brought within the provision of section 4701, Rev. Codes 1899: "Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage." In *Peugh* v. *Davis,* 96 U. S. 332, 24 L. Ed. 775, Field, J., delivering the opinion, says: "It is an established doctrine that a court of equity will treat a deed absolute in form as a mortgage when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction, and, when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. As the equity upon which the court acts in such cases arises from the real character of the transaction, any evidence, written or oral, tending to show this, is admissible." Under the evidences and circumstances in this case, and especially considering the particular circumstances, viz., that the value of the property was much greater than the sum of money advanced by the plaintiffs, the embarrassed financial condition of the defendants, the agreement to pay 8 per cent interest, the deed and sale contract being contemporaneous and for the same consideration, we find no difficulty in concluding that the relation between the parties to this action is that of mortgagor and mortgagee. This conclusion finds support in the following cases: *O'Toole* v. *Omlie,* 8 N. D. 444, 79 N. W. 849; *Niggeler* v. *Maurin,* 34 Minn. 118, 24 N. W. 369; *King* v. *McCarthy,* 50 Minn. 222, 52 N. W. 648; *Yankton Bldg. & Loan Ass'n* v. *Dowling* (S. D.), 74 N. W. 438; *Saunders* v. *Ayers* (Neb.), 88 N. W. 526; *Huscheon* v. *Huscheon* (Cal.), 12 Pac. 410; *Beebe* v. *Wis. etc., Mfg. Co.* (Wis.), 93 N. W. 1103; *Voss* v. *Eller,* 109 Ind. 260, 10 N. E. 74; *Clark* v. *Woodruff* (Mich.), 51 N. W. 357; *Keithley* v. *Wood,* 151 Ill. 566, 38 N. E. 149, 42 Am. St. Rep. 265.

Plaintiffs, because of defaults in payments which were due, sought to gain possession by notice addressed to and served upon the defendants, declaring a forfeiture, and requiring defendants to vacate the premises. Acting under the mutual mistake of law that the defendants' rights could be thus forfeited, the agreement was made, as already stated, that the Geyers might remain in possession until April 1, 1902, when they should vacate, and surrender all rights

and claims in or to the land. Afterward they repudiated the agreement, continued in possession, and claimed that such agreement was made by mutual mistake of law, and wholly without consideration. Both plaintiffs and defendants construed the contract to mean that the defendants' rights might be forfeited for default in the manner that was attempted. It was not understood by either of the parties that a period of redemption remained during which the mortgagee was entitled to remain in possession. The permission granted to the defendants to remain in possession until April 1, 1902, was not a consideration, since it granted no right or privilege which they did not already possess. The agreement referred to purported to surrender more than the mere possession of the mortgaged premises, which might be done without a new consideration. Section 4722, Rev. Codes. In effect it declared the transaction between the parties to be an absolute deed and conditional sale, and the latter forfeited without the right of redemption. In truth, the agreement was a mortgage that entitled the mortgagors to the possession of the mortgaged premises, and a period of one year after foreclosure sale for redemption. While the right of redemption may be surrendered, such must be the intention of the parties, and grounded on a new and adequate consideration. Equity will not recognize an agreement to waive the right of redemption, where such agreement is made simultaneously with the execution of the mortgage. In *Peugh* v. *Davis,* 96 U. S. 337, 24 L. Ed. 775, the court said: "It is an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has, in a court of equity, the right to redeem the property upon the payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates. Its maintenance is deemed essential to the protection of the debtor, who, under pressing circumstances, will often submit to ruinous conditions, expecting or hoping to be able to repay the loan at its maturity, and thus prevent the conditions from being enforced and the property sacrificed." According to the agreement to surrender or release, made January 21, 1902, Geyer was owing Wells about $6,050, and he was granted permission to remain in possession until April 1, 1902, when he should vacate and surrender all rights in or to the mortgaged lands, including his right of redemption.

The premises were ample in value to secure the debt, and, as we have seen, Wells parted with nothing of value, and Geyer received no advantage or benefit whatever. The contract is, therefore, unsupported by an adequate consideration. It has not been executed by either party. Geyer repudiated the agreement before the time came to move out, and retained possession; and Wells retained the Geyer notes until some time after such repudiation. The release was signed January 21, 1902, and on February 10th following Geyer tendered money sufficient to pay the mortgage debt. Wells held the notes until March 21, 1902, before offering to return them. He could not retain the notes and at the same time claim that defendants had executed a release and had no further rights under the contract. *Svaboda* v. *Cheney* (C. C.), 29 Fed. 500 504; *Comstock* v. *Brosseau,* 65 Ill. 39, 43. It has been judicially determined that such transactions will be regarded with great jealousy by courts of equity, and will only be sustained if perfectly fair, and for an adequate consideration. *Moeller* v. *Moore* (Wis.), 50 N. W. 396; *Odell* v. *Montross,* 68 N. Y. 504; *Baugher* v. *Merryman,* 32 Md. 192; *Bradbury* v. *Davenport* (Cal.), 46 Pac. 1063, 55 Am. St. Rep. 92; *Jones* v. *Franks* (Kan.), 6 Pac. 789.

The trial court found that defendants did not receive adequate consideration for the execution of the waiver or relinquishment, and allowed the defendants, or either or them, to redeem. A sufficient tender of payment being made, the final judgment declares that the defendant Marian A. Geyer is the true and lawful owner of the premises in controversy, and such judgment is affirmed.

YOUNG, C. J., and MORGAN, J., concur. COCHRANE, J., having been of counsel in the court below, took no part in deciding the case; S. L. GLASPELL, Judge of the Fifth Judicial District, sitting in his stead.

(96 N. W. Rep. 289.)

HANS C. DAHL *v.* ANDREW STAKKE AND EDWARD J. STAKKE.

Opinion filed August 11, 1903.

Sufficiency of Evidence to Sustain Verdict Reviewable On Appeal Without Exception to Direction of Verdict.

1. The trial court directed a verdict for the plaintiff, and no exception was taken to such direction. The defendant moved for a new trial, and specified as grounds for granting the same that the evidence was insufficient to sustain the verdict. Upon an appeal from the order denying the motion for a new trial, it is *held* that the sufficiency of the evidence to sustain the verdict is reviewable in this court, although no exception was taken to the direction of a verdict. *De Lendrecie* v. *Peck*, 48 N. W. 342, 1 N. D. 422, overruled as to this point.

Covenant Against Existing Incumbrances Broken, When Deed Is Delivered.

2. A covenant against incumbrances in a warranty deed is broken when made, if incumbrances exist on the land conveyed when the deed is delivered.

Title to Land Free From Incumbrances, Not Covenant Against Them the Real Consideration of Purchase.

3. The real consideration for a promissory note given for the purchase price of land conveyed by warranty deed containing a covenant against incumbrances is the title to the land free from incumbrances, and not the covenant against incumbrances.

When Maker Has Paid Off Such Incumbrances, Defense of Total or Partial Failure of Consideration May Be Pleaded Against Such Note.

4. The defense of a total or partial failure of consideration may be interposed, in an action on promissory notes given for the purchase price of land, in case of a breach of a convenant against incumbrances, when the maker has paid off the incumbrance.

Amount So Paid, In Good Faith, Extent of Such Failure.

5. The extent of the failure of consideration will depend upon the amount paid in good faith by the maker for a discharge of the incumbrance.

Defense May Be Interposed, Although Maker Has Remained In Possession.

6. Such defense may be interposed in such cases although the maker of the note has remained in continuous possession of the premises sold.

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

Action on purchase money notes by Hans C. Dahl against Andrew J. Stakke and another. Judgment for plaintiff, and defendants appeal.

Reversed.

Halvor Steenerson, Charles Loring and Gordon & Lamb, for appellants.

The note described in the first cause of action is barred by the statute of limitations. Section 5201, Rev. Codes 1899. It was given July 1, 1891, and was payable December 1, 1892, and the action was not begun until November 27, 1899. The evidence showed no new promise, or payment to take it out of the statute. The claim of payment of $38.73 on October 12, 1893, is not proven. If not barred, on account of a payment of $163.73 on October 10, 1893, by Andrew J. Stakke, the verdict for the full amount sued for, is not sustained by the evidence, and the directed verdict for full amount sued for is certainly erroneous.

The consideration for both notes has wholly failed.

When plaintiff conveyed to defendant, the tracts of land described in the complaint, by warranty deed, there was a mortgage on each tract in contravention of the covenants of the deed; each was foreclosed and title to the land perfected in third parties. This is undisputed.

By his objection to the introduction of evidence showing such mortgages, their foreclosure and perfection of title thereunder, in third parties, respondent is presumed to be acting under the obsolete rule, viz: "That where a promissory note was given for the purchase price of land conveyed by deed containing covenants of warranty and seizin and the title to the land failed, the covenants in the deed formed a sufficient consideration for the notes, and that the purchaser could not plead failure of title as a defense, but must pay the note and for his relief resort to a cross action on the covenants." This has now been superseded by the more salutary one "where there has been a total failure of title, to allow this to be set up in defense to an action upon the note as a total failure of consideration." 6 Am. & Eng. Enc. of Law (2d Ed.), 789. *Nichols & Shepard Co.* v. *Soderquist,* 80 N. W. Rep. 630; *Durment* v. *Tuttle,* 52 N. W. Rep. 909; *Rice* v. *Goddard,* 14 Pick. 296; *Cook* v. *Mix,*

11 Conn. 432; *Fleetwood* v. *Brown,* 9 N. E. Rep. 352, 11 N. E. Rep. 779; *LaPene* v. *Delaporte,* 27 La. Ann. 252.

Actual eviction not necessary, before the defense of failure of consideration can be interposed in an action on the notes given for the purchase price of land, where the purchaser has bought in an outstanding paramount title, against which his grantor has covenanted. 8 Am. & Eng. Enc. of Law (2d Ed.), 108.

Spencer & Sinkler, for respondent.

There was a directed verdict in the court below. There were no objections to evidence nor exceptions to the rulings of the court. No exceptions were taken to court's directing a verdict for the plaintiff. There is no exception in the entire record.

No exception being taken, there is nothing for the court to consider. Without an exception, the court cannot consider whether the trial court erred in directing a verdict. *De Lendrecie* v. *Peck,* 1 N. D. 422, 48 N. W. Rep. 342; *Kirch* v. *Davies,* 11 N. W. Rep. 689; *Anstedt* v. *Bentley,* 21 N. W. Rep. 807; *Geisenger* v. *Beyl,* 37 N. W. Rep. 423; *Selby* v. *Detroit Ry. Co.,* 81 N. W. Rep. 106; *London & Northwest American Mtg. Co.* v. *McMillan,* 80 N. W. 841; *Franzer* v. *Phillips,* 77 N. W. Rep. 668; *D. M. Osborne & Co.* v. *Williams,* 35 N. W. 371; *McCormack* v. *Phillips,* 4 Dak. Ter. 506, 34 N. W. Rep. 39; *Lomstead* v. *Nat'l Life Ins. Co.* 7 N. W. Rep. 403; *McKinnon* v. *Atkins,* 27 N. W. Rep. 564.

Appellants further contend that the consideration for the note sued on has wholly failed. Under the state of the record the court cannot examine the evidence to determine this point. If it could do so, plaintiff must still recover. A vendee cannot dispute his vendor's title nor the possession or right under which he enters, nor can he purchase an outstanding title to the exclusion of his vendor; if he does, such title inures to his vendor's benefit. *Lacey* v. *Davis,* 66 Am. Dec. 529; 25 Am. & Eng. Enc. of Law 707; 2 Desty on Taxation, 929; 29 Am. & Eng. Enc. of Law 127; *Bond* v. *Montague,* 54 S. W. Rep. 403; *Curran* v. *Banks,* 82 N. W. Rep. 247.

In an action for the purchase price of land by the vendor, against the vendee, the latter cannot defend for failure of consideration by reason of failure of consideration, on account of an outstanding paramout title in another, unless he has been evicted or shows the vendor to be insolvent. *Proce* v. *Hubbard,* 65 N. W. Rep. 436; *Hefflin* v. *Phillips,* 11 So. Rep. 730; *Frank* v. *Riggs,* 9 So. Rep. 359;

Thompson v. *Shepard,* 5 So. Rep. 334; *Elder* v. *Bank,* 42 S. W. Rep. 124; *Coleman* v. *Bank,* 22 So. Rep. 84; *Stave Co.* v. *Smith,* 22 So. Rep. 275; *Egan* v. *Yeaman,* 46 S. W. Rep. 1012; *Foster* v. *Lyons,* 44 S. W. Rep. 625; *Walker* v. *Arnold,* 44 Atl. Rep. 351; *Zerfing* v. *Seeling,* 80 N. W. Rep. 140; *Nathans* v. *Steinmeyer,* 35 S. E. Rep. 733; *Warren* v. *Clark,* 24 S. W. Rep. 1105.

The pleadings must allege eviction by party having a paramount title. *Jones* v. *Jones,* 7 S. E. Rep. 886; *Sedgwick* v. *Hollenback,* 7 Johns. 346; *Burke* v. *Beverage,* 15 Minn. 160; *Maybury* v. *Thornton,* 1 S. E. Rep. 909.

If a grantor at the time of conveyance is in exclusive possession under claim of title, the covenant of seisin is not broken until the purchaser or those claiming under them are evicted by title paramount. *Backers* v. *McCoy,* 17 Am. Dec. 585; *Devore* v. *Sunderland,* 49 Am. Dec. 442.

A decree of foreclosure and sale does not constitute an eviction. *Waldrons* v. *McCarty,* 3 Johns. 236; *Van Slyck* v. *Kimball,* 8 Johns. 197; *Miller* v. *Watson,* 5 Cowen 190; *Wagner* v. *Finnigan,* 55 N. W. Rep. 1129.

MORGAN, J. On the trial in the District Court, the court directed a verdict in plaintiff's favor for the full amount claimed in the complaint. The defendants saved no exceptions to rulings made during the progress of the trial, and took no exception to the direction of a verdict in plaintiff's favor. The respondent now claims that this court cannot review any of the errors alleged to have been committed by the District Court, for the reason that no exceptions were taken to any of the rulings in the District Court. The appellants moved to set aside the verdict and for a new trial upon a settled statement of the case, and, among other grounds of such motion, specified that the evidence was insufficient to justify the verdict. The particulars wherein such evidence was insufficient to justify the verdict were pointed out and specified in such motion. The specifications of error in the statement of the case contained, among others, one that the court erred in directing a verdict in favor of the plaintiff. The question is therefore presented whether the sufficiency of the evidence to sustain the verdict can be reviewed in this court when no exception was taken to the direction of the verdict, but a motion for a new trial was made on the ground that the evidence is insufficient to sustain the verdict. Section 5463, Rev. Codes

1899, provides that the verdict of the jury and an order granting or denying a motion for a new trial are, among other matters, "deemed to have been excepted to, and the same may be reviewed both as to questions of law and the sufficiency of the evidence upon motion for a new trial, or upon appeal, as fully as if exception thereto had been expressly made." Section 5627 provides: "Upon an appeal from a judgment, the Supreme Court may review any intermediate order or determination of the court below, which involves the merits or necessarily affects the judgment appearing upon the record transmitted or returned from the district court, whether the same is excepted to or not."

This court held, in *De Lendrecie* v. *Peck*, 1 N. D. 422, 48 N. W. 342, that the action of a trial court in directing a verdict cannot be reviewed on appeal when no exception was taken to such action. That is a correct statement of the law in cases where no subsequent proceedings were brought before the court to review the correctness of that ruling. In other words, the correctness of the trial court's rulings must be somewhere challenged in that court before the appellate court will review the erroneous ruling complained of. *Kirch* v. *Davies* (Wis.) 11 N. W. 689; *McGary* v. *De Pedrorena*, 58 Cal. 94. The case of *De Lendrecie* v. *Peck, supra*, goes further, however, and holds that the sufficiency of the evidence to sustain a verdict cannot be reviewed on appeal even when its correctness is challenged on a motion for a new trial based on the sufficiency of the evidence. We cannot follow that decision in so holding. To the direction of the verdict there was no exception. That fact rendered the ruling not reviewable as an error of law occurring at the trial. But the sufficiency of the evidence to justify the verdict was subsequently challenged on a motion for a new trial, in which the insufficiency of the evidence to sustain the verdict was urged as a ground for reviewing the evidence and granting a new trial. This motion was denied. The statute grants an exception to the ruling denying a new trial, and it is not therefore necessary that one be taken by the party. The order denying a new trial is an order involving the merits and necessarily affecting the judgment, and may be reviewed on an appeal from the judgment, whether excepted to or not, under section 5627, Rev. Codes 1899. A case in point is *Morris* v. *National Pro. Society*, 106 Wis. 92, 81 N. W. 1036, in which it is said: "It is true that

no exception was taken to the denial of the motion to direct a verdict for defendant, but a motion was made to set aside the verdict and for a new trial, which was overruled, and it has been distinctly held that, where it appears by the record that such a motion has been denied, this court may, on appeal from the judgment and without exception to the order, examine the record to see whether there was any evidence to support the verdict, and if there was none, or if there was a clear preponderance the other way, may reverse the judgment on that ground. *Tourville* v. *Nemadje B. Co.,* 70 Wis. 81, 35 N. W. 330. See, also, *Webster* v. *Phoenix Ins. Co.,* 36 Wis. 67, 17 Am. Rep. 479. This ruling was made because the order (when made part of the record by the bill of exceptions) is one of the orders covered by section 3070, Rev. St. 1898, and by the express terms of that section may, without any exception thereto, be reveiwed upon appeal from the judgment." We conclude, therefore, that the evidence may be reviewed by us to determine whether there was error in denying the motion for a new trial.

The complaint alleges the making and delivery of certain promissory notes, and that they were given for the purchase price of lands described in the complaint. The answer alleges that the consideration for the notes totally failed; that they were given for the purchase price of lands to be conveyed to the defendant Andrew J. Stakke by deed, free and clear from all incumbrances; that said lands were not conveyed clear of incumbrances; that mortgages against said lands were permitted to be foreclosed and the time for redemption to expire, and the title to said lands passed entirely out of plaintiff's control, whereby it became impossible for the plaintiff to perform his contract. The notes sued on were given to the plaintiff by the defendants for the purchase price of 320 acres of land. No cash payment was made on said purchase, and the notes represented the sum to be paid for said lands. A warranty deed was delivered to the purchaser, and defendants immediately went into possession of the premises, and have remained in possession ever since. The deed to said premises was lost, and secondary evidence was given as to its terms. The evidence is silent as to what covenants it contained, save that it contained a covenant that the premises were free and clear of all incumbrances. After going into possession, the defendant was informed that mortgages upon the premises conveyed to him by plaintiff were being foreclosed by

advertisement. The foreclosure proceeded to a sale, and the premises were bid in by the mortgagees. The redemption period under one mortgage expired on the 27th day of May, 1894, and a deed was issued to the purchaser on the 30th day of October, 1894. The redemption period under the other foreclosure expired on the 31st day of August, 1893, and a deed was issued to the purchaser on October 31, 1899. The mortgage under which the last foreclosure was made was given subject to a prior mortgage on said premises given in 1887 for the sum of $250, with interest thereon at 12 per cent per annum. After the foreclosure sales, and before the time for a redemption had expired, the defendant Andrew H. Stakke leased the premises from the purchasers at the foreclosure sales for an annual cash rental. This lease continued in force for two years. At the expiration of this lease the defendant purchased these lands from the purchasers at such foreclosure sale under the crop payment plan. The redemption period expired without redemption, and deeds were issued to the mortgagees by the sheriff. The redemption period had expired under both foreclosures when the defendant purchased the lands from the purchasers at the mortgage foreclosure sales. The total amount of incumbrances on the land on July 1, 1891, when plaintiff conveyed the lands to the defendant, was $648.33, without interest; with interest added, the amount was less than $839, the price agreed to be paid for the land. The price agreed to be paid for the lands was the sum of $839. The defendant paid the sum of $163.73 upon the notes in suit on October 10, 1893, before he had notice that the mortgages were being foreclosed.

When the taking of testimony closed, the trial court directed a verdict for the plaintiff on the notes. The grounds of the motion made for a directed verdict were that the defendant went into possession of the premises under the deed, and has remained in possession thereof ever since, and has never been ousted or ejected therefrom, and that defendant is estopped to set up an outstanding title, he having entered into and remained in possession under plaintiff's deed.

In this court it is claimed on behalf of the appellants that the consideration for the notes has wholly failed by reason of the failure of the plaintiff to perform his covenant that the lands were free from incumbrances. The respondent contends that the defendant

having remained in possession, he cannot interpose this defense. The decision of the case must turn upon an answer to the question, what was the consideration for the notes? The plaintiff claims that the consideration for the notes was the conveyance of the fee with a covenant against incumbrances. He claims that the promise to pay and the covenant against incumbrances are separate and independent promises, and the failure of the covenant against incumbrances does not affect the promise to pay; that appellants' remedy lies in an action for damages on the breach of the covenant, and that, if damages were incurred by virtue of a breach of this covenant, they cannot be adjusted in this action, but must be litigated in another action. The appellants contend that the consideration for the notes was the title to the land free from incumbrances, and that, the covenant against incumbrances having been broken, and he having been compelled to buy the title, which had vested indefeasibly in third parties by virtue of the foreclosure of such mortgages, the consideration for the notes has wholly failed. We cannot coincide with respondent's contention, although it is supported by respectable authority. The real consideration for the notes in this case was the title to the land free from incumbrances. The defendant gave his notes for the land free from incumbrances, and did not give them in view of the plaintiff's covenant that the land should be free from incumbrances. In *Rice* v. *Goddard,* 14 Pick. 293, the court said: "The promise is not made for a promise, but for the land; the moving cause is the estate; if that fails to pass, the promise is a mere *nudum pactum.*" In *Whitlock* v. *Denlinger,* 59 Ill. 96, it was said: "It is true, the land and not the covenants of the deed is the true consideration of the deed." Rawle on Covenants, section 327. See, also, Am. & Eng. Enc. L. Vol. 8, p. 208, where it is said, referring to the rule contended for by respondent: "This rule, however, has not been followed by the modern decisions, and the grantee is now permitted, in an action for the recovery of the purchase price, to set up a total failure of title as a total failure of consideration." *Dunning* v. *Leavitt,* 85 N. Y. 30, 39 Am. Rep. 617; *Cook* v. *Mix,* 11 Conn. 432; *Fleetwood* v. *Brown,* 109 Ind. 567, 9 N. E. 352. 11 N. E. 779; *La Pene* v. *Delaporte,* 27 La. Ann. 252; *Mason* v. *Wait,* 4 Scam. 134; *Hall* v. *Perkins,* 4 Scam. 548; *Schuchmann* v. *Knoebel,* 27 Ill. 177; *Deal* v. *Dodge,* 26 Ill. 460; *Davis* v. *McVickers,* 11 Ill. 328; *Lull* v. *Stone,* 37 Ill. 229. It is

also contended that the defense of failure of consideration, either total or partial, cannot be interposed in an action for the purchase price of the land, but that defendant must resort to an action on the covenant against incumbrances contained in the deed. Section 5273, Rev. Codes 1899, permits pleading by way of answer any "statement of any new matter constituting a defense or counterclaim." It is not disputed that, if the covenant in this deed against incumbrances has been broken, an action would lie on the covenant for whatever damages the defendant suffered by reason of such breach of the covenant, not exceeding the consideration money. The only question involved, therefore, is whether the damages thus incurred can be determined in the present action, there being no allegation or proof that plaintiff is insolvent. Under many decisions, the policy is favored of putting an end to litigation by settling all issues connected with the cause of action set forth in the complaint in that action, and thereby avoiding the expense, delay, and inconvenience of circuity of action or multiplicity of suits. Rawle on Covnts. section 326, says: "Yet, as has been said, it is now considered that he should not be compelled to pay over purchase money which he might next day recover in the shape of damages for a breach of his covenants; and hence, to prevent circuity of action, the defense at law of a failure of title has been in some cases allowed." See also, *Knapp* v. *Lee,* 3 Pick. 452; *Davis* v. *Bean,* 114 Mass. 358; *Glenn* v. *Thistle,* 1 Cushm. (Miss.) 42; *Slack* v. *McLagan,* 15 Ill. 242; *McDaniel* v. *Grace,* 15 Ark. 489; *Brandt* v. *Foster,* 5 Iowa 298; *Nesbitt* v. *Campbell,* 5 Neb. 429; *Pence* v. *Huston's Ex'rs,* 6 Grat. 304; *Doremus* v. *Bond,* 8 Blackf. 368; *Walker* v. *Johnson,* 13 Ark. 522; *Desha's Ex'rs.* v. *Robinson,* 17 Ark. 228; Chitty on Cont., p. 703; *Durment* v. *Tuttle,* 50 Minn. 426, 52 N. W. 909; *Mills* v. *Saunders,* 4 Neb. 190; *Warren* v. *Stoddart* (Idaho) 59 Pac. 540; *William Farrel Lumber Co.* v. *Deshon* (Ark.) 44 S. W. 1036.

We conclude that total or partial failure of consideration or want of consideration may be shown as a complete or partial defense in an action on a note given for the purchase price of land sold with covenants, where the title has failed or partially failed; and that, in case of a breach of a covenant against incumbrances, the purchaser is entitled to a credit on a note given for the purchase price of real estate of the amount paid by him to protect his title

against such mortgage by paying said mortgage. The evidence in this case, however, does not show a total failure of consideration for the notes sued on. When the deed was delivered, the mortgages on the land were less than the price agreed on for the land, evidenced by the notes. It is also true that, when the deeds were delivered to the defendant by the mortgagees who had foreclosed the mortgages and received sheriff's deeds, the whole amount of the incumbrances and interest was less than the purchase price with accumulated interest. The defendant paid the sum of $1,250 for the title which had been secured by the purchasers under these forclosure sales. The purchase price as represented by his three notes, with interest thereon, amounted to more than $1,250, after giving credit for the payment of $163.78. So that, from whatever view it may be considered, the mortgages did not exceed the purchase price. Hence the notes represented a consideration over and above the incumbrances.

Respondent's contention, and the ground upon which the trial court directed a verdict, is that defendant, having gone into possession of the premises under the deed, and not having since been ousted or ejected from such possession, is not relieved from the payment of the purchase price; that, if a purchaser buys an outstanding title to protect his title, such purchase inures to the benefit of his grantor; that he cannot buy an outstanding title, remain in possession, and defeat recovery for the possession of the purchase price. It is true that a total failure of title in many cases is not ground for resisting payment of the purchase price if the purchaser remains in possession of the premises, and is not threatened with dispossession, and does nothing towards protecting himself against such adverse title, and is not in any way disturbed or damaged by such outstanding title, it not being hostilely asserted against him. The grounds upon which such cases turn are that such possession may ripen into a good title by the lapse of time, and that the law will not countenance a purchaser in accepting and holding possession and title which are not attacked and to perfect which the purchaser has done nothing, and at the same time refuse to pay for the land. *Mecklen* v. *Blake*, 22 Wis. 495, 99 Am. Dec. 68. Such are not the facts in this case. The defendant has bought the outstanding title held by third parties by virtue of the foreclosure of the mortgages on the premises when the plaintiff conveyed them

to the defendant. In this case it is not material whether the defense be considered as one arising by virtue of the purchase of an outstanding title hostilely asserted, or by virtue of the payment of a valid mortgage against the premises. The outstanding title grew out of the mortgages, and the principles of law applicable are not materially different, except that, before the outstanding title can be purchased with safety, it must be hostilely asserted against the possession of the purchaser of an inferior title. The covenant of the deed was that the premises were free from incumbrances. We will, therefore, treat the case as arising by virtue of a breach of a covenant against incumbrances. The answer does not well plead this defense, but as the answer contains a general denial, and no objection was made to the answer as not sufficient to warrant the defense, we will treat it as sufficient; and, as no objection was made to any of the evidence substantiating this defense on the ground that such defense was not well pleaded, we deem all objections thereto waived. The objection to a defense, arising out of the breach of a covenant against incumbrances, that there has been no eviction, cannot be sustained. A covenant against incumbrances is a covenant that is broken when made if the incumbrance then exists. Rawle on Covnts., and cases cited under section 188; *Lawrence* v. *Montgomery,* 37 Cal. 183; *Marbury* v. *Thornton,* 82 Va. 702, 1 S. E. 909; *Thayer* v. *Clemence,* 22 Pick. 493; *Carter* v. *Denman's Ex'rs,* 23 N. J. Law 260; *Blondeau* v. *Sheridan,* 81 Mo. 545; *Guerin* v. *Smith,* 62 Mich. 369, 28 N. W. 906. If a valid mortgage exists on the land when the deed containing the covenant is delivered, a cause of action for a breach of such covenant arises immediately. The existence of the cause of action for such breach, as such, alone entitles the purchaser to no more than nominal damages, unless he has suffered greater damages by paying the mortgage. In that event, his damages are the amount necessarily paid by him to remove such mortgage, not exceeding the consideration money. If a valid mortgage exists against the land, he may pay off such mortgage before foreclosure or after foreclosure. The existence of such mortgage entitles him to his damages on a breach of the covenant whenever he pays off the mortgage. Section 4982, Rev. Codes 1899. As said in *Delavergne* v. *Norris,* 7 Johns. 358, 5 Am. Dec. 281: "If the plaintiff, when he sues on a covenant against incumbrances, has extinguished the incumbrance, he is entitled to recover the price

he has paid for it. But if he has not extinguished it, but it is still an outstanding incumbrance, his damages are but nominal, for he ought not to recover the value of an incumbrance on a contingency when he may never be disturbed by it." Rawle, section 149, says: "If the title be defective, or if an incumbrance exist, the purchaser has a right of action which, as such, is not affected either beneficially or injuriously by the purchase of the paramount claim. Such a purchase merely affects the question of damages, and, moreover, the question whether the claim is or is not asserted, and, if asserted, to what extent, has nothing to do with the right of action. It is sufficient if such claim exists." Jones on Law of Real Property says: "When, at the time of the conveyance, there is an outstanding lien or incumbrance, the grantee need not wait until he is evicted. If the grantee extinguishes the incumbrance, he may recover the amount so paid. If he has not extinguished it, he can recover only nominal damages." Section 891. *Mills* v. *Saunders,* 4 Neb. 190; *Warren* v. *Stoddart* (Idaho) 59 Pac. 540; *Kramer* v. *Carter,* 136 Mass. 504. The defendant was therefore entitled to a credit on his notes for the sum of $1,250 paid for outstanding title resulting from the foreclosure of the mortgages. It was error to direct a verdict for the plaintiff without allowing credit for this sum.

The judgment is reversed, a new trial granted, and the cause remanded for further proceedings according to law. All concur.

(96 N. W. Rep. 353.)

JOHNSON ET AL. *v.* KINDRED STATE BANK.

Opinion filed September 28, 1903.

Where An Exhibit Attached to Complaint, Negatives It, Exhibit Governs.

1. Where an exhibit attached to a complaint, and made a part of the pleading, negatives or contradicts allegations in the complaint founded upon it, the terms of the exhibit will control such general averment.

Same.

2. Plaintiff attached to his complaint a copy of the written lease upon which his action was based, and made it a part of the complaint by reference. This lease contained a covenant to "write $400 insurance upon building, and deduct from rent." An averment that defendant allowed the insurance to lapse and cease is not sufficient to show a breach of the covenant to write the insurance.

Must Point Out Uncertainty in Contract, and Construe It By Averment.

3. In stating a cause of action for the breach of a contract, which is ambiguous when applied to the subject of litigation, the pleader should point out in his complaint in what particular he claims the contract to be uncertain, and put some definite construction on it by averment.

Where Contract Shows Itself To Be Incomplete, Parol Part May Be Proven.

4. Where a written contract purports upon its face to contain the whole contract of the parties, parol evidence cannot be received to add to its terms. If it appears from the writing itself that the whole agreement was not reduced to writing, and that the writing is incomplete to express the entire agreement, then, on proper allegations, the parol part of the contract may be proven.

Parol Collateral Promise Must Relate to Subject Distinct From That of the Writing.

5. To justify the admission of a parol promise by one of the parties to a written contract on the ground that it is collateral, the promise must relate to a subject distinct from that to which the writing relates.

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

Action by C. M. Johnson and George Halland against the Kindred State Bank. From a judgment of dismissal, entered for defendant after an order sustaining a demurrer to the complaint, plaintiff appeals.

Affirmed.

A. T. Cole, for appellants.

Parol evidence is admissible to explain a written contract which is equally capable of two constructions. *Ripon College* v. *Brown,* 68 N. W. Rep. 837. To vary elements of contract, admissible, *Ingersoll* v. *Truebody,* 40 Cal. 603. If equally susceptible of two constructions, *Lee et al.* v. *Crawens et al.,* 48 Pac. Rep. 159; *McPhee et al.* v. *Young et al.,* 21 Pac. Rep. 1014; *Brown* v. *Markland,* 52 Pac. Rep. 579; covenant of lessee to insure, binding. Damages, amount of loss, *Jacksonville M. P. Ry. & Nav. Co.* v. *Hooper et al.,* 160 U. S. 514, 40 L. Ed. 515. On interpretation of contract and parol evidence the following are authorities: *Knight* v. *Worsted Co.,* 2 Cush. 271; *Erie Cattle Co.* v. *Guthrie et al.,* 44 Pac. Rep. 984; *Lee* v. *Butler,* 46 N. E. Rep. 52; *Hendricks* v. *Crowley,* 31 Cal. 472; *Miller, Clayton Electric Co.* v. *McKeesport & J. W. R. Co.,* 179 Pa. 350, 36 Atl. 287.

Notice of increase or decrease of rent on holding over after expiration of year, does not vary the terms of lease but carries them with it. *Re Canada Coal Co.*, 27 Ont. Rep. 151; *Rand* v. *Purcell*, 58 Ill. App. 228. Parol evidence is admissible to show intent as to provisions, not to wipe them out. *McKinstry* v. *Babcock*, 26 N. Y. 378; *Johnson et al.* v. *Bratton et al.*, 70 N. W. Rep. 1021; *Seymour* v. *Bowles*, 172 Ill. 521, 50 N. E. Rep. 122; *Tracy* v. *Albany Ex. Co.*, 7 N. Y. 472; *Bradley* v. *Slater*, 70 N. W. Rep. 258; *Manf'g Furn. Co.* v. *Kremer et al.*, 64 N. W. 528; *Machine Co.* v. *Faulkner*, 64 N. W. Rep. 163; *Pool* v. *Philips*, 167 Ill. 432, 47 N. E. Rep. 753; *Hammond* v. *Martin*, 40 S. W. Rep. 347; *White* v. *Rice*, 70 N. W. Rep. 1024. An agent disregards specific instructions at his peril; if he adopts his own course and loss to his principal ensues, he is liable, although he used reasonable diligence, *Heinemore et al.*, v. *Heard et al.*, 50 N. Y. 27; *Butts Adm.* v. *Phelps*, 79 Mo. 302; and he who covenants is more strongly bound, *Whitney* v. *Mer. Union Exp. Co.*, 104 Mass. 152; *Fuller* v. *Ellis*, 39 Vt. 345; *Milwaukee Co.* v. *Hacker*, 21 Wis. 613; *Sawyer* v. *Mayhew*, 51 Me. 389; *Thompson* v. *Stewart*, 3 Conn. 172, 8 Am. Dec. 168; *Austill* v. *Crawford*, 7 Ala. 355; *Short* v. *Skepwith*, 1 Brok. (U. S.) 103. The breach of contract is the gist of the action and must be averred. *Grant* v. *Sheerin*, 84 Cal. 197, 23 Pac. Rep. 1094; *Wheeler, etc., Mfg. Co.* v. *Worrall*, 80 Ind. 297; *Wilson* v. *Clarke*, 20 Minn. 367; *Rich* v. *Calhoun*, 12 So. Rep. 707; *Tracy* v. *Tracy*, 59 Hun. (N. Y.) 1; *Phipps* v. *Hope*, 16 Oh. St. 586; *Holman* v. *Criswell*, 13 Tex. 38; *White* v. *Romans*, 29 W. Va. 571.

In the case at bar it was necessary to state the facts constituting the covenant and breach thereof, and so doing it was proper to plead interpretation of lease. Holding over is subject to all of the covenants of the lease. *Salisbury* v. *Hale*, 12 Pick. 416; *Weston* v. *Weston*, 102 Mass. 514; *Schyler* v. *Smith*, 51 N. Y. 309; *Finney* v. *St. Louis*, 39 Mo. 177; *Bonney* v. *Foss*, 62 Me. 248; *Bacon* v. *Brown*, 9 Conn. 339; *Moore* v. *Beasley*, 3 Oh. 294; *Bradley* v. *Slater*, 70 N. W. Rep. 258; *Kollock* v. *Scribner*, 73 N. W. 776; *Dutton* v. *Gale Mnf. Co.*, 43 Hun. 198; *Scott* v. *Beacher*, 52 N. W. Rep. 20; *Roley* v. *Crabtree*, 72 Ill. App. 581.

R. M. Pollock, for the respondents.

There is no holding over and no renewal of any lease in the transaction between the parties. The lease itself provides for a tenancy of more than one year.

There is no ambiguity about the expression in the lease. Where there are ambiguous expressions extraneous evidence may be employed to interpret them; but the court cannot impart into the contract, or impress upon it anything not included in it. I Green Ev. section 175, 277; *Dent* v. *No. Am. Steamship Co.,* 49 N. Y. 390; *Farmers Loan & Trust Co.* v. *Com. Bank of Racine,* 15 Wis. 424.

COCHRANE, J. The complaint alleges the incorporation of defendant; that plaintiff Johnson is the owner and Halland the mortgagee of the leased premises; that on June 21, 1900, plaintiffs and defendant entered into a written lease of the described property, a copy of which is attached to the complaint as "Exhibit A," and made a part of the complaint; that defendant was required by the terms of this written lease to write $400 insurance on the building on the leased premises; that it was agreed and understood between the parties that said insurance should be maintained and kept in force by defendant in some company for which it was agent as long and for the full time during which the lessee remained in possession of the premises under the terms of the lease; that on May 28, 1901, while defendant was occupying the premises under the terms of the lease, the building was totally destroyed by fire; that prior to its burning, defendant negligently permitted the insurance thereon to lapse and cease, "against the covenant and agreement of said defendant with the plaintiffs," and plaintiffs were damaged thereby in the sum of $400; that defendant elected to and continued to remain in possession and use of the leased premises after the expiration of the first year, under the terms of the lease, and was in possession at the time of the fire; that plaintiffs demanded before suit that defendant pay them $400 because of the destruction of the building and the loss incurred by and on account of the negligence and failure of said defendant to keep said building insured, as aforesaid, and by reason of the fact that said defendant has broken and violated its express covenant as to insurance. Exhibit A, referred to in the second paragraph of the complaint, and attached to it, in its formal part recites its making on the 21st day of June, 1900, the description of the property, and its pertinent part read as follows: "To have and to hold the above-rented premises

unto the said lessee, its successors and assigns, for and during the full term of one year from and after the 15th day of May, 1900, and as many weeks, months, or years after May 15, 1901, as said Kindred State Bank may desire from time to time; and the said lessee agrees to and with the said lessor to pay as rent for the above-mentioned premises the sum of $96, payable May 15, 1901, and as rent for the time building is used after the expiration of one year it is agreed that the lessee shall pay at the rate of $8 per month, said rent to be paid to George Halland for and during the full term of this lease. It is hereby further agreed that said Kindred State Bank, as agents for C. M. Johnson and George Halland, shall have certain repairs and painting done on building, as agreed with C. M. Johnson this day, and deduct the actual cost of the same from the rent when paid; also to write $400 insurance on building, and deduct from rent." To this complaint defendant demurred, and, as grounds therefor, specified that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the trial court, and an order made directing the entry of judgment for the dismissal of plaintiff's action, with costs. This appeal is from the judgment.

The action is founded upon the written lease, a copy of which is made a part of the complaint by reference, and its plain purpose is to recover damages for a breach of the stipulation therein "to write $400 insurance on building, and deduct from rent." The terms of this writing will control in determining the sufficiency of the complaint as against demurrer in every particular where the terms of the lease do not sustain the allegations as to its contents; and where the averments are contradictory of or inconsistent with it, they will be disregarded. *Willard* v. *Davis* (C. C.) 122 Fed. 363; *Freiberg* v. *Magale* (Tex. Sup.) 7 S. W. 684. To state a cause of action, therefore, this complaint should allege a breach of the contract to write $400 insurance upon the building, and consequent damages. This is not done. The facts set forth as a breach are that, prior to the burning of the building, defendant permitted the insurance thereon to lapse and wholly cease, against the covenant and agreement of defendant. There is no covenant in the lease that the insurance was to be maintained by defendant for any time, or that it was to be rewritten. It was simply to write it. Consequently, no breach of contract is pleaded. But appellant urges that there is a latent ambiguity in the insurance clause of

this lease, in that the contract is silent as to the time for which the insurance written should run; and he has attempted to supply the time by alleging an agreement between the parties that the insurance should be written and kept in force by defendant for the full time it remained in possession of the premises under the lease, and that the covenant to write $400 insurance was a continuing covenant. We think that, when suing upon a contract which is ambiguous or uncertain in its provisions, when applied to the subject-matter of litigation, the pleading should so state, and by averment point out wherein plaintiff claims the contract to be uncertain, and put some definite construction on it by way of averment. *Durkee* v. *Cota,* 74 Cal. 313, 16 Pac. 5. Under the pretense of construing a written contract, new terms cannot be added to it. The writing is only the outward and visible expression of the meaning of the parties to it, and no other words can be added to, or substituted for, those used. The duty of the court is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words expressed, but what is the meaning of the words they used. *Board* v. *Brown* (Minn.) 68 N. W. 839; *Hei* v. *Heller,* 53 Wis. 415, 10 N. W. 620; *Hunt* v. *White,* 24 Tex. 643. The question here is entirely one of pleading. The complaint points out no ambiguity in the written contract, and places no construction upon its terms which would help out plaintiff's cause of action. By no possible interpretation of the language used in this contract can the words "write $400 insurance on building" be construed to mean rewrite and maintain $400 insurance on the building. Unless the language used in the lease is susceptible of this enlarged interpretation, no breach of contract is pleaded.

Appellant contends that the continuance of defendant in the occupancy of the leased premises after one year carried over the covenant to write insurance on the building, and imposed the duty of rewriting; and he cites section 4084, Rev. Codes 1899, to sustain his contention. Defendant's occupancy of the leased premises, under the positive averments of the complaint, was by virtue of provisions in the written lease, and the section of the statute quoted can have no application. *Fields* v. *Mott,* 9 N. D. 621, 84 N. W. 555. The lease expressed the terms upon which defendant could remain in possession after May 15, 1901, and, if it was the intention of the parties that the insurance should be rewritten after the first year in case defendant continued its occupancy of the leased prem-

ises, this intention should have been expressed therein. The very fact that the terms of defendant's occupancy after the expiration of the first year are expressed without mention of insurance would, so far as the written contract advises us, indicate that the insurance was to be written but once.

Plaintiff further contends that his action was brought and is at issue upon a contemporaneous collateral matter attaching itself to the lease, the lease being made a part of the complaint, to show that there was a contract for insurance, and that he pleaded and intends to show that collateral to this promise there was an oral agreement to be executed if respondent continued the lease after the first year. The answer to this contention is that no such contract is pleaded, and could not, under established rules of evidence, be shown, even if it were fully set forth in the complaint, and the demurrer must, nevertheless, be sustained. This contention is, however, inconsistent with the averments of the complaint. No parol agreement is set out, no consideration for such agreement is alleged, and the breach set forth is alleged to be of the covenant in the written lease. In each paragraph of the complaint reference is made to the written contract and the stipulation as to insurance as a covenant. It is clear that the word "covenant," as here repeatedly used, was intended and understood by the pleader in the sense of a written promise, and does not refer to any parol agreement. *DeBolle* v. *Ins. Co.*, 4 Whart. 68; 33 Am. Dec. 38. If a parol stipulation was made concerning insurance after the first year, it was made as a part of the transaction then in hand, which is conclusively presumed to have been closed at the signing and delivery of the written contract, in that the written lease upon its face appears to be complete, and to express the full contract of the parties. The stipulation as to insurance is not concerning a matter separate and independent of the written contract, and must therefore be found, if at all, in one of the items and terms of the contract. *Dutton* v. *Gerrish*, 9 Cush. 89, 55 Am. Dec. 45; *Thompson* v. *Libby*, 34 Minn. 374, 26 N. W. 1. To permit this stipulation to be proven by parol would be to permit an additional term to be grafted upon the written contract, which would as effectually change the contract expressed in the writing as if the stipulation were in direct contradiction of its terms. *Cliver* v. *Heil* (Wis.) 70 N. W. 346. It is stated as the settled general rule that all parol negotiations between the parties to a written contract anterior to or contemporaneous

with the execution of the instrument are to be regarded as either merged in it or concluded by it. *Thurston* v. *Ludwig,* 6 Ohio St. 1, 67 Am. Dec. 328; *Howard* v. *Thomas,* 12 Ohio St. 204; *Naumberg* v. *Young,* 44 N. J. Law 331, 43 Am. Rep. 380. To come within the exception to this general rule, which permits proof of an oral agreement collateral to the agreement expressed in the writing, and supplementary thereto, made at the same time as the written contract, it must appear that the alleged collateral promise relates to a subject distinct from that to which the writing relates. So understood, the parol promise of defendant to rewrite insurance if it continued to occupy the premises was not a collateral promise, but a part of the one contract. It was one of the terms of the lease, and not a separate and independent contract. *Howard* v. *Thomas,* 12 Ohio St. 201, 205; *Thompson* v. *Libby,* 34 Minn. 374, 26 N. W. 1; *Palmer* v. *Albee,* 50 Iowa 429; *Naumberg* v. *Young,* 44 N. J. Law 331, 43 Am. Rep. 380; *Godkin* v. *Monahan,* 83 Fed. 116-119, 27 C. C. A. 410; *Cliver* v. *Heil* (Wis.) 70 N. W. 346; *Case* v. *Bridge Co.* (N. Y.) 31 N E. 254.

The judgment appealed from is affirmed. All concur.

(96 N. W. Rep. 588.)

JOHN R. JONES AND FREDERICK JONES, CO-PARTNERS AS JOHN R. JONES & SON, *v.* THE GREAT NORTHERN RAILWAY COMPANY.

Opinion filed October 26, 1903.

Railroads—Killing Stock—Sufficiency of Complaint.

1. A complaint in an action to recover damages for negligently killing certain stock alleged that on or about a specified date the defendant, in operating a train of cars, negligently, carelessly, and wrongfully struck and killed the same. *Held,* that such complaint states a cause of action.

Appeal from District Court, Benson county; *Morgan,* J.

Action by John R. Jones & Son against the Great Northern Railway Company. From an order overruling a demurrer to the complaint, defendant appealed.

Affirmed.

C. J. Murphy for the appellant.

While under the Code, pleadings are liberally construed as to matters of form, yet the rule does not dispense with the necessity of properly pleading the facts; and as to all substantial matters and allegations, a complaint will be strictly construed against the pleader. *Nation et al.* v. *Cameron,* 2 Dak. 347; *State ex rel. McKinzie* v. *Casteel, Auditor,* 11 N. E. Rep. 219.

Without a showing that the plaintiffs' animals were at a public crossing, or by license of defendant on its right of way; or the duty of defendant to fence its track; that defendant saw animals in time to avoid killing them, the mere allegation of "negligence" is not sufficient to show the defendant's liability. *Williams* v. *Northern Pacific R. Co.,* 3 N. D. 168, 14 N. W. Rep. 97; Code defines negligence, Rev. Codes 1899, sections 5110, 5111.

A case could arise under the statute where stock might be killed by a railroad company, and the latter be guilty of negligence, and yet not liable for damages. For instance, if stock is trespassing upon the right of way, and train employes fail to exercise "great care and diligence, which amounts to slight negligence" under the Code, whereby stock is killed, there could be no recovery. The question therefore arises, what sort of negligence does the complaint state? Under the rule, that ambiguous and defective pleadings must be construed most strongly against the pleader, the complaint, it seems to us, is bad. *Ensley R. R. Co.* v. *Chewning,* 11 Am. Neg. Cases 22.

To warrant recovery of damages for gross or wilful negligence, such negligence must be specifically alleged and proven. *Chicago & Eastern Ill. R. Co.* v. *Hedges, Admx.,* 25 Am. Eng. R. R. Cases, 55; *Williams* v. *Northern Pacific R. Co., supra; Munger* v. *R. R. Co.,* 4 N. Y. 349; *Spinner* v. *R. R. Co,* 67 N. Y. 156; *Sheffler, Admr.* v. *Minneapolis & St. Louis Ry. Co.,* 21 N. W. Rep. 518; *Johnson* v. *Truesdale,* 48 N. W. Rep. 1136; *Cin., etc., R. R. Co.* v. *Eaton,* 53 Ind. 307; *Evansville, etc., R. R. Co.* v. *Wolf,* 59 Ind. 89; *Penn. R. R. Co.* v. *Gelatine,* 7 Am. & Eng. R. R. Cases 517; Maxwell on Code Pleadings, 254; *Woodward* v. *Oregon Ry. & Nav. Co.,* 22 Pac. Rep. 1076; *McPherson* v. *Pacific Bridge Co.,* 26 Pac. Rep. 560.

Guy C. H. Corliss for respondent.

Negligence is regarded as a matter of fact, not as a conclusion of law. When it is alleged that the act, which caused the injury,

was negligently done, the ultimate fact on which the liability rests is stated. Everything else is a mere matter of evidence, and has no place in the complaint. *New York, C. & St. L. R. Co.* v. *Kistler,* 64 N. E. Rep. 130, 87 Mo. App. 618; *Chaperon* v. *Portland General Electric Co.,* 67 Pac. Rep. 928; *Kelley* v. *Anderson,* 87 N. W. Rep. 579; *Louisville & N. R. Co.* v. *Shearer,* 59 S. W. Rep. 330; *Cederson* v. *Oregon R. & Nav. Co.,* 62 Pac. 637; *Cederson* v. *Oregon R. & Nav. Co.,* 63 Pac. 763; *Cunningham* v. *Los Angeles Ry. Co.,* 47 Pac. Rep. 452; *Fremont, E. & M. V. R. Co.* v. *Harlin,* 70 N. W. Rep. 263, 36 L. R. A. 417, 61 Am. St. Rep. 578, 14 Enc. Pl. & Pr. 333, 334; *Rogers* v. *Truesdale,* 58 N. W. Rep. 688; *Louisville E. & St. L. Consolidated R. R. Co.* v. *Hicks,* 37 N. E. Rep. 43; *Louisville, N. A. & C. Ry. Co.* v. *Berkey,* 35 N. E. Rep. 3; *House* v. *Meyer,* 100 Cal. 592, 35 Pac. Rep. 308; *Benjamin* v. *Holyoke St. Ry. Co.,* 35 N. E. Rep. (Mass.) 85; *Senat* v. *R. R. Co.,* 57 Mo. App. 223; *Bunnell* v. *Berlin Iron Bridge Co.,* 66 Conn. 24; *Railroad Co.* v. *Croskell,* 6 Tex. Civ. App. 160; *Hanson* v. *Anderson,* 90 Wis. 195, 62 N. W. Rep. 1055.

Plaintiff is entitled to the benefit of Sec. 2978 Rev. Codes. The law casts on defendant the burden of showing the fault, in all its particulars. The plaintiff, who is necessarily ignorant of the facts, may plead the negligence the most general way. See *Smith* v. *N. P. R. R. Co.,* 53 N. W. Rep. 173.

FISK, District Judge. This action was commenced for the purpose of recovering damages claimed to have been sustained by the plaintiffs on account of defendant's negligence in operating its trains, whereby certain of plaintiffs' stock was killed and injured by such trains. The complaint is challenged by demurrer upon the ground that it fails to allege facts sufficient to constitute a cause of action; the particular defect urged being that the allegation of negligence is too general, and merely states a conclusion.

The complaint, so far as it is material to the questions here involved, is as follows: "That on or about April 26, 1891, in operating a train upon said railroad in said county, defendant negligently and carelessly and wrongfully struck and killed a certain heifer then and there the property of plaintiffs, of the value," etc. The complaint contained several causes of action, but they are all pleaded in the same manner. Is such a complaint vulnerable to attack by demurrer upon the ground above stated? We think not. It

alleges, in substance, that defendant, in operating its train, struck and injured plaintiffs' stock, and that this was negligently done. Negligence is a traversable fact, and a general allegation, without stating the particulars showing negligence, is enough, as against a demurrer for insufficiency. Such an allegation is equivalent to whatever degree of negligence is necessary to sustain the pleading, and the degree of negligence is a matter of proof, and therefore need not be pleaded. Whatever degree of negligence—whether slight, ordinary, or gross—which it is necessary for the plaintiff to prove in order to make out his case can be proved under such a general allegation. While there are a few authorities to the contrary, we think the great weight of authority is that such an allegation of negligence is sufficient. *Rolseth* v. *Smith* (Minn.) 35 N. W. 565, 8 Am. St. Rep. 637, and numerous cases cited in note; *Harper* v. *Norfolk, etc., Ry. Co.* (C. C.) 36 Fed. 102; *Hobson* v. *N. M. R. Co.* (Ariz.) 11 Pac. 551; *Fordyce* v. *Merrill,* 49 Ark. 277, 5 S. W. 329; *Central R. Co.* v. *Kitchens,* 83 Ga. 83, 9 S. E. 827; *Hammond* v. *Schweitzer,* 112 Ind. 246, 13 N. E. 869; *Anderson* v. *East* (Ind.) 19 N. E. 726, 2 L. R. A. 712, 10 Am. St. Rep. 35; *Scott* v. *Hogan* (Iowa) 34 N. W. 444; *McFadden* v. *Missouri Pac. Ry. Co.,* 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721; *Davis* v. *Guarnieri* (Ohio) 15 N. E. 350, 4 Am. St. Rep. 548; *Washburn* v. *C. & N. W. Ry. Co.,* 68 Wis. 474, 32 N. W. 234; *N. Y., C. & St. L. Co.* v. *Kistler* (Ohio) 64 N. E. 130; *Chaperon* v. *Portland Gen'l Electric Co.* (Or.) 67 Pac. 928; *Kelley* v. *Anderson* (S. D.) 87 N. W. 579; *Louisville & N. R. Co.* v. *Shearer* (Ky.) 59 S. W. 330; *Cederson* v. *Oregon R. & N. Co.* (Or.) 62 Pac. 637; Id. (Or.) 63 Pac. 763; *Cunningham* v. *Los Angeles Ry. Co.* (Cal.) 47 Pac. 452; *Fremont, etc.,* v. *Harlin* (Neb.) 70 N. W. 263, 36 L. R. A. 417, 61 Am. St. Rep. 578; 14 Ency. Pl. & Pr. 333 to 344, and numerous cases cited. In the case of *Clark* v. *C., M. & St. P. Ry. Co.* (Minn.) 9 N. W. 75, Mitchell, J., in writing the opinion, uses the following language: "It is urged that it is not sufficient to allege that an act was done negligently or carelessly; that this is a mere conclusion of law, and not a statement of an issuable fact; that the physical facts constituting the negligence must be alleged. It is, of course, an elementary rule of pleading that facts, and not mere conclusions of law, are to be pleaded. But this rule does not limit the pleader to the statement of pure matters of fact, unmixed with any matter of law. When a pleader alleges title to or owner-

ship of property, or the execution of a deed in the usual form, these are not statements of pure fact. They are all conclusions from certain probative or evidential facts not stated. They are in part conclusions of law, and in part statements of facts, or, rather, the ultimate facts drawn from these probative or evidential facts not stated; yet these forms are universally held to be good pleading. Some latitude must therefore be given to the term 'facts,' when used in a rule of pleading. It must of necessity include many allegations which are mixed conclusions of law and statements of fact; otherwise pleadings would become intolerably prolix, and mere statements of the evidence. Hence it has become a rule of pleading that while it is not allowable to allege a mere conclusion of law, containing no element of fact, yet it is proper not only to plead the ultimate fact inferable from certain other facts, but also to plead anything which, according to the common and ordinary use of language, amounts to a mixed statement of fact and of a legal conclusion. It may not be possible to formulate a definition that will always describe what is a mere conclusion of law so as to distinguish it from a pleadable, ultimate fact, or that will define how great an infusion of conclusions of law will be allowed to enter into the composition of a pleadable fact. Precedent and analogy are our only guides. And it is undoubtedly true that there will be found a want of entire judicial harmony in adjudicated cases as to what are statements of fact and what are mere conclusions of law. And in holding one class of references as facts to be pleaded, and another as conclusions of law to be avoided, courts may have been often governed more by precedent than by a substantial difference in principle. But it has been quite generally held that the question of negligence in a particular case is one of mingled law and fact; that when we speak of an act as negligent or careless, according to the common use of language, we state, not simply a conclusion of law, but likewise state an ultimate fact inferable from certain other facts not stated. Therefore it has been generally settled by precedent and authority that a general allegation of negligence or carelessness, as applied to the act of a party, is not a mere conclusion of law, but is a statement of an ultimate fact allowed to be pleaded." We are in full accord with the foregoing reasoning.

But counsel for appellant urge that negligence of the plaintiffs in permitting the stock to be on the railroad track is not negatived in the complaint, and therefore is admitted. They argue that, inas-

much as stock was not permitted to run at large at the time of the alleged injury, plaintiffs must have been guilty of contributory negligence, as a matter of law, in permitting the stock to be upon the defendant's right of way. The fallacy of this argument is that there is nothing in the complaint to show the reason why said stock was on the right of way. Furthermore, there is nothing to show that the stock was on the right of way. For all that appears from the complaint, they may have been injured at a public crossing. Certainly there is nothing to show that the stock was at the place of the injury (wherever it may have been) through any negligence of plaintiffs, and our answer to the contention of defendant's counsel in this regard is that negligence on the part of the plaintiffs will not be presumed, but is an affirmative defense. In some jurisdictions it is necessary for plaintiff to negative negligence on his part, but this is not the rule in this state.

We are of the opinion, therefore, that the order overruling the demurrer was correct, and should be affirmed. All concur.

MORGAN, J., being disqualified, took no part in the decision; Judge C. J. FISK, of the First Judicial District, sitting by request.

(97 N. W. Rep. 535.)

CITY OF LIDGERWOOD *v.* ALBERT MICHALEK, ALBERT HELEY, AND MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY.

Opinion filed November 3, 1903.

Cities Have Power to Lay Out and Open Streets, and Exercise the Right of Eminent Domain.

1. Under subdivision 7 of section 2148, and section 2454, Rev. Codes 1899, cities are given the power, through their city councils, to lay out and open streets, and, when necessary, to exercise the right of eminent domain in the manner provided by chapter 35 of the Code of Civil Procedure.

Essential Requisites of Complaint In Eminent Domain Proceedings Prescribed By Statute—Complaint Sufficient.

2. In this state, eminent domain proceedings are prosecuted by a civil action in the district court, and the essential allegations of the complaint in such an action are prescribed by section 5962, Rev. Codes 1899. It is *held*, on general demurrer, that the complaint in this action fully meets the requirements of the above section; further,

that it is not necessary for a plaintiff to allege, as a right to maintain the action, that it has made provision to pay the award, either by general taxation or by special assessment.

Appeal from District Court, Richland county; *W. S. Lauder,* J.

Action by the city of Lidgerwood against Albert Michalek and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Purcell & Bradley, for appellants.

The procedure for laying out and improving highways is found in sections 2279 and 2280 only; under these provisions the first step is to declare the work or improvement necessary, and this the city council of Lidgerwood did. The next step required is, that the resolution of the city council declaring such necessity be published for four consecutive weeks at least once in each week in the official newspaper of the city. The complaint shows that this was not done; it alleges that the resolution was published in the official newspaper on April 24, 1902. The object of the notice is to apprise the owners of property liable to assessment, so that within twenty days after the publication is made they may file a protest against the improvement. A single publication, when the law requires four, furnishes no foundation for a legal highway; and unless the complaint sets forth facts showing it to be a legal highway, the city has no power to exercise the right of eminent domain. *City of Madison* v. *Daly,* 58 Fed. 751; *Siskiyou County* v. *Gamlich,* 42 Pac. Rep. (Cal.) 468; *Blaisdell* v. *Inhabitants of Winthrop,* 118 Mass. 138; *In re Schreiber,* 3 Abb. N. C. 68; *City of Buffalo* v. *New York,* 78 N. Y. 362.

A. L. Parsons and *Smith Stimmel,* for respondent.

The one question in this appeal is, do sections 2279 and 2280 Rev. Codes govern this action, or the provision of section 2454. The former apply only to improvements in which "a special assessment is to be levied," and do not apply where no special assessment is to be levied. In the case at bar, the proposed improvement is one of direct benefit to the entire corporation, and no special assessment is contemplated. In such case, section 2454, and the provisions for the exercise of the right of eminent domain under Chap. 35 of Code of Civil Procedure, therein referred to, apply.

YOUNG, C. J. This action is prosecuted by the city of Lidgerwood for the purpose of condemning certain real estate owned by the defendants for street use, in opening and extending Wiley, Hubbard, and Severance avenues. The defendants demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendants have appealed from the order overruling the same.

The complaint is sufficient, and the demurrer was properly overruled. The plaintiff has the right, under the statute, to lay out and open streets, and to exercise the right of eminent domain, in order to acquire real property for street use. Section 2148, Rev. Codes 1899, reads as follows: "The city council shall have power * * * (7) to lay out, establish, open, alter, widen, grade, pave or otherwise improve streets * * * and vacate the same." Section 2454, Id., provides: "Any city * * * is authorized and empowered, through its proper municipal officers, to lay out, open, grade and otherwise improve the streets * * * therein and to vacate the same. When it becomes necessary in order to make any of the improvements herein specified to take or damage private property, such municipal corporation may exercise the right of eminent domain for any public use authorized by law in the manner provided in chapter 35 of the Code of Civil Procedure. * * *" The manner of exercising the power of eminent domain conferred upon cities by section 2454, *supra,* is governed by chapter 35 of the Code of Civil Procedure (sections 5955-5973w, inclusive, Rev. Codes 1899). Section 5961 provides that "all proceedings under this chapter must be prosecuted by civil action brought in the district court of the county in which the property or some part thereof is situated." Section 5962 provides what the complaint shall contain. An examination of the complaint in this action shows that it fully complies with the requirements of this section. It contains (1) the name of the corporation in charge of the public use for which the property is sought; (2) the names of all owners and claimants of the property; (3) a statement of the right of the plaintiff; (4) it shows the location, general route, and termini of the right of way sought, and is accompanied with a map thereof; (5) it contains a description of the lands owned by the defendants, and a particular description of each piece of land sought to be taken. The complaint fully meets the requirements of the statute, and is therefore sufficient.

The real attack which the defendants make upon the complaint is directed to other averments, which, as we shall see, are wholly immaterial, and are unnecessary in this kind of a proceeding. In addition to the averments of facts required by the statute, the complaint alleges in paragraph 2 "that by resolution duly adopted by the city council on April 15, 1902, and published in the official newspaper of said city on the 24th day of April, 1902, the plaintiff above named authorized the opening of Wiley, Hubbard, and Severance avenues, in said city, commencing at their present termination on the north, and opening same, for a like width of said avenues, due north to the north boundary line of said city, as same appears from the plat thereof, a copy of which resolution, marked 'Exhibit A,' is hereto attached, and made a part of this petition." The resolution referred to is as follows: "Whereas, it appears to be necessary and for the best interests of the city to open Hubbard, Severance and Wiley avenues, commencing at their present termination on the north, and opening same for a like width of said avenues due north to the north boundary line of said city, as same appears from recorded plat thereof; therefore be it resolved, that the city of Lidgerwood, N. D., proceed to forthwith take such legal proceedings as may be necessary to open said avenues as above set forth, and that the matter be referred to the street commissioners and city attorney." It will be noted that the resolution was published but once, towit, on the 24th day of April, 1902. Defendants' contention is that four publications of the resolution were necessary to the existence of the power of the city to proceed with the condemnation proceedings. This contention is based upon section 2279, Rev. Codes 1899, which, so far as material, is as follows: "When the city council shall deem it necessary to open, widen, extend," etc. "* * * any street * * * within the city limits * * * for which a special assessment is to be levied as herein provided, the city council shall, by resolution, declare such work or improvement necessary to be done, and such resolution shall be published for four consecutive weeks at least once a week in the official newspaper of the city, and if a majority of the owners of the property liable to be assessed therefor shall not within twenty days after the expiration of such publication file with the city auditor a written protest against such improvement, then the city council shall have power to cause such improvement to be made and to contract therefor and to levy and collect the assessments as herein provided. * * *" It is patent, upon a mere

inspection of the above section, that it applies only when the improvement is to be paid for by special assessment, and, further, that the publication of the resolution is not jurisdictional to the right of the city to institute condemnation proceedings. In a controversy between the city and property owners subjected to a special assessment, the noncompliance with the provisions of this section could be successfully urged as a defense to the assessment. But that is not this case. The plaintiff is merely seeking to condemn defendants' property for street use under the power of eminent domain. The question as to whether the property, if condemned, shall be paid for out of revenue derived from general taxation, or whether the city shall be reimbursed by special assessment, does not concern the defendants in any way, and is not involved. The rights of the defendants are fully protected by the statute authorizing and regulating condemnation proceedings. The plaintiff can acquire neither an easement, nor right to the use which it seeks, nor to possession, until the damages awarded in the condemnation proceedings shall have been paid; and no order of condemnation can be made until such payment is made to the defendants, or in court for their use. Sections 5970, 5971, Rev. Codes 1899. The city may conclude that the award is excessive, and decline to make provision for its payment, and if payment is not made the condemnation proceedings are rendered abortive. Sections 5968, 5969, Id. As stated in 2 Lewis on Eminent Domain, section 656: "The weight of authority undoubtedly is that, in the absence of statutory provisions on the question, the effect of proceedings for condemnation is simply to fix the price at which the party condemning can take the property sought, and that, even after confirmation or judgment, the purpose of taking the property may be abandoned without incurring any liabilty to pay the damages awarded." See cases cited in note 13. Under the statutes of this state, the rule above quoted is applicable to condemnation proceedings when prosecuted by municipal corporations. The prosecution of eminent domain proceedings under the power of eminent domain must not be confounded with proceedings for imposing special assessments. The method of procedure and right of condemnation under the power of eminent domain are found in chapter 35, Code of Civil Procedure. Section 2279, upon which counsel for appellants rely, relates to the right to impose special assessments. The prosecution of eminent domain proceedings and the imposition of special assessments are not interdepend-

ent or necessarily concurrent acts. See *Holmes* v. *Village of Hyde Park,* 121 Ill. 128, 13 N. E. 540; *Village of Hyde Park* v. *Borden,* 94 Ill. 26; also *Mason* v. *City of Sioux Falls,* 2 S. D. 640, 51 N. W. 770, 39 Am. St. Rep. 802. In *City of Fargo* v. *Keeney,* 11 N. D. 484, 92 N. W. 836, which was an appeal from an order setting aside a judgment entered by inadvertence and mistake in an action prosecuted to condemn certain lands for street use, this court, after sustaining the order vacating the judgment upon the grounds upon which the motion was made, towit, inadvertence and mistake, observed in the course of its opinion that the action was prematurely brought, for the reason that the city, as shown by the evidence in the case, had not taken any steps to provide funds to pay the award, either by special assessment or general taxation. As applied to the facts which were developed in the trial of that case, and upon the motion to vacate the judgment, it might properly be said that the action was prematurely brought, for it was clear that the proceedings would be futile, for the reason that the city could not comply with the award, for want of funds. The language used can hardly be construed as intimating that it is necessary for a municipal corporation to make provisions in advance for raising funds to pay a subsequent award, either by special assessment or by general taxation, as a condition precedent to its right to maintain condemnation proceedings, and to allege that it has done so in its complaint. So far as it will bear that meaning, it is misleading, and is disapproved. Cities in this state are given the right to condemn land for street use, and may institute condemnation proceedings for that purpose. The statute provides the essential elements of a complaint in such an action, and we are without authority to add other elements which the legislature has seen fit to omit.

The order appealed from is affirmed. All concur.

(97 N. W. Rep. 541.)

S. PAUL PAULSON *v.* L. O. LYSON.

Opinion filed November 3, 1903.

A Party to An Action, Without the Assent of His Attorney, May Consent to Its Dismissal.

1. Defendant, without the knowledge or consent of his attorney of record in the case, entered into a written stipulation with plaintiff's attorneys for the dismissal of the action with prejudice and without costs. This was such a stipulation as it was in the power of the party to make without the assent of his attorney of record in the case, and, being within his power to make, it was the duty of the court to enforce it, to the extent that no costs could be taxed on dismissal in favor of the defendant.

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

Action by S. Paul Paulson against L. O. Lyson. Judgment for defendant, and plaintiff appeals.

Reversed.

McCumber, Forbes & Jones, for appellant.

A party to litigation may settle his own law suit and put an end to it, without the knowledge or consent of his attorney, in the absense of any statutory provision to the contrary. *Anderson* v. *Itasca Lumber Company*, 91 N. W. Rep. 12; *Williams et al.* v. *Miles et al.*, 89 N. W. Rep. 455; *Swanston* v. *Morning Star Mining Co.*, 13 Fed. Rep. 215; *Garvin* v. *Martin*, 93 N. W. Rep. 470; *Shank* v. *Shoemaker*, 18 N. Y. 489; *Adkinson* v. *Graham et al.*, 28 N. E. Rep. 380; *Kusterer* v. *The City of Beaver Dam*, 14 N. W. Rep. 617; *Pulver* v. *Harris*, 52 N. Y. 73; *Wright* v. *Wright*, 70 N. Y. 96; *Courtney* v. *McGavock*, 23 Wis. 619.

No amendments to the statement of the case were proposed by the respondents, nevertheless, the court refused to settle the statement without adding to, and making a part of it, the execution and the proceedings thereon, showing the judgment fully satisfied. The payment of a judgment is no bar to an appeal therefrom, especially when such payment is enforced by an execution. *Dyett* v. *Pendleton*, 8 Cow. 326; *Hayes* v. *Nourse*, 14 N. E. Rep. 508, *Chapman* v. *Sutton*, 32 N. W. Rep. 683; *Sloane et al.* v. *Anderson*, 57 Wis. 123, 2 Enc. Pl. & Pr. 181; *Perry* v. *Woodbury*, 17 N. Y. S. 530; *Nicholas, Shepard & Co.* v. *Knowles*, 17 Fed. 494; *Clowes* v. *Dickenson et al.*, 8 Cowen 328; *Erwin* v. *Louwry*, 7 How. 172.

This appeal is from the portion of the judgment allowing costs and disbursements against the appellant. An appeal from a portion of a judgment is proper, and the portion of the judgment that affixes the costs upon appellant is erroneous and should be reversed. Rev. Codes 1899, Sec. 5606; *Conrad* v. *Bauldwin et al.,* 46 N. W. Rep. 850; *Spencer* v. *Mungus,* 72 Pac. 663; *Sanborn* v. *Perry,* 56 N. W. Rep. 337; *Sutton* v. *Wegner,* 39 N. W. Rep. 775; *Broadway* v. *Scott,* 31 Hun. (N. Y.) 378; *Burt* v. *Ambrose,* 4 Pac. Rep. 465; *Garvin* v. *Martin,* 93 N. W. Rep. 470.

The judgment for costs so entered, and collected, as shown in the record, should be reversed, and judgment against the respondent for restitution entered. 6 Am. & Eng. Ency. of Law (1st Ed.) 835; *N. W. Fuel Co.* v. *Brock et al.,* 139 U. S. 216, 11 Sup. Ct. Rep. 523; *Chamberlain* v. *Choles,* 35 N. W. Rep. 477; *Heir* v. *Anheuser-Busch Brewing Ass'n,* 82 N. W. Rep. 77; *Anheuser-Busch Brewing Ass'n* v. *Heir,* 75 N. W. Rep. 1111; *Horton* v. *State,* 88 N. W. Rep. 146; *Clark* v. *Pinney,* 6 Cowen 297; *Safford* v. *Stevens,* 2 Wend. 158.

J. A. Dwyer, for respondent.

The pretended stipulation for dismissal was of no force and effect whatever, it not being signed by the plaintiff, in person, and his attorney not being shown to have been authorized to sign it. Nothing in the stipulation bound the plaintiff; he could at any time repudiate it, change his attorneys and reopen his case. It was the duty of defendant's attorney to protect his client's rights and object to the stipulation. The court was justified in ignoring the same and removing it from the record. *Wells* v. *Penfield,* 72 N. W. Rep. 816; *Bray* v. *Doheny,* 40 N. W. Rep. 262.

Action can be dismissed only by the order of the court. *Aultman, Miller & Co.* v. *Becker* 71 N. W. Rep. 753.

An attorney's employment is to prosecute, not to dismiss; he must have specially delegated authority for the latter. *Rhutasel* v. *Rule,* 65 N. W. Rep. 1013; *Steinkamp* v. *Gaebel,* 95 N. W. Rep. 684.

The dismissal of an action without the participation of the attorney of record, and without notice to him, is not looked upon with favor by the Supreme Court of North Dakota. *McKenzie* v. *Bismarck Water Co.,* 6 N. D. 361, 71 N. W. Rep. 608.

Upon ground of professional morality, convenience in the transaction of business, protection to litigants entitled to the advice of

their counsel at all times, to avoid useless expense and confusion, the rule that the court should hear a party through his attorney when he is represented by one, in the important moves in an action pending, should prevail. *Board of Commissioners* v. *Younger,* 29 Cal. 147; *Mott* v. *Foster,* 45 Cal. 72; *Pilger* v. *Gou,* 21 How. Pr. 155; *McBrantny* v. *Ry. Co.,* 87 N. Y. 467; *Reed* v. *French,* 26 N. Y. 285; *Bonnifield* v. *Thorp,* 71 Fed. 294; *Thompson et al.* v. *Pershing et al.,* 86 Ind. 304; *McConnell* v. *Brown,* 40 Ind. 384, 6 Enc. Pl. & Pr. 944; Mechem on Agency, section 811; *Axiom Mining Co.* v. *Little,* 61 N. W. Rep. 441.

In the cases cited by appellant, the holding is, that the right to dismiss is not an unqualified one. The court in most instances is authorized to impose terms, and the compliance therewith made a condition of dismissal. *Sheedy* v. *McMurty,* 63 N. W. Rep. 23; *Garven* v. *Martin,* 93 N. W. Rep. 470; *Huntington* v. *Forkson,* 7 Hill 195; *Sellers* v. *The Union Lumbering Co.,* 36 Wis. 398.

COCHRANE, J. After this action was at issue and upon the court calendar for trial at a regular term of court, plaintiff, through his attorneys, entered into the following written stipulation with defendant: "It is hereby stipulated by and between the parties to the above-entitled action that the said action be and the same is hereby dismissed with prejudice and without cost to either party." This stipulation was filed in the office of the clerk of the district court of Richland county, where the case was at issue. Four days after its filing, the district judge, on motion of defendant's attorney, but without notice to appellant or his attorneys, ordered the stipulation removed from the files, and returned to the attorneys for plaintiff. When the case was reached in its order on the calendar counsel for respective parties were present in court. Plaintiff's attorneys moved for judgment of dismissal, pursuant to the written stipulation. This motion was overruled, for the reason, as set forth in the written order, that the stipulation was not signed by the attorney for defendant, neither with his knowledge or consent, and for the reason that the litigation is under control of the attorney while the relation of attorney and client exists. Thereafter, an order was made, on motion of defendant's attorney, dismissing the action, and for costs against plaintiff. Judgment was entered accordingly. This appeal is from the judgment for costs.

The defendant had the right to settle his case independently of his attorney. The subject matter of litigation is at all times under

the exclusive control of the client. *Coughlin* v. *Ry. Co.,* 71 N. Y. 447, 27 Am. Rep. 75; *Pomeranz* v. *Marcus* (Sup.) 82 N. Y. Supp. 707; *Peri* v. *Ry. Co.,* 152 N. Y. 521, 46 N. E. 849; *Moseley* v. *Jamison* (Miss.) 14 South. 529; *Lee* v. *Vacuum Oil Co.,* (N. Y.) 27 N. E. 1018; *Garvin* v. *Martin,* (Wis.) 93 N. W. 470; *Bonnifield* v. *Thorp* (D. C.) 71 Fed. 928; *Williams* v. *Miles* (Neb.) 89 N. W. 456. For this reason even where a plaintiff has agreed to pay his attorney a contingent fee, or a part of the subject matter of litigation in case of recovery, he may nevertheless make a good faith settlement of his suit. *Kusterer* v. *Beaver Dam* (Wis.) 14 N. W. 617; *Swantson* v. *Morning Star* (C. C.) 13 Fed. 215; *De Graffenreid* v. *Ry. Co.* (Ark.) 50 S. W. 272; *Western Union Tel. Co.* v. *Semmes* (Md.) 20 Atl. 127. In some jurisdictions it is held that a contract with his attorney by which a client agrees not to settle or discontinue his suit is contrary to public policy, in that its enforcement would foster and encourage litigation. *North Chicago Street Ry. Co.* v. *Ackley* (Ill.) 49 N. E. 222, 44 L. R. A. 177; *Davis* v. *Webber,* (Ark.) 49 S. W. 822, 45 L. R. A. 196, 74 Am. St. Rep. 81; *Huber* v. *Johnson,* 68 Minn. 74, 70 N. W. 808, 64 Am. St. Rep. 456; *Lewis* v. *Lewis' Adm'x,* 15 Ohio 715; *Ellwood* v. *Wilson,* 21 Iowa 523; *Boardman* v. *Thompson,* 25 Iowa 487; *Gammons* v. *Johnson,* 76 Minn. 78 N. W. 1035; *Mosely* v. *Jamison,* (Miss.) 14 South. 529. If, then, the subject of litigation is under the control of the party, so that he may settle and compromise without the knowledge or consent of his attorney, and in the teeth of an agreement not to do so, such settlement must be recognized by the court in which the action is pending, to the extent of making an order disposing of the case according to the settlement.

In the case at bar the defendant was sued for damages for slander. The answer interposed was a general denial. No affirmative judgment could have been obtained in favor of defendant in which his attorney could obtain any interest, and as said by the Supreme Court of Arkansas in *Davis* v. *Weber,* 49 S. W. 822, 45 L. R. A. 196, 74 Am. St. Rep. 81, and also in *De Graffenreid* v. *Ry. Co.* (Ark.) 50 S. W. 272, "the attorney has no right to question the bona fides of any settlement made between the plaintiff and the defendant." Nor had defendant's attorney any right to have the litigation continued as against his client, and at his client's cost, but for his own benefit. In *Garvin* v. *Martin* (Wis.) 93 N. W. 470, the defendant Crowley alone answered, alleging that what purported to

be his signaure to the note in suit was a forgery.. Later, upon a stipulation signed by Crowley in person, without the knowledge of his attorney, and in his absence, an order was entered dismissing the action as to him without costs. Subsequently, on order to show cause obtained by Crowley's attorney, the stipulation and order were set aside, and a judgment rendered in Crowley's favor, dismissing the complaint as to him, with costs in his favor, against the plaintiff. On appeal it was said: "The idea that an attorney can acquire a lien of either a legal or an equitable character upon the mere right of his client to defend against the claim or cause of action of the plaintiff, precluding the parties from settling the litigation independently of him, regardless of their motives therefor, is without support in principle or authority so far as we are aware." In *Pomeranz* v. *Marcus* (Sup.) 82 N. Y. Supp. 707, the defendant's attorney asked leave to try the action for the purpose of getting judgment for costs against the plaintiff in order to get paid in that way for his services. The court said: "The parties had the right to settle their cases, and it follows, from the right of the parties to settle an action, that neither nor both of the attorneys can keep it going and try it in spite of the parties." By the stipulation of the defendant, the taxation of costs and the right to enter judgment therefor was waived. The attorney could have obtained no interest in any but the statutory costs, had judgment been regularly entered against the plaintiff; and he could not acquire any interest in the statutory costs, as against his client until judgment was in fact entered.

The right of the client to control the subject matter of litigation is distinct from the right of the attorney to manage the case in its procedure through the courts. An attorney at law has authority, by virtue of his employment as such, to do in behalf of his client all acts in and out of court necessary or incidental to the management of the suit, and which affect the remedy only, and not the cause of action. *Moulton* v. *Bouker,* 115 Mass. 40, 15 Am. Rep. 72; *Bonnifield* v. *Thorp* (D. C.) 71 Fed. 928. Consequently, when a party appears by attorney, such attorney is looked to for the management and control of the action or defense; and neither the opposing counsel nor the court should or will, save under exceptional circumstances, recognize the party, or any representative of him, as having any control of the proceeding. Stipulations in the course of the proceeding through the courts, made by the party

without the knowledge or consent of his attorney in the case, will not be enforced by the court. *Toy* v. *Haskell* (Cal.) 61 Pac. 89, 79 Am. St. Rep. 70; *Bonnifield* v. *Thorp, supra.*

The trial court in refusing to recognize this stipulation, disapproved the practice of an attorney dealing directly with the opposite party in disregard of his attorney in the case, and intended to follow the rule that a court will not recognize a stipulation in a case having reference to its conduct when signed by the party, and not by his attorney of record in the case, or assented to by him. We think, however, the action of the court was erroneous in dealing with the stipulation as one having to do with the conduct of the case in the court, as to which the attorney of record can alone treat, and not as dealing with the subject of litigation, with reference to which the party can exercise independent control to the extent of terminating or putting a period to it. When the case was reached on the trial calendar, the attorneys for both parties were in court. No question was made but that the written stipulation evidenced the agreement of the parties for a dismissal of the action without costs. Defendant's counsel admitted that his client's signature to the stipulation was genuine. No reason was assigned why the stipulation should not be carried out. No claim was made that defendant had been overreached in the settlement. His counsel claimed that he had been to some expense in the case, for which he had not been reimbursed, but made no showing that his client was insolvent, unable or unwilling to reimburse him, and no showing entitled to consideration, in opposition to an order such as was stipulated for. The attitude of counsel was in apparent hostility to his client, because hostile to the stipulation he had made with reference to a subject matter concerning which he had authority to stipulate. Defendant's counsel showing no valid reason why his client's agreement should be ignored, it should have been enforced. The reason of the rule requiring notice to be given to counsel of record as to proceedings in a case was complied with in this case, when counsel was present and heard concerning the subject matter of the stipulation. His objections were not because of any rights of the defendant which had been infringed upon, but because of an unpaid balance due from his client, which could not go to the defeat of the stipulation. He could not be heard to urge, in opposition to his client's contract, matters personal to himself. The case of *Commissioners* v. *Younger,* 29 Cal. 147, relied on by respondent,

is distinguished upon this ground in *Theilman* v. *Superior Court* (Cal.) 30 Pac. 193, and in *Toy* v. *Haskell* (Cal.) 61 Pac. 89, 79 Am. St. Rep. 70, and is not authority, under the facts in this case, in support of respondent's contention.

That part of the judgment appealed from is reversed. All concur. (97 N. W. Rep. 533.)

THE PINE TREE LUMBER COMPANY *v.* CITY OF FARGO.

Opinion filed July 21, 1903.

Under the General Incorporation Act, Cities Are Not Limited to Specia Assessments for Payment of Street Improvements.

1. Cities organized under the general incorporation act are authorized to alter, extend, grade, pave, and improve streets, and to make contracts therefor. They are authorized to provide for the expense of making such improvements by special assessments upon adjoining property, but such cities are not restricted so as to require them to contract for payment for such improvements only out of the particular fund realized from special assessments.

May Render Itself Generally Liable Therefor.

2. There is no charter restriction upon the power of a city to render itself generally liable upon its contract for special improvements.

Under the Scheme of the Statute, City Makes Improvements and Reimburses Itself by the Special Assessment.

3. The scheme of the statute is to enable a city to make special improvements upon its streets, and to reimburse itself for the cost of the same through special assessments of property abutting upon and benefited by the improvements, to the extent of assessments made, and this without cost to the general taxpayer.

When a City Issues a Warrant On a Fund To Be Raised by Special Assessment, It Assumes the Duty of Raising and Paying Such Fund and Cannot Divert It.

4. The city of Fargo contracted for the pavement of Front street, and stipulated therein to pay for the work by city warrants drawn on account of the contract, and thereafter, in payment, delivered to the contractors, and they accepted warrants directing the payment of the specified amounts "out of the Front street paving funds in the treasury not otherwise appropriated for account contract paving Front street." The city imposed upon itself by such transaction the duty of making and collecting the assessments for creating the fund out of which such warrants could be paid, and of paying such warrants with-

out unnecessary delay; and a diversion of such moneys, when collected, to any other purpose than the payment of the warrants drawn against the fund, was a breach of contract, for which the city could be held liable in damages.

Plaintiff Need Only Prove the Fund, Sufficient Money Therein, Presentation, Demand and Nonpayment; Improper Credits to Funds, Matter of Defense.

5. In an action against a city to recover against it generally because it has diverted from the purposes of its creation moneys realized by assessments for a special fund against which plaintiff's warrants were drawn, it was sufficient for plaintiff to prove his warrants, and that the special fund was created by the city; that there was credited to this fund an amount sufficient to pay his warrants and all other warrants drawn against it; and that his warrants were presented and demand made for payment, and that they were unpaid. The burden was then shifted to the city to show what, if any, of the credits to the fund were improperly made, or otherwise to overcome the *prima facie* case of diversion made by plaintiff.

Public Officers Are Presumed to Perform Their Duty.

6. The presumption is that public officers do as the law and their duty require them.

When An Official Duty Depends Upon the Performance of a Prior Act, the Latter Will Be Presumed Performed.

7. Where an act is done by a public functionary in the discharge of official duty, which can be done only after the performance of some prior act, proof of the latter carries with it a presumption of the due performance of the prior act, and this though the prior act is required of the corporation of which he is an officer.

Section 2183, Rev. Codes 1895, Does Not Prevent a City From Reimbursing a Fund for Special Improvements, for Advances Made Therefrom.

8. Section 2183, Rev. Codes 1895, requiring all moneys received on special assessments to be held by the treasurer as a special fund to be applied to the payment of the improvement for which the assessment was made, and directing that such moneys shall be used for no other purpose does not prevent a city, when it has advanced money to pay for a special improvement, to reimburse itself later out of the special improvement fund.

Objection That Complaint Does Not State a Cause of Action, Must Point Out the Particulars of Its Insufficiency.

9. A general objection to any and all evidence under the complaint, on the ground that it does not state a cause of action, without pointing out any particulars wherein the pleading is considered insufficient, will not be considered.

Motion for a Verdict Non Obstante Must Unite the Alternative of a New Trial, or Latter Will Not Be Awarded.

10. A motion for judgment notwithstanding the verdict tests the sufficiency of the evidence to sustain the verdict rendered, and a new trial will not be awarded or errors considered which can only be remedied by new trial, when the moving party failed to unite with his motion for judgment *non obstante* a request for the alternative of a new trial.

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

Action by the Pine Tree Lumber Company against the City of Fargo to recover on certain city warrants. Plaintiff had judgment and defendant appeals.

Affirmed.

M. A. Hildreth, for appellant.

Under section 2183 of Political Code, the council and every city officer are prohibited from transferring money from one special fund to another. Such council and city officers are prohibited from making any such appropriation, or any contract, which would take any portion of the general funds of the city and apply it to any special improvement. *Engstad et al.* v. *Dinnie et al.*, 8 N. D. 1, 76 N. W. Rep. 292; *Roberts* v. *City of Fargo*, 10 N. D. 231, 86 N. W. Rep. 726; *City of Fargo* v. *Keeney et al.*, 11 N. D. 484, 92 N. W. Rep. 836.

The plaintiff cannot recover upon any theory under the evidence. He failed to show any misappropriation of the special assessments arising from the Front street and Northern Pacific avenue funds. A general liability against a municipality cannot arise excepting in instances where the city has failed to make an assessment on account of the failure of the law to provide for a special assessment, or officers have negligently failed to do their duty, or where the funds have been misappropriated by an act of the municipality itself. *Casey* v. *City of Leavenworth*, 17 Kan. 189; *Trustees of Bellview* v. *Hahn*, 82 Ky. 1; *Heick et al.* v. *Voight*, 11 N. E. Rep. 306; *Hammet* v. *Philadelphia*, 65 Pa. 146; *Chamberlain* v. *Cleveland*, 34 Ohio 551; *N. P. Lumber Mfg. Co.* v. *East Portland*, 14 Ore. 3; *Goose River Bank* v. *Willow Lake School Township*, 1 N. D. 26, 44 N. W. Rep. 1002; *Woodard* v. *Colhoun Co.*, No. 2182 Fed. Cases; *Lake* v. *Trustees of Williamsburg*, 4 Den. 520; *Eilert* v. *City of Oshkosh*, 14 Wis. 586; *Whalen* v. *City of LaCrosse*, 16 Wis. 271; *Finney et al.* v. *City of Oshkosh*, 18 Wis. 209; *People* v. *City of*

Milwaukee, 10 Mich. 274; *Goodrich* v. *Detroit,* 12 Mich. 279; *New Albany* v. *Sweeney,* 13 Ind. 245; *Casey* v. *Leavenworth,* 17 Kan. 189; *Swift* v. *Mayor,* 83 N. Y. 538.

Plaintiff's complaint is upon the warrants. They show on their face that they are to be paid out of a special fund. Plaintiff cannot recover. *Martin* v. *City and County of San Francisco,* 16 Cal. 285; *People* v. *Gray,* 23 Cal. 125; *Dana et al.* v. *City and County of San Francisco,* 19 Cal. 486; *Wilson* v. *City of Aberdeen,* 52 Pac. 524; *Ger. Am. Savings Bank* v. *City of Spokane,* 38 L. R. A. 259.

Where work has been done under a law declared unconstitutional, and special assessments have been made thereunder, action will lie generally against the municipality on the contract. *Barber* v. *Harrisburg,* 64 Fed. Rep. 283; *Barber* v. *Denver,* 72 Fed. Rep. 336.

Benton, Lovell & Holt, for respondents.

An action on warrants drawn against a street improvement fund will lie against a city. *Potter* v. *New Whatcom,* 20 Wash. 589, 72 Am. St. Rep. 135; *Terry* v. *City of Milwaukee,* 15 Wis. 543.

The transfer of money from one fund to another being an official act of the city treasurer the presumption arises that it was legally made. And where some preceding act or pre-existing fact is necessary to the validity of an official act, the presumption in favor of the validity of the official act is presumptive evidence of such act or fact. *Delaney* v. *Schuette,* 5 N. W. Rep. 796; *Nonfire* v. *U. S.,* 164 U. S. 657, 17 Sup. Ct. Rep. 212, 41 L. Ed. 588; *U. S. Bank* v. *Dandridge,* 12 Wheat. 64, 6 L. Ed. 552; *Rankin* v. *Hoyt,* 4 How. 327, 11 L. Ed. 996; *Huey* v. *Van Wie,* 23 Wis. 613.

Where an act is done which can only be legally done after a prior act, proof of the latter carries with it proof of the prior act. *Rutherford* v. *Hamilton,* 97 Mo. 543; *Kieth* v. *Bingham,* 100 Mo. 300; *State* v. *Kempf,* 69 Wis. 470; *State* v. *Dugan,* 110 Mo. 138; *Boots* v. *Washburn,* 79 N. Y. 207; *Howard* v. *City of Oshkosh,* 33 Wis. 309; *Bilk* v. *Hamilton,* 130 Mo. 292.

Respondent having shown that the city had established and supplied with funds the accounts on which the warrants in suit were drawn, and the legal presumptions being in favor of the regularity of these acts, a *prima facie* case was made of the city's present liability to pay the warrants out of such accounts. The burden was thereby shifted upon the appellant to show any irregularity that would void such transfers. *Hockaday* v. *Board of Co. Com-*

missioners, 29 Pac. Rep. 291; *State* v. *Lee,* 37 Atl. Rep. 79; *Nonfire* v. *U. S., supra; Metropolitan St. Ry. Co.* v. *Powell,* 89 Ga. 601.

This burden was not assumed, and respondent's *prima facie* case results, and the accounts on which the warrants were drawn were shown to be regularly created and supplied with funds. *Woodcock* v. *Calais,* 68 Me. 244; *Littell* v. *Fitch,* 11 Mich. 524; *Pease* v. *Cole,* 53 Conn. 53; *Hockaday* v. *Board of County Com., supra.*

The appellant is liable to respondent out of its general fund, because the funds set apart for the payment of the warrants in suit were diverted to other purposes. *Potter* v. *New Whatcom,* 56 Pac. Rep. 394, 72 Am. St. Rep. 135; *Valleau* v. *Newton Co.,* 72 Mo. 593; *Same* v. *Same,* 81 Mo. 591; *City of Gladstone* v. *Thropp,* 71 Fed. 348; *Wilder* v. *City of New Orleans,* 87 Fed. 843, 31 C. C. A. 249; *Warner* v. *City of New Orleans,* 167 U. S. 467, 42 L. Ed. 239, 17 Sup. Ct. Rep. 892.

When the warrants in suit were issued, the appellant undertook to make proper assessments, collect them, and see that the money was paid over to the warrant holder, within a reasonable time after the completion of the contract. A failure to discharge these duties rendered the City of Fargo liable out of its general fund to the holders of the warrant in suit. *Commercial National Bk.* v. *Portland,* 33 Pac. Rep. 532; *Barber* v. *City of Harrisburg,* 64 Fed. Rep. 283; *Barber* v. *City of Denver,* 72 Fed. Rep. 336; *Wilder* v. *City of New Orleans, supra; Reilly* v. *City of Albany,* 112 N. Y. 42; *N. P. Lumber Co.* v. *East Portland,* 12 Pac. 4; *Cummings* v. *Mayor,* 11 Paige 596; *Buck* v. *City of Lockport,* 6 Lans. 251; *Mather* v. *City of San Francisco,* 115 Fed. Rep. 37.

There is a distinction between warrants made payable by law out of a special fund only, and those which are evidences of a general corporate indebtedness, but which are to be charged to a particular corporate fund. A municipality is liable for improvements out of its general funds when the laws authorize a special assessment upon property benefited. The resort to the property benefited after the work is done, is for the reimbursement of the city. *Clark* v. *Des Moines,* 19 Ia. 221; *Montague* v. *Horton,* 12 Wis. 599; *Kelley* v. *Mayor,* 4 Hill (N. Y.) 263.

At the close of plaintiff's testimony defendant's counsel moved for a directed verdict. The motion was denied. Plaintiff's counsel then moved for a directed verdict, which motion was granted. Thereupon defendant's counsel moved for judgment notwithstand-

ing the verdict, which motion was denied. Counsel did not ask for a new trial in connection with his motion *non obstante.* The right to a judgment *non obstante* is conferred by chapter 63, Laws of 1901.

This statute was adopted from Minnesota, and has had full construction there. The motion should be granted only when it clearly appears from the evidence that the cause of action or defense sought to be established, could not in point of substance constitute a legal cause of action or defense; and should be denied where it appears probable that the party has a good cause of action or defense, and the defects in the evidence are of such a character that they could be supplied upon another trial. *Cruikshank* v. *St. Paul, etc., Ins. Co.,* 77 N. W. Rep. 958; *Bragg* v. *Chicago, etc., Ry. Co.,* 83 N. W. Rep. 511; *Kreatz* v. *St. Cloud School Dist.,* 81 N. W. Rep. 533; *Richmire* v. *Andrews & Gage El. Co.,* 11 N. D. 453, 92 N. W. Rep. 819.

Appellant did not join to his motion for judgment a request for a new trial, and thereby waived his right to one, and this court will grant the motion or sustain the judgment. *Bragg* v. *Chicago, etc., Ry. Co.,* 83 N. W. Rep. 511; *Marquardt* v. *Hubner,* 80 N. W. Rep. 617; *Cruikshank* v. *St. Paul, etc., Ins. Co.,* 77 N. W. 958; *St. Anthony Bank* v. *Graham,* 69 N. W. Rep. 1077; *Kernan* v. *St. P. City Ry. Co.,* 67 N. W. Rep. 71.

COCHRANE, J. Action upon warrants (ten in number) drawn against city paving accounts by the city of Fargo. Plaintiff holds the warrants as transferree of the original paving contractors. The city of Fargo in July and August, 1895, entered into contracts for the paving of Front street and Northern Pacific avenue, in said city. Each contract provided that the payment should be by city warrants issued in behalf of the contract, to be accepted at par value. The warrants in suit, drawn under the Front street contract, directed each its payment "out of Front street paving funds in the treasury not otherwise appropriated for account of contract paving Front street." The warrant issued against the Northern Pacific avenue fund was in the same form, except that the name of the avenue is substituted for that of Front street. These warrants were issued and delivered in fulfillment of the contracts, and on October 9, 1895, were severally presented to the city treasurer for payment, registered by him, and indorsed, "Not paid for want of funds," and they are still un-

paid. In pursuance of its duty under these contracts, the proper officers of appellant opened two accounts on its books, known as "Front Street Paving Account" and "Northern Pacific Avenue Paving Account," respectively. It is admitted that special assessments were made to pay for these improvements, that all proceedings required by statute were duly and regularly taken, and that the assessments were from time to time collected. Delinquent assessments were certified to the proper authorities for collection, and collections made. $24,327.40 was credited by the city treasurer to the Front street paving account, and the total amount of warrants drawn against this account was $19,277.44. Of this, $1,048.92 represents the warrants in suit. The treasurer's books show a total credit to Northern Pacific avenue paving account of $17,160.02. The total amount of warrants drawn against this account was $14,355.99. Of this, $500 represents the warrant in suit. Of the $24,327.40 credited to the Front street account, $4,217.54 shows upon the books as "appropriated from street and bridge fund," and $2,411.89 as "transferred from North Broadway fund." Of the total credit to the Northern Pacific avenue paving account, $3,144.82 shows upon the books as "appropriated from street and bridge fund." On November 26, 1895, the delinquent assessments for the Front street paving were certified to the county auditor for collection, and amounted at that time to $4,029.45. Of this there was collected and remitted to the city treasurer $3,424.59. On November 29, 1895, the delinquent assessment roll for Northern Pacific avenue was certified to the county auditor for collection. The amount of unpaid assessments for this fund at that time was $2,550.17, and thereafter there was collected and remitted to the city treasurer, with accumulated penalties and interest, the sum of $3,206.45. At the time of the trial there was $219.17 in the Northern Pacific avenue paving account, and there was no money in the Front street paving account. No part of the interest or penalty upon these assessments was credited to the special accounts, but the city officers credited all the penalty and interest collected into the general fund. In the complaint each warrant is the subject of a separate cause of action, but a synopsis of one will illustrate the issues tendered as to all, because of the similarity in the form of averment. It alleges the incorporation of the plaintiff and defendant; the issuance and delivery of the described warrant pursuant to the contract referred to made with McDonald & O'Neil; the presentation for payment;

its registration; that it was indorsed, "Not paid for want of funds"; its sale and transfer to plaintiff; that it has not been paid; and that the paving fund has not been otherwise appropriated—and concludes as follows: "Plaintiff further alleges, upon information and belief, that the defendant, for the purpose of paying said warrant, undertook, promised, and agreed with the said McDonald & O'Neil, and their assigns, at the time of issuing said warrants, to cause the amount of money necessary to pay said warrants to be assessed, levied, and collected as a special tax upon the abutting real property benefited by said paving contract, and the paving laid thereunder, and that thereafter the defendant caused such special tax to be levied and assessed, and that defendant collected therefrom, for the Front street paving funds aforesaid, an amount of money sufficient to pay all the warrants issued on such funds, with interest thereon, including the warrant hereinbefore described, and that such money applicable to the payment of such warrants is now in such funds, and that, if sufficient of said money so collected and applicable for the payment of such warrants is not in such funds, it is because it has been wrongfully and unlawfully diverted therefrom and misapplied by the defendant, without the knowledge or consent of the plaintiff, or any other of the owners of said warrant or warrants; that, if any portion of the amount so levied and assessed remains uncollected, it is because of the negligence of the defendant city, and without the knowledge, or fault on the part of the plaintiff, or any of the prior owners of such warrant or warrants." The plaintiff prays a money judgment for the face of the warrant and interest. The answer is a general denial. At the conclusion of the testimony each party moved for a directed verdict. Plaintiff's motion was granted, and a verdict directed for the full amount claimed. Defendant's motion for judgment notwithstanding the verdict was denied. Judgment was entered for plaintiff, and defendant appeals.

M. A. Hildreth, for appellant.
Benton, Lovell & Holt, for respondent.

COCHRANE, J. (after stating the facts). Respondent's theory of his right to a recovery appears from the section of his complaint above quoted—in effect, that the city has received into each of these special funds an amount sufficient to pay all warrants issued against them, respectively, including the warrants in suit; that, if it has not funds in the accounts, is has misappropriated them, leaving plain-

tiff without remedy other than this to recover against the city generally.

The paving of its streets was a municipal improvement contracted for by the city, and, when completed, of general utility. Unless there is something in the general incorporation act or general statutes which otherwise directs, or by necessary implication limits the right of a city to become generally liable upon its contracts for this class of improvements, or something in the contract with the city by which the claimant is limited in his recovery to the special funds to be raised from the assessment of abutting property, we can see no reason why the city cannot be held generally liable for debts it has thus contracted. The city council, at the time this indebtedness was incurred, had power to alter, extend, grade, pave, and improve streets (subdivision 7, section 2148, Rev. Codes 1895), to make contracts therefor, and to provide for paying the expense thereof. *Argenti* v. *City,* 16 Cal. 263. It was authorized to contract for the payment of such improvements out of the general funds of the city. *Soule* v. *City* (Wash.) 33 Pac. 384, 1080; *Stephens* v. *City* (Wash.) 39 Pac. 266; *Clark* v. *City,* 19 Iowa 221, 87 Am. Dec. 423. In such event, it was required to make an appropriation for the expense of the same before entering into a contract therefor. Sections 2262-2264, Rev. Codes 1895; *Engstad* v. *Dinnie,* 8 N. D. 1, 76 N. W. 292; *Roberts* v. *Fargo,* 10 N. D. 231, 86 N. W. 726; *City of Fargo* v. *Keeney,* 17 N. D. 484, 92 N. W. 836. It was also authorized to provide for the expense of making such improvements by special assessments upon adjoining property or property benefited thereby. Section 2265, Rev. Codes 1895. And this method of defraying the expense of paving Front street and Northern Pacific avenue was pursued by the city.

No question is raised in this case as to the legality of the proceedings leading up to and including the assessments of the adjoining property, or for the collection of the special assessments. On the contrary, it is expressly admitted by counsel for the appellant that there was ample power in the city to make the assessments; that they were in fact made and collected from time to time; that delinquent assessments were certified to the proper authorities for collection, and that collections were diligently made. The case was presented on both sides upon the theory that the statutory requirements as to the making of the improvements, through the instrumentality

of special assessments of benefited property, have been in all respects complied with, down to the time this suit was commenced.

The following summary of the sections of the general incorporation act, so far as applicable, will make manifest the basis of contention in this case, and the reasons for their solution. Reference is made in each instance to the Revised Codes of 1895. Power to make assessments for local improvements on property adjoining or benefited thereby is vested in the city council; also power to collect the same, and to fix, determine, and collect penalties for nonpayment of any special assessment and taxes. Section 2265, Rev. Codes 1895. When the council deemed it necessary to grade, pave, or otherwise improve any street within the city limits, for which a special assessment was to be levied, it was required, by resolution, to declare such work necessary to be done, and to cause such resolution to be published in the official newspaper of the city once a week for four consecutive weeks, and, in the absence of a written protest by a majority of the property owners affected, the city council "shall have power to cause such improvement to be made and to contract therefor, and to levy and collect the assessment as hereinafter provided, and all work done under this section shall be let by contract to the lowest responsible bidder therefor." Section 2279, Rev. Codes 1895. By section 2280 it is provided that when the work has been determined upon, and the contract let, the city engineer shall calculate the amount of the assessment for each lot or parcel of ground abutting or bounding upon such improvement; and in making his estimate he was required to divide the entire cost of the improvement by the number of feet fronting or abutting upon the same, the quotient to be the sum to be assessed per front foot so abutting. It provides for the filing and approval of such estimate, and for the giving of notice and time and place of its approval. Section 2288 required an assessment roll to be made up, and prescribed what it should contain—this to be filed with the city treasurer—and required the city treasurer to publish this list for three weeks, with a notice that the assessments would become delinquent if not paid within thirty days after the date of the first publication, and that a penalty of 10 per cent would be added thereto after they became delinquent. By section 2287 it was provided that all assessments should draw interest after delinquency at the same rate as general taxes under the laws of the state, and it required the city treasurer to collect the assessments by distraint of

personal property, or, if it could not be made by distress, then by sale of the real property assessed. Sections 2295 to 2302 provided for time, place, and manner of selling the property assessed for delinquent special taxes, the redemption from such sales and the giving of deed when not redeemed. Sections 2308 to 2310 gave the city council power to issue bonds of the city, to be known as "Internal Improvement Bonds," the proceeds from the sale of the bonds to be kept as a special fund, separate from other funds of the city, and to be used exclusively for the payment for work done and material furnished in the making of the special improvement, and provided that no more of the fund should be used than the amount of the special assessment, and that all assessments, penalties, and interest should be credited to the fund as fast as collected, and should remain a part of the same. It was provided by section 2311 that all contracts and bonds of the city, under these sections of the statute, should be signed by the mayor and countersigned by the auditor, with the seal of the city affixed.

As between the city and the parties with whom it contracted to furnish the labor and material and to pave its streets, the city had power to render itself generally liable, notwithstanding the cost of the improvement was to fall ultimately upon the owners of the abutting property. The scheme of the statute was to enable the city to make the improvements enumerated in the statute, and to reimburse itself for the costs of the same through special assessments of property abutting upon, and theoretically, at least, benefited, to the extent of the assessments, by the improvements made. This scheme, if faithfully carried out, would avoid complications as to constitutional debt limits, and place it within the power of the city to collect the assessments in time to meet its contract obligations within the time agreed, and without borrowing from its general funds. The liability of the property holders for these assessments is to the city exclusively. The assessments are levied and collected by the city, and the money, when collected, comes into the city treasury. The contractor is not in privity with the property owners, and has no means of enforcing collection against them. He looks alone to the city. There is nothing in the statute which imposes upon the person to whom the contract is let to pave the streets the requirement to look alone to the proceeds of the special assessments for his pay, or limiting his recovery to the funds realized therefrom. On the contrary, the fact that the city may bond for the payment

of the indebtedness, the bonds not to exceed in amount the aggregate of the special assessment, and the funds realized from the assessments, including principal, penalties, and interest, to be kept in a special fund for their retirement, shows that, as to the contractor, the city may render itself generally liable, all the time looking to the special fund for its indemnity. Such has been the construction of charters of the same general phraseology and purpose. In *Meech* v. *City,* 29 N. Y. 212, it was ruled that where a municipal corporation was empowered to make a public improvement, the expense of which was to be borne, not by the whole city, but by the real estate owners benefited by it, the corporation to do the work, and the expense thereof to be ultimately assessed upon the property benefited, the corporation, by its proper officers, could either do the work itself, or contract for doing it. In the case of a contract, where the work was performed, the contractor could look to the city alone for payment; and the corporation, if the contract price was paid from the general fund, could reimburse itself and such fund out of the assessments made. In *Cumming* v. *Brooklyn,* 11 Paige 596—an action in equity to recover the contract price for grading the streets—it was adjudged that the city, having the general power of a corporation, was competent to enter into a contract with the complainants to grade the street, and to pay them for so doing. The charter gave general authority to the common council to cause the streets to be graded and paved, and there was nothing in the charter which prohibited the corporation from entering into general contracts for the making of such improvements. The court said: "It is true that the section of the charter which authorized these improvements to be made directs the expense thereof to be assessed upon the owners and occupants of the lands and premises benefited thereby, in proportion to the amount of such benefit. The assessment of the expense as a local tax is not, however, a restriction upon the power of the corporation, so as to require it to contract only for payments out of that particular fund. But this local tax is a fund which has been provided by the legislature to reimburse the corporation for the expense of an improvement which it has either paid or become liable to pay. And if the corporation, voluntarily or by compulsion, pays such expense out of its general fund, any citizen who pays taxes may apply to the proper tribunal to compel the corporation to cause the general fund to be reimbursed by an assessment and collection of the expense of such im-

provement from the owners of the property benefited, or out of the property itself, as authorized and directed by the charter." In *Hitchcock* v. *Galveston,* 96 U. S. 341, 24 L. Ed. 661, the city council, by its charter, was given power to grade, pave, and improve streets, the cost to be defrayed by the owners of lots fronting on the improvement. The court said: "The city is authorized to construct sidewalks, and, though the cost of construction is to be defrayed by the abutting lot owners, the city is to collect from them the cost. * * * The resort to the lot owners is to be after the work has been done, after the expense has been incurred, and it is to be for the reimbursement of the city." In *Heller* v. *City* (Kan.) 48 Pac. 842, the power to plant shade trees upon the streets was expressly given, and it was provided that assessments should be levied against abutting property to pay for such improvements. It was held, however, that the city was primarily liable to those with whom it contracted to make them, reimbursing itself later by a special assessment against the abutting property. The same court, in *City* v. *Trigg,* 47 Pac. 524, used the following language: "While the statute provides for assessing the cost of the improvement against the property benefited, the city is not limited to that method of making payment. It has been determined that this provision requiring an assessment to be made for the improvements relates to the ultimate liability therefor, and is for the purpose of raising a fund to reimburse the city for the amount paid for such improvements."

The cases cited to support these conclusions disclose a harmony of judicial sentiment upon this point, viz., that the city had power to render itself generally liable upon its contract for paving its streets. *Clark* v. *Des Moines,* 19 Iowa 221, 87 Am. Dec. 423; *City* v. *Leu* (Kan.) 29 Pac. 467; *City* v. *Leatherman,* (Ky.) 35 S. W. 625; *Fisher* v. *City,* 44 Mo. 482; *Barber, etc., Paving Co.,* v. *City,* 72 Fed. 336, 19 C. C. A. 139; *Barber, etc., Paving Co.* v. *City,* 64 Fed. 283, 12 C. C. A. 100, 29 L. R. A. 401; *Northern Pacific L. & M. Co.* v. *City,* 14 Or. 3, 12 Pac. 4; *Commercial Nat. Bank* v. *City,* 24 Or. 188, 33 Pac. 532, 41 Am. St. Rep. 854; *District of Columbia* v. *Lyon,* 161 U. S. 200, 16 Sup. Ct. 450, 40 L. Ed. 670; *Cole* v. *City* (La.) 6 South. 688; *State* v. *Commissioners,* 37 Ohio St. 530; *Ft. Dodge, etc., Co.* v. *Ft. Dodge* (Iowa) 89 N. W. 10.

It is urged that the city could not make a contract which would impose, under any contingency, the payment of money from its treasury, realized from general taxation, unless such expenditure

was first provided for in the annual appropriation bill; that, if the city could render itself generally liable upon a contract for paving, it could only do so after making the preliminary appropriation. The city as we have seen, is provided with the means of fully protecting itself against expense in the making of special improvements. Any payments made upon its contracts for paving should be paid for out of the funds realized from the special assessments; and, if the city exercise the powers given it, the general taxpayer cannot be burdened at all with the cost of the improvement. If, however, the city council fails to take advantage of the means provided to realize upon special assessments the cost of the improvement, as between the city it represents and the contractor, the consequences of the neglect should fall upon the city. At the time of making the contract for paving, it was not contemplated that the expense would be paid out of the general revenues of the city. This was not an expense or liability of the corporation, within the meaning of section 2262, Rev. Codes 1895, which had to be provided for in the annual appropriation bill, or to be defrayed therefrom. This is made apparent by the exception in the concluding sentence of section 2264, Rev. Codes 1895, which section reads: "No contract shall be made by the city council and no expense shall be incurred by any officers or departments of the corporation, whether the object of the expenditures shall have been ordered by the city council or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided." Following this exception are the sections providing for local improvments and contracts therefor, and special assessments for their cost, the substance of the pertinent portions of which are hereinbefore quoted. In the language of Judge Sanborn: "The conclusion is irresistibly forced upon our minds by this review of the provisions of this charter that this and like contracts for grading and paving streeets that were not a part of the current expenses of the city, and were not to be paid for by the general tax levy, but through the expenditure of the funds authorized to be raised by special assessment, are expressly excepted from the restrictions and prohibitions of (section 2264) the last clause of that section." *Barber Asphalt Paving Co.* v. *City,* 19 C. C. A. 147, 72 Fed. 344. We conclude that the city had power to render itself generally liable upon its contract for paving.

The city, in this case, did not take advantage of sections 2308 to 2310, Rev. Codes 1895, and did not issue internal improvement

bonds, but, on the contrary, issued to the contractors, in payment for their work and material, warrants in the form of the ones in suit; and it is now insisted that, by the acceptance of these warrants in payment, the contractors and their transferees assented that all right of recovery thereon should be, and that it is, limited to the funds named in the particular warrants, and against which they were drawn, and that plaintiff can only recover by showing money in these funds realized from special assessments not otherwise appropriated. The stipulation in the contract "that all payments made by the party of the second part shall be made by city warrants to be issued on behalf of this contract and shall be accepted by the parties of the first part at par value" in no way binds the contractors to look exclusively to a fund realized from special assessments for their pay. The stipulation to take city warrants at par would indicate, at most, that there might be some delay in realizing upon them. When the warrants were accepted by the contractors, directing payment out of Front street paving funds in the treasury not otherwise appropriated, for account contract paving Front street, and similar orders for their work on Northern Pacific avenue, drawn on Northern Pacific avenue paving funds, they had a right to assume that the reference in the warrants to particular funds was for the convenience of the officers handling the funds and keeping account thereof, and not as varying or limiting the city's liability upon its contract with them. *Clark* v. *City,* 19 Iowa 222, 87 Am. Dec. 423. The city had received full performance of the contract, and was enjoying the fruits of it, and could not claim at such time that the acceptance of the warrants constituted a new contract, or relieved it from any antecedent liability it had subjected itself to. The contractors had knowledge of the statute authorizing special assessments, and, doubtless, in accepting the warrants drawn in this form, sought to obtain the added assurance of payment which an assignment of this fund would give.

We will assume, for the purposes of this case, that the contract for paving, and the language of the city warrants delivered in fulfillment of it, were understood by the parties, and were intended to postpone the redemption of the warrants until the special assessments could be made and collected. It follows from this assumption that the issuance and delivery of the warrants operated as an assignment of so much of these funds as was necessary to retire them. *Swanson* v. *City* (Iowa) 91 N. W. 1052, 59 L. R. A. 620; *Ft.*

Dodge, etc., Co. v. *City* (Iowa) 89 N. W. 11. Immediately and as fast as moneys were covered into the particular funds from these special assessments, the warrant holders became entitled to them, in the order of the presentation of the warrants, and until the moneys were in fact paid out in retirement of the warrants the city held them as trustee for the warrant holder. The contractors, by accepting warrants payable out of these special funds, had a right to rely upon the city's performing with all expedition the acts necessary to create the fund out of which the warrants would be retired. The contract duty of the city, under the construction we have assumed, was not only to make proper assessments, but to put in operation the proper machinery to collect these assessments, and to see that the money was actually collected within a reasonable time after the issuance of the warrants; that such moneys, when collected, should be held in the special funds, and paid out only upon the warrants issued against these funds; and that the moneys would not be diverted to any other purpose. *Commercial Nat. Bank* v. *Portland* (Or.) 33 Pac. 532; *Northern Pacific, etc., Co.* v. *Portland* (Or.) 12 Pac. 4; *Reilly* v. *City,* 112 N. Y. 42, 19 N. E. 508; *Cumming* v. *Mayor,* 11 Paige 596; *Barber* v. *City,* 64 Fed. 283, 12 C. C. A. 100, 29 L. R. A. 401; *Allen* v. *City* (Iowa) 77 N. W. 532, 539. If this duty had been fully performed by the city, this action never would have been commenced or made necessary.

As to the $500 warrant in suit, drawn against the Northern Pacific avenue paving account, the evidence shows that the city did not fulfill its obligations hereinbefore pointed out. It was stipulated that all proceedings for the imposition of special assessments for Northern Pacific avenue paving were regularly taken. The contract for paving was entered into before the cost was apportioned against the properties. Section 2280, Rev. Codes 1895. The assessment was for a sum sufficient to pay all warrants issued under the contract, and all other costs of the improvements. The evidence discloses that on November 29, 1895, the assessments unpaid amounted to $2,550.17. These were certified to the county auditor for collection. This amount, with penalty and interest, was collected, and there was remitted to the city treasurer $3,206.45. There was but $219.17 in this fund when suit was commenced. This shows a diversion of this fund by the city, and, as to the warrant in suit, to hold that the city is not liable would be equivalent to saying that it could violate its contract with impunity, and at the same time retain

its fruits. Such is not the law. Substantially the same condition is shown as to the Front street paving account. On November 26, 1895, the delinquent assessments certified to the county auditor amounted to $4,029.45. All the balance of these assessments must have been paid before that time. Of this there was collected and remitted to the city treasurer $3,424.59. The date of this remittance is not shown. The small balance of this fund uncollected should have been realized by a sale of the properties against which the assessment was made, and this within a year after delinquency. Section 2295, Rev. Codes 1895. If any portion of these assessments remained unpaid, this fact and the amount uncollected could have been shown, and by the defendant city. The evidence and appellant's admissions disclose that the duty to collect had been imposed upon and undertaken by the city, and the presumption, if any arising from such showing, is that the duty has been performed. Subdivision 15, section 5713c, Rev. Codes 1899; 22 Am. & Eng. Enc. Law 1267.

But the proofs do not stop here. It appears that the treasurer credited into the Front street paving account and the Northern Pacific avenue paving account, respectively, the sums realized from the special assessments. The assessments payable into each account were required to be, and in fact were, in amounts sufficient to pay all warrants issued against the fund to be created by them. The officer having custody of the city's money, and upon whom rested the duty of keeping these accounts, disclosed a credit in each of them of an amount more than sufficient to pay all warrants drawn against them, including the ones in suit. These credits are not out of proportion to the gross amount of the special assessments. The presumption is that the treasurer performed his legal duty, and credited into these accounts moneys primarily received in payment or satisfaction of the assessments made for the benefit of these funds. *Delaney* v. *Schuette* (Wis.) 5 N. W. 796; *Nofire* v. *United States,* 164 U. S. 657, 17 Sup. Ct. 212, 41 L. Ed. 588; *U. S. Bank* v. *Dandridge,* 12 Wheat. 64, 6 L. Ed. 552; *Rankin* v. *Hoyt,* 4 How. 324, 11 L. Ed. 996; *Huey* v. *Van Wie,* 23 Wis. 613; *Floyd* v. *Day,* 19 Ind. 450.

When plaintiff had gone thus far with its proofs, and shown that each of the funds against which the warrants in suit were drawn had been credited with a sum sufficient with which to pay its warrants and all others drawn against the funds, respectively, a *prima*

facie case was made out. *Hockaday* v. *Commissioners* (Colo. App.) 29 Pac. 290. The plaintiff became immediately entitled to the moneys assigned to him by the warrants, and the city had no right to divert them elsewhere or to any other purpose. The evidence that there was no money in either fund, excepting $219.17 in the Northern Pacific avenue account, showed a diversion of the money in said accounts from the purposes of their creation, and a conversion of plaintiff's money in violation of trust, rendering the city liable. *Potter* v. *City* (Wash.) 56 Pac. 394; *Hockaday* v. *Commissioners* (Colo. App.) 29 Pac. 291; *City* v. *Leu* (Kan.) 29 Pac. 467; *Commercial Nat. Bank* v. *City* (Or.) 33 Pac. 532; *Frush* v. *City,* 6 Or. 281; *Northern Pacific Lumber Co.* v. *City* (Or.) 12 Pac. 4; *Valleau* v. *Newton Co.,* 72 Mo. 593; *Id.,* 81 Mo. 591; *Chaffee* v. *Granger,* 6 Mich. 51; *Lansing* v. *Van Gorder,* 24 Mich. 456; *Eilert* v. *Oshkosh,* 14 Wis. 637; *Hohl* v. *Town,* 33 Wis. 324, 21 Am. & Eng. Enc. L. 23. The case is analogous to those where a city had agreed to pay out of a fund to be raised by special assessment, and then, by negligence of its officers or some defect in legislation, the fund was not realized after the city had reaped the benefit of its contract and obtained the improvement contracted for. *Reilly* v. *City,* 112 N. Y. 30, 19 N. E. 508; *Ft. Dodge, etc., Co.* v. *City* (Iowa) 89 N. W. 7, 11; *Stevens* v. *City* (Wash.) 39 Pac. 266; *Denny* v. *City,* 79 Fed. 720, 25 C. C. A. 164; *Stevens* v. *City* (Wash.) 44 Pac. 541; *McEwan* v. *City* (Wash.) 47 Pac. 433; *Eidemiller* v. *City* (Wash.) 44 Pac. 877; *Cumming* v. *Brooklyn,* 11 Paige 599; *Baldwin* v. *Oswego,* 1 Abb. Dec. 62; *Smith* v. *Buffalo,* 44 Hun. 156; *Wilder* v. *City,* 87 Fed. 843, 31 C. C. A. 249; *Warner* v. *City,* 167 U. S. 467, 17 Sup. Ct. 892, 42 L. Ed. 239; *Barber, etc., Co.* v. *Denver,* 72 Fed. 339, 19 C. C. A. 139; *Barber, etc., Co.* v. *Harrisburg,* 64 Fed. 283, 12 C. C. A. 100, 29 L. R. A. 401; *Bucroft* v. *City,* 63 Iowa 646, 19 N. W. 807; *Hitchcock* v. *Galveston,* 96 U. S. 350, 24 L. R. A. 659; *Scofield* v. *City,* 68 Iowa 695, 28 N. W. 20; *Bill* v. *City* (C. C.) 29 Fed. 344; *City of Chicago* v. *People,* 56 Ill. 327; *Maher* v. *City,* 38 Ill. 266; *Fisher* v. *City,* 44 Mo. 482; *Portland, etc., Co.* v. *City* (Or.) 22 Pac. 542; *Allen* v. *City,* 35 Wis. 403; *Eilert* v. *City,* 14 Wis. 637. In such cases the city is liable, notwithstanding the contract under which the warrant issued expressly stipulated that the holder could not call upon the city to redeem, but should be limited in his recovery to the special fund again which the warrant was issued. *Barber, etc., Co.* v. *Den-*

ver, 72 Fed. 36, 19 C. C. A. 139; *Barber, etc., Co.* v. *Harrisburg,* 64 Fed. 283, 12 C. C. A. 100, 29 L. R. A. 401; *Bank* v. *Portland* (Or.) 33 Pac. 532; *City* v. *People,* 56 Ill. 334. The case of *Redmon* v. *Chacey,* 7 N. D. 234, 73 N. W. 1081, is not an authority opposed to this conclusion. The facts distinguish it. The warrants there were required, by the law authorizing their issue, to be drawn against the special fund, and the warrants were not drawn by the county commissioners, who alone have authority to bind the county generally in such matters. The very point we have here illustrated is that the general incorporation act did not require these contractors to be paid by warrants drawn against the paving fund, or out of the paving fund at all; and the city council, who made the contract for paving, had power thereby to bind the city generally for this, among other reasons, that the law did not limit their authority in drawing warrants to the contractors to restrict their payment out of the special fund. The contract with plaintiff's assignors, though made, as all corporate contracts must be, through the agency of the city council, yet was, when made, the contract of the city. *Lansing* v. *Van Gorder,* 24 Mich. 456. When the paving contractors, therefore, accepted warrants drawn against the paving fund, there was no statutory requirement that they should be limited to this fund, in all events, for their pay. But in so far as they were so limited, it was by the contract and acceptance of these warrants so worded in fulfillment thereof; and in reliance upon an implied promise of the city to promptly take the needed steps to create the fund out of which they were to be paid.

The city cannot, more than a private individual, take advantage of its own wrong to escape a contract obligation. The distinction made by this court in *Redmon* v. *Chacey,* when it declared the warrants there considered as not county obligations, because issued, "not by the county commissioners, but by the drain commissioners —a board whose authority in that line is limited to dealing with the drainage fund, and that cannot bind the county generally"— is well illustrated by Judge Cooley in *Lansing* v. *Van Gorder, supra,* when he said: "It is contended on the part of the city that in respect to such local improvements, and the assessments to pay for the same, the common council did not act for the whole city, but as agents, on the one side, for the owners of the property benefited, in making the contract for the work, and supervising its construction, and on the other for the contractor, in levying, col-

lecting, and paying over the assessment; and if the common council are guilty of any wrong to their principals, or any misappropriation of moneys, the city cannot be held liable therefor. We think this argument wholly mistakes the position of the council. The council is the legislative body of the city, and it is acting as such not less when levying a special assessment than when imposing the ordinary taxes. The improvement does not belong to the parties assessed, but to the public at large, and it is made from considerations of the general benefit. The cost is levied upon the adjacent property because such property receives the larger portion of the benefit from enhanced values, and therefore is thought to embrace the proper limits for an assessment district; but if the whole city had been made such district, the character of the work, its use and proprietorship, so far as there can be said to be any, would have been the same as now. So far are the owners of the land taxed from being principals of the council which taxes it, that they are not even suffered to decide for themselves that they will have the improvement; but the council, looking to the needs of the whole city, orders it, and then imposes the cost upon a few, though the advantages of the street are received by all. The few thus taxed may well deny the agency of those who are first set over them by the votes of all, and who then tax them for the benefit of all. When the parties assessed have paid the tax levied upon them, they have performed their whole duty, and discharged their entire liability. The duty then devolves upon the city, through its common council, to see that the money is properly applied."

It is contended by appellant that, in making proof of the book entries credited to the Front street paving fund, $1,217.54 thereof appears as "appropriated from street and bridge fund," $2,411.89 as "transferred from North Broadway fund," and in the credit to the Northern Pacific avenue account is an item of $3,144.82, "appropriated from street and bridge fund"; that the form in which these entries appear upon the books negatives the idea that these sums could properly or legally be credited to these special accounts, and negatives the idea that these sums were realized from the special assessments for the paving of these streets; that this evidence, having come in as part of plaintiff's showing, relieves the city of the burden of proving that all the assessments were not collected; and that without these credits the funds would not be sufficient to pay all warrants drawn against them. It is also claimed

that under section 2183, Rev. Codes 1895, all moneys received on any special assessment must be held by the treasurer as a special fund, to be applied to the payment of the improvement for which the assessment was made, and that such money can be used for no other purpose; that, giving this statute effect, there was no authority in law, and none was in fact shown, whereby the treasurer could divert $2,411.89 from the North Broadway paving fund to the Front street paving fund; and that the credits appearing as appropriations from street and bridge fund cannot be considered, because, under sections 2262, 2263, Rev. Codes 1895, as interpreted by this court in *Engstad* v. *Dinnie,* 8 N. D. 1, 76 N. W. 292, no appropriation by the city council is shown, nor any authority in the council to make such appropriation.

Appellant's assignments of error upon these points are not well taken. These amounts are shown as credited into the special accounts. The treasurer, in the performance of his official duty, has so credited them. No explanation is offered as to the language in which the items are credited to this fund. The aggregate credited as "appropriations from bridge and street fund" is made up of many entries. From month to month, during the period of collection of these assessments, items are credited to these accounts in the language, "appropriation from bridge and street fund," ranging in amounts from $5.20 to $1,816.19. The fact that the credits to these paving funds appear on the books in this language does not negative the idea that the amounts were properly credited into these special accounts, or that they were not primarily received from the special assessments upon the property abutting upon Front street or Northern Pacific avenue. The moneys collected by the city treasurer from time to time, and from various sources, may have been carried, for his own convenience, in the account designated as "Bridge and Street Fund," and then, at stated intervals, the amounts belonging to the various funds credited to them as appropriations from bridge and street fund, thus indicating, under the method of bookkeeping, how the amounts collected could be traced on the books to their original sources. But it is idle to speculate upon this point. If these amounts so credited to the special accounts were improperly credited, it was the duty of the city to show it. The plaintiff had shown by the books of the treasurer a credit to these funds amply sufficient to pay his warrants. This credit was made up of items entered by the treasurer at intervals

over a long period of time. The funds in which these credits were shown were created and maintained for the sole purpose of keeping accounts of money received and disbursed from the assessments which brought them into existence. No reason can be assigned for moneys being credited into these accounts which were not primarily received from assessments of the property in the improvement district after which they were named. But on appellant's assumption that these moneys were appropriated from moneys raised through general taxation, it was not necessary for plaintiff to show that an appropriation from the bridge fund was made by the city council, or that it had authority to make such appropriation as he contends. The fact that the transfers were made by the city treasurer while acting in the discharge of official duty raised the presumption that they were legally made in pursuance of authority. Lawston, Presumptive Ev. 60, 67. And if an appropriation by the city council was necessary as a preliminary to such transfer of funds from one account to the other, the fact that the transfer was officially made by the custodian would give rise to the presumption that the necessary action of the city council had been taken, and would cast the burden of proof on the one disputing the legality of the transfer. *Bofire* v. *United States,* 164 U. S. 657, 17 Sup. Ct. 213, 41 L. Ed. 588; *United States Bank* v. *Dandridge,* 12 Wheat 64, 6 L. Ed. 552; *Delaney* v. *Schuette,* 49 Wis. 366, 5 N. W. 796; *Barber, etc., Co.* v. *Denver,* 72 Fed. 341, 19 C. C. A. 139; *Knox County* v. *Bank,* 147 U. S. 91, 13 Sup. Co. 267, 37 L. Ed. 93.

The answer of the city in this case was a general denial. The proof discloses that for seven years the warrants in suit have remained unpaid. No claim is made that the contractors failed in any particular to perform their contract. The proof shows compliance upon their part. The city has profited by the labor, material furnished, and improvement made, while the very time that has been permitted to elapse since the issuance of the warrants in suit is a breach of the city's contract to create a fund for the retirement of the warrants, and to retire them without delay. If, then, any moneys credited to either of these funds were improperly so credited—if the sufficient amount to retire these warrants once in these accounts was not improperly diverted to other purposes—it was within the power of the city, and it was its duty, to so show. *Hockaday* v. *Commissioners* (Colo. App.) 29 Pac. 291. If general

funds of the city were put into these special accounts without authority of the council, or if the council lacked authority to make such appropriations, these facts were peculiarly within the knowledge of the defendant, and are new matter which should have been affirmatively pleaded by the city in its answer. *Nash* v. *St. Paul*, 11 Minn. 174 (Gil. 110); *Barber, etc., Co.* v. *Denver*, 72 Fed. 341, 19 C. C. A. 139.

Nor is the appellant's assignment as to the credit from the North Broadway fund on any better foundation. Section 2183, Rev. Codes 1895, prevents the use of special funds for a purpose outside that of their creation. But a city is permitted to contract for the payment of special improvements from money in its treasury, relying for its reimbursements upon the special taxes when collected. Under this method of paying for improvements, the city controls and owns the moneys collected from the special assessments, and can apply them to any general account of the city without violating the mandate of section 2183, Rev. Codes 1895. The object and purpose of the statute is fulfilled when the cost of the improvement is paid for by the property benefited by it, and the special fund is as much devoted to the accomplishment of this purpose when taken by the city in payment of moneys already advanced by it on the improvement as if the assessment fund were paid directly to the contractor.

The city offered no evidence to show under what arrangement or how the sum of $2,411.89 happened to be in the North Broadway paving fund, or the occasion for its being transferred to the Front street paving fund. There is no showing that all warrants issued against the North Broadway paving fund had not been paid; that these moneys were needed in that account. The purpose of the statute in preventing these moneys being used for other than North Broadway paving may have been accomplished. This balance may have been in the fund because of penalties and interest collected on delayed payments. It may have represented moneys advanced by the city from its general funds to pay upon the contracts for improvement of North Broadway. It may have represented moneys that had been borrowed temporarily from the Front street paving fund for the use of North Broadway fund. However the balance came to be there, the same presumptions arise from the fact that its transfer into the Front street account, and that it was legally and rightfully transferred, as are indulged in favor of the entries concerning appropriations from the bridge and street fund. If this

sum was an unlawful credit, it was for the city to show, and not to leave the matter to rest simply on the presumptions to which the entries give rise.

Appellant insists that there was no evidence in the case showing or tending to show a diversion or misapplication of funds in these special accounts; that the burden of proof was on plaintiff to show such diversion; that the presumption in favor of a public official performing his legal duty, when indulged in favor of the defendant, would, *prima facie,* at least, show that the depletion of the fund was a legal and authorized one; that the presumption that moneys were properly credited in these accounts would be offset by the presumption that the absence of funds was legally produced. This argument is well answered by the Supreme Court of Colorado in the Hockaday case, *supra,* where it was said: "It is shown that the amount of the credits to the road fund in the years 1883 to 1886, both inclusive, exceed, in the aggregate, the outstanding warrants and warrants drawn against it, some $19,000, and that in each of the years the available road fund exceeded by quite an amount the warrants drawn; hence, if the fund had been entirely devoted to the purposes of its creation, and there had been no diversion or misapplication of the fund, it was at all times solvent, and with money in the treasury to pay all warrants drawn during the year. * * * No proof whatever was offered on the part of the defense to explain or show to what use the fund had been applied, and why it was not on hand. *Prima facie,* a case was made, sustaining the allegations in the complaint, that required defendant to rebut. No effort was made to do so. Counsel evidently relied upon the supposed invalidity of the warrants, and did not think it necessary to interpose other defenses. The figures contained in the stipulation showing that there should have been a large balance of the special fund in the treasury,—the same document stipulating that there was none—*prima facie,* at least, established the allegations of the complaint of diversion and misapplication of the fund to other purposes by the county officials." The money, when credited into this account, was thereby, and by the fact of entry, immediately dedicated to the payment of these warrants. The delivery of the warrants was an equitable assignment of the fund to their holders, and, as against the warrant holders, the moneys could not be retransferred to other accounts or to other purposes, except in violation of the city's contract, evidenced by

the warrants. The presumption that the money was legally re-transferred to other accounts cannot be indulged, because the owner of the warrants did not consent to an abandonment of its rights thereto, and the presumption cannot be indulged against countervailing proofs.

Appellant has assigned for error twenty-six rulings of the trial court, which, upon argument, he grouped under three heads. Rulings in the admission of evidence we will not consider in detail in this opinion for the reason that no motion for a new trial was made in the court below. The evidence, free from legal objection, is sufficient to sustain the verdict, and a consideration of errors which could only be reviewed on motion for a new trial can serve no good purpose; appellant having waived, by the form of his motion, any right to a new trial herein. *Bragg* v. *Ry. Co.,* 81 Minn. 130, 83 N. W. 511; *St. Anthony Falls Bank* v. *Graham,* 67 Minn. 318, 69 N. W. 1077.

Appellant's objection to the introduction of any evidence in the case, for the alleged reason that the complaint did not state facts sufficient to constitute a cause of action, without pointing out in what particular counsel considered it insufficient, was properly overruled. This form of objection has been repeatedly condemned. *Bowman* v. *Eppinger,* 1 N. D. 21, 44 N. W. 1000; *Chilson* v. *Bank,* 9 N. D. 98, 81 N. W. 33; *Schweinber* v. *Elevator Co.,* 9 N. D. 113, 81 N. W. 35.

The argument that plaintiff cannot recover in this form of action; that, to recover, it must show money in the special fund applicable to the payment of its warrants; and that mandamus is the remedy in case the treasurer refuses to pay over moneys applicable to the retirement of the warrants—is answered in this: The warrants were city warrants. When the money was collected by the city, plaintiff was entitled to it, and failure to pay it over was a breach of the contract by the city. Neither the law, the contract, nor the warrants limited the right of recovery absolutely and in all events to the special fund; and, even if it did, the city could not convert the fund, and urge this fact in defense of a suit on the warrants. Mandamus is not the remedy in a case where both the law and the contract restrict the recovery within the accounts realized on special assessment, when, as in this case, by fault of the city there is no money in the fund to be paid over. *Hockaday* v. *Commissioners* (Colo. App.) 29 Pac. 290.

Appellant tried its case upon the theory that plaintiff could not prove a cause of action. It has rested its right on appeal upon the proposition that the facts alleged and proven by plaintiff were insufficient to sustain the verdict. By not uniting with its motion for judgment notwithstanding the verdict the request for alternative relief by new trial, it in effect says it could make no better showing if a new trial was ordered. *Bragg* v. *Ry. Co.,* 81 Minn. 130, 83 N. W. 511; *Aetna Indemnity Co.* v. *Schroeder* (N. D.) 95 N. W. 436; *Richmire* v. *Andrews & Gage,* 11 N. D. 453, 92 N. W. 819.

We find no error in the record. The verdict was properly directed for the plaintiff. The judgment of the district court is in all respects affirmed. All concur.

(96 N. W. Rep. 357.)

GEO. S. MONTGOMERY, RECEIVER OF THE RED RIVER VALLEY MUTUAL HAIL INSURANCE COMPANY OF NORTH DAKOTA *v.* ANDREW WHITBECK.

Opinion filed August 7, 1903.

Promoters of a Mutual Insurance Company Cannot Bind It Before Its Organization.

1. The promoters of a mutual insurance company are authorized and required to take applications for $200,000 of insurance before the company is organized, but such promoters have no authority to bind the corporation by any kind of contract before it is organized and authorized to do business.

Policy Issued Before Its Incorporation Does Not Bind a Mutual Insurance Company.

2. A policy of insurance, signed with the names of the president and secretary of the corporation, and delivered to an applicant for membership before the corporation has come into existence and before officers could be elected or the corporation enter into binding contracts, is not enforceable against the company after it has been organized and authorized to do business.

Disregard of Statutory Requirements in the Issuance of Policy Renders It and Assessments Thereunder Void.

3. Where the statute upon which a mutual insurance company was organized required it to charge and collect upon its policies the full mutual premium in cash or notes absolutely payable, and in its by-laws to fix the contingent mutual liability of its members for the payment of losses and expenses not provided for by its cash funds, and

that such contingent liability of each member should not be less in amount and should be in addition to the cash premium written into the policy, and that the total liability of a policy holder should be legibly stated on the back of each policy, a total disregard of each of these requirements in the issuance of its policies rendered the policies void, as in conflict with the statute, and no assessment for losses could be made or enforced thereunder.

The Statute, By-Laws, Application and Policy Are Parts of Contract of Insurance of Which Notice Must Be Taken.

4. Every person applying for insurance and membership in a mutual insurance company must take notice of the law of the state under which it is organized, and is authorized to do business. This statute, the articles of incorporation, by-laws, application for insurance, and the policy each become parts of the contract and binding upon the member.

Where All Members Are On Same Footing, There Is No Estoppel Against Ultra Vires.

5. Where all policy holders in a mutual insurance company are on the same footing, none with equities superior to his associates growing out of the business done in defiance of statutory requirements, no estoppel will be indulged against any member asserting the *ultra vires* nature of the business done.

Member Not Estopped to Show Ultra Vires Against Illegal Contract.

6. The doctrine of estoppel *in pais* does not extend so far as to enable a person or corporation to do in effect what is forbidden by law, or what they are otherwise incapable of doing, and therefore a party to a contract with a mutual insurance corporation, made in violation of the letter and policy of the statute under which the corporation is organized and authorized to do business, is not estopped to show its illegality for the purpose of preventing a recovery upon it.

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

Action by George S. Montgomery, as receiver of the Red River Valley Mutual Hail Insurance Company of North Dakota, against Andrew Whitbeck, to recover an assessment upon a policy. Plaintiff recovered in justice court, and afterwards, on appeal to the district court, a verdict was returned in his favor by direction. Defendant appeals from the judgment entered upon the verdict.

Reversed.

Lee Combs, for appellant.

A mutual insurance company, under section 3108, Rev. Codes, must charge and collect fixed premiums from each of its members,

either in cash or note payable absolutely. *Montgomery* v. *Harker,* 9 N. D. 527, 84 N. W. Rep. 369. Not having done so, the policy is void. *Williams* v. *Babcock,* 25 Barb. 116.

If the statute expressly forbids a corporation to make a certain contract, such contract is void, even if not expressly declared to be so, and it is incapable of ratification; and that it is void and unlawful may be pleaded by anyone in an action founded on it, unless, (1) the statute expressly states what the consequences of violating it shall be, and these consequences are other than that the contract shall be void; (2) unless the statutory prohibition was evidently imposed for the protection of a certain class of persons, who may take advantage of it; or, unless to adjudge the contract void and incapable of forming the basis of a right of action would clearly frustrate the evident purpose of the prohibition itself. *In re Mutual Guaranty Fire Insurance Co.; Alvoid* v. *Barker et al.,* 77 N. W. 868; *Kent* v. *Mining Co.,* 78 N. Y. 159; *Miller* v. *Insurance Co.,* 21 S. W. Rep. 39; *Rochester Fire Ins. Co.* v. *Martin,* 13 Minn. 59.

Purcell & Bradley and *Chas. E. Wolfe,* for respondents.

The defense, that the acts of the corporation were *ultra vires,* was not pleaded by defendant, who was a member of the company, and he could not plead it, after having dealt with it, and by his acts ratified those of the company.

The state alone could plead such a defense, or make it an affirmative cause of action. *Washburn Mill Co.* v. *Bartlett,* 3 N. D. 138, 54 N. W. Rep. 544.

Defendant's application and assessment note were before the Commissioner of Insurance when he examined into the fact that the requisite amount of insurance was subscribed for, to enable the company to do business. His certificate when issued authorizes the issuance of policies. His decision declares that the application complies in all respects with the law. He is a judicial officer, and his determination is binding upon all, including the state. *Montgomery* v. *Harker,* 9 N. D. 527, 84 N. W. Rep. 369; *Sabariego* v. *Maverick,* 124 U. S. 261, 31 L. Ed. 430.

The state, which alone can incorporate, may waive the breach or acquiesce in the usurpation. *Lehman, Dore & Co.* v. *Warner,* 61 Ala. 455; *Bakersfield Town Hall Ass'n* v. *Chester,* 55 Cal. 98; *Humphrey* v. *Money,* 5 Colo. 282.

COCHRANE, J. The Red River Valley Mutual Hail Insurance Company of North Dakota was organized as a mutual insurance company under the provisions of chapter 14 of the Civil Code, and received its certificate of authority to do an insurance business on the 23d day of April, 1898. Defendant signed a written application for insurance and membership in this company on April 14, 1898, and his policy of insurance was executed and delivered to him on the same day. By his application defendant stipulated to pay all just assessments, not to exceed 5 per cent of the face of his policy, or $60, to be governed by the articles of incorporation and bylaws of the company, his insurance to run for five years, beginning on April 14, 1898, and describing the land upon which the crops were to be grown. As a part of the transaction, and to cover his membership fee, all premiums and assessments, he executed and delivered to the party taking his application a note in the following terms: "$60. Courtenay, N. D., April 14, 1898. On or before the first day of October, for value received, I promise to pay to the order of the Red River Valley Mutual Hail Insurance Company of North Dakota the sum of sixty dollars, or such portion thereof as may be assessed on my policy by the officers of said company for payment of expenses and losses by hail according to the bylaws, rules and regulations of said company, with interest at the rate of eight per cent per annum from the maturity hereof, payable at the office of the company at Wahpeton, N. D. There is included in this note a membership fee of ——. Section 20, Twp. 142, range 62; P. O. Courtenay, N. D. Andrew Whitbeck. Policy Number 1302. Non-negotiable." His certificate of indemnity and membership delivered to him in exchange for his note and application was in the following language:

"The Red River Valley Mutual Hail Insurance Company of North Dakota, by this certificate, insures Andrew Whitbeck, of Courtenay P. O., County of Stutsman, State of North Dakota, his heirs and assigns, against loss or damage to growing crops by hail, commencing at noon on the 14th day of April, 1898, and ending January 1st, 1903, in accordance with the articles of incorporation and bylaws of this company, on the following described premises:

County	Acres	Quarter	Section	Township	Range	Am't
Stutsman.....	160	S. E.	20	142	62	$ 600
Stutsman.....	.....	N. E.	20	142	62	600

"Loss, if any, payable to Andrew Whitbeck as his interest may appear. This insurance is based upon the written application of the assured, and upon the approval whereof the Red River Valley Mutual Hail Insurance Company of North Dakota has caused these presents to be signed by its president and attested by its secretary at its office in the city of Wahpeton.

G. W. Pease, President.

"Attest: B. J. Howland, Secretary."

The articles of incorporation and by-laws were printed upon the back of this policy; also a notice as follows: "The assured is hereby notified that by virtue of this policy he is a member of the Red River Valley Mutual Hail Insurance Company of North Dakota, and that the annual meetings of such company are held at its home office in the city of Wahpeton, Richland county, North Dakota, on the second Wednesday of November of each year, at 10 o'clock, a. m."

Plaintiff was appointed receiver of this company December 29, 1899. Its assets consisted entirely of notes in the form of the one hereinbefore set forth. The action was to recover an assessment attempted by the directors in September, 1899, to meet losses for that year. The same form of notes and policies were issued to all members of the association. The certificate of insurance and membership proven in this case bears the signature of the president and secretary, and has indorsed upon its back what purports to be the by-laws of the corporation, and it was delivered to the defendant nine days before the corporation received its certificate from the commissioner of insurance authorizing it to do business or to issue policies. Section 3090, Rev. Codes.

The promoters of mutual insurance societies are authorized, and required, as a preliminary to organization, to take applications for $200,000 of insurance in not less than 100 separate risks before a policy can be issued. Section 3104, Rev. Codes. The purpose of this is, doubtless, to secure at the start a fund from the cash premiums sufficient for current expenses and early losses.

Appellant, from the date of his application, must have been one of the number which the promoters of this enterprise secured as an advance subscriber. There is no evidence of a redelivery of the policy after the corporation was authorized to do business; nor was any cash premium paid or note absolutely payable given by the defendant after the legal organization of the company, if any was effected. "That a corporation should have a full and complete organization and existence as an entity before it can enter into any kind of a contract or transact any business, would seem to be self-evident. Until organized, it has no being, franchises, or faculties. Nor do those engaged in bringing it into being have any powers to bind it by contract, unless so authorized by its charter. Until organized as authorized by the charter, there is not a corporation. By its birth it for the first time acquires its faculties to transact its business and perform its functions. * * * If it was intended that the application for the policy and the giving of the premium note should constitute a contract to insure, such a provision would not have been enacted; but by its adoption it is manifest that the general assembly intended that the application and note should be held simply to be acted upon after the organization should be completed. It was simply a proposition or an application for a policy after the organization should be had and the company authorized to take risks and issue policies. Beyond that the incorporators had no power to bind the future company." *Gent* v. *Mfg.. etc., Ins. Co.,* 107 Ill. 658; *Farmers' Mut. Ins. Co.* v. *Burch* (S. C.) 24 S. E. 503; *Lagrone* v. *Timmerman* (S. C.) 24 S. E. 290. The reading of the statute is plain. The certificate of the commissioner of insurance, when issued and recorded, "shall be its authority to commence business and issue policies." Had the statute stated that no policy could be issued until the certificate from the commissioner had been obtained, its mandate could not have been more readily understood. *Montgomery* v. *Harker,* 9 N. D. 527, 84 N. W. 369.

We need not pause upon the proposition that the corporation retained the non-negotiable contract of appellant, and treated the policy as if redelivered after it received its certificate of authorization, and that the acts of both parties were such concerning the transaction as to estop either from questioning the binding force of it. Even if, as between the parties, it were possible to establish a liability by estoppel, none exists here. One who accepts a policy

of insurance in a mutual insurance society organized under the provisions of chapter 14 of the Civil Code thereby becomes a member of the society, and must take notice of the terms of the contract to which he is a party. The statute under which the corporation is organized, the articles of incorporation, and the by-laws are made to contain the whole plan of insurance, its limitations, extent, and the obligations imposed. They embrace the terms of the contract. Whatever vitality the policy of insurance possesses is derived from these sources. The statute authorizing and controlling the organization and business of this society became as much a part of the contract for insurance and membership as if its terms were incorporated into the printed certificate, and every person becoming a member was bound to take notice of it. Niblack, Mut. Ben. Soc. 271, 272; *Smith* v. *Sherman* (Iowa) 85 N. W. 747; *Davidson* v. *Society,* 39 Minn. 303, 39 N. W. 803, 1 L. R. A. 482; *Bradford* v. *Ins. Co.,* 107 Ill. 652; *Simeral* v. *Ins. Co.,* 18 Iowa 322; *State* v. *Mfg., etc., Ins. Co.* (Ohio) 33 N. E. 401, 24 L. R. A. 252; *Insurance Co.* v. *Stoy,* 41 Mich. 385, 1 N. W. 877, 21 Am. & Eng. Enc. L. 257. The law (section 3108, Rev. Codes 1899), a part of this contract, required that the amount of cash premium accepted should be written in the policy; that the company should charge and collect upon its policies the full mutual premium in cash or in notes absolutely payable. None of these requirements made prerequisite to a valid insurance contract was observed in this case. The note given was payable only upon the contingency of a loss and assessment. The amount payable was left in uncertainty until the happening of events which were not certain to follow. The statute required that the total amount of the liability of a policy holder should be plainly and legibly stated upon the back of the policy, that the by-laws fix the contingent mutual liability of its members for the payment of losses and expenses not provided for by their cash funds, and that this contingent liability should not be less than a sum equal to and in addition to the cash premium written in the policy. These requirements were ignored. No cash fund could be obtained for the payment of expenses or losses under the form of contracts admitted until assessments could be made and collected. No valid consideration was given for the insurance contract. The policy of the law would be frustrated if this invasion of its mandate could be tolerated. This policy was and is void. *Smith* v. *Sherman* (Iowa) 85 N. W. 747; *Gent* v. *Mfg. Ins. Co.,* 107

Ill. 652; *Corey* v. *Sherman* (Iowa) 64 N. W. 828, 32 L. R. A. 490, 514; *Mut. Ins. Co.* v. *Barker,* 107 Iowa 143, 77 N. W. 868, 70 Am. St. Rep. 149; *McNulta* v. *Bank* (Ill.) 45 N. E. 954, 56 Am. St. Rep. 203; *Gas Co.* v. *Sims* (Cal.) 37 Pac. 1042, 43 Am. St. Rep. 105. The policy being void, the assessment cannot be enforced, and the note given was without consideration. *Haverhill Ins. Co.* v. *Prescott,* 42 N. H. 547, 80 Am. Dec. 123, 21 Am. & Eng. Enc. L. 258.

Appellant did not receive or retain any property of the corporation for which he was either morally or legally obligated to pay. He has nothing to restore. A contract of insurance entered into contrary to law or public policy is simply void, and neither party to it is estopped from showing the fact; otherwise the public law and policy would be at the mercy of individual interest and caprice. Bacon on Mut. Benefit Societies, section 424; *Spare* v. *Home Mut. Ins. Co.* (C. C.) 15 Fed. 707; *in re Comstock,* 6 Fed. Cas. 244 (No. 3,078) 3 Sawy. 218; *Keen* v. *Coleman,* 39 Pa. 299, 80 Am. Dec. 524; *Wheeler* v. *Russell,* 17 Mass. 258. Every member of this corporation was a party to these contracts, individually as the assured and collectively as the corporation. As parties to the contract with the corporation, they were severally *in pari delicto.* No estoppel operates either in favor of or against any of them, because there is nothing upon which it can be built. "An estoppel can never arise by implication alone, except from some conduct which induces action in reliance upon it to an extent that renders it a fraud to recede from what the party has been induced to expect. It is only enforced to prevent fraud." *Security Ins. Co.* v. *Fay,* 22 Mich. 468, 7 Am. Rep. 670. There cannot be any estoppel to show a violation of a statute, even to the prejudice of an innocent party. How much less can a corporation claim to bind a member to the payment of a void assessment on the theory of estoppel? To build up an estoppel against one situated as appellant is in this case and in favor of the corporation, would be to make the courts an instrument of oppression. In *Bank of the United States* v. *Owens,* 2 Pet. 538, 7 L. Ed. 512, the court held that a contract contrary to a clause in the act incorporating the bank which forbid it to take a greater interest than 6 per cent, but did not declare such contract void, was nevertheless illegal and void. In answer to the question whether such contracts are void in law upon general principles, the court says: "The answer would seem to be plain and obvious

that no court of justice can, in its nature, be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country. How can they, then, become auxiliary to the consummations of violation of law?" *Harris* v. *Runnels,* 12 How. 83, 13 L. Ed. 904.

Respondent relies upon section 2852, Rev. Codes. This statute is the expression of a rule long established to the effect that a defendant who has contracted with a corporation cannot collaterally question its powers in an action to recover on an obligation entered into with it; but the legality of the corporation or its powers to do a legal business is not here questioned. The objection here is to the want of power in the corporation, and not a defect in its organization. Uninfluenced by statute, the rule established by law as well as reason is that parties recognizing the existence of a corporation by dealing with it have no right to object to any irregularity in its organization, or any subsequent abuse of its powers not connected with such dealing. As long as these are overlooked or tolerated by the state, it is not for individuals to call them in question. *Methodist Epis. Church* v. *Pickett,* 19 N. Y. 485; *Washburn Mill Co.* v. *Bartlett,* 3 N. D. 138, 54 N. W. 544; *McFarlan* v. *Triton Ins. Co.,* 4 Denio. 397; *Swartwout* v. *Ry. Co.,* 24 Mich. 394. But where the objection is a want of power in the corporation, and not a defect in its organization, the case is different. *In re Comstock,* 6 Fed. Cas. 247 (No. 3,078), 3 Sawy. 218; *Wheeler* v. *Russell,* 17 Mass. 258; *Russell* v. *De Grand,* 15 Mass. 35. "The doctrine of estoppel *in pais* has never been carried so far as to prevent a party from showing that a corporation, even if it be one *de jure,* had not the power to do a particular thing, or that it was done in violation of statute. * * * For instance, if a corporation was forbidden by statute to carry Indians on its boats it could not make or enforce a contract for that purpose, and no one would be estopped from alleging the fact in bar of an action by the corporation for the passage money. In *Russell* v. *De Grand,* 15 Mass. 37, it was held that a promissory note given for the premium on a policy of insurance on a vessel bound on a voyage prohibited by the laws of the United States was void, and the defendant, though a party to the agreement, was permitted to show its illegality to defeat a recovery upon it. * * * The reason of the rule is apparent and satisfactory. The maintenance of the public policy of a state, as manifested by its legislation, is of much more

importance than the real or supposed equities of the parties to an illegal transaction, and therefore they are not estopped to show such illegality for the purpose of preventing the enforcement of a contract in opposition to such policy; otherwise the public law and policy would be at the mercy of individual interest and caprice. * * * To allow this corporation, by means of an alleged estoppel, which grows out of the very act prohibited, to indirectly do an act for which it had neither capacity nor right, would be practically to dispense with the limitation which the state has imposed upon its power of doing business." *In re Comstock*, 6 Fed. Cas. 248 (No. 3,078) 3 Sawy. 218.

This disposes of the respondent's contentions that defendant is estopped by his contract; that none but the state can question its validity, and that in a direct proceeding; and that the contract is not void as in conflict with the policy of the law, because not in express words in the statute so declared.

Our conclusion is that the judgment appealed from should be reversed. It is so ordered. Appellant will recover costs of justice and district courts and of this court. All concur.

(96 N. W. Rep. 327.)

ROBERT B. BLAKEMORE, EXECUTOR, AND LAURA B. KEDNEY, EXECUTRIX, *v.* MATILDA M. ROBERTS.

Opinion filed October 14, 1903.

An Executor or Administrator May Sue to Quiet Title to Real Estate.

1. An executor or administrator is authorized, under the Revised Codes, to bring an action to quiet title to real estate belonging to a decedent, pending administration of the estate.

Complaint Setting Forth Several Tax Liens States But One Cause of Action.

2. A complaint to determine adverse claims under chapter 5, p. 9, Laws 1901, setting forth several tax liens as the basis of plaintiff's interest in the real estate involved in the suit, does not state more than one cause of action.

Complaint, Statutory Form, Need Not Allege Regularity of Tax Proceedings.

3. In an action brought under chapter 5, p. 9, Laws 1901, and based on a tax lien, the complaint need not allege that such tax lien was based on a regular assessment and levy of taxes.

Statutory Complaint Stating Additional Facts, Not Demurrable.

4. The fact that a complaint, under said chapter 5, states facts additional to those necessary, does not render the complaint demurrable, if it appears that all the matters required thereby are stated, and that no other or different cause of action is stated.

Complaint Sufficient.

5. A complaint to determine adverse claims under chapter 5, p. 9, Laws 1901, considered, and *held* not demurrable.

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

Action by Robert B. Blakemore and others against Matilda M. Roberts. Judgment for plaintiffs, and defendant appeals.

Affirmed.

J. E. Robinson, for appellant.

Merely averring that the plaintiffs were the owners and holders of tax certificates does not state a cause of action. *Swenson* v. *Greenland,* 4 N. D. 532, 62 N. W. Rep. 603; *Ball* v. *Dangerfield,* 26 Minn. 307, 3 N. W. Rep. 698; 2 Blackwell on Tax Titles (5th Ed.) sections 1089-1091.

The owner and holder of a mere tax certificate has no right to bring an action to quiet his title or claim to land. *Boardman* v. *Boozewinkel,* 121 Mich. 320, 80 N. W. Rep. 37.

The plaintiffs have no legal capacity to sue. Their appointment as executors does not transfer to them title to the real property of their testator. It descends to his heirs or devisees, not to his executors. The heir only can maintain an action based on the tax certificate. *Rice* v. *White,* 8 Ohio 216; Revised Codes, section 6466; *Flood, Admr.* v. *Pilgrim,* 32 Wis. 376.

Newman, Spalding & Stambaugh, for respondents.

Decedent had the right to rents and profits of the land in suit at the time of his death. The tax certificate vested in him the entire beneficial interest in such lands including such rents and profits, and the possession, and he was the equitable owner of the property provided his certificates were valid. This title descended to his heirs subject to the right of possession of his executors, who could maintain an action for possession in the same courts that were open to their testator. Rev. Codes, section 6461. The only question is the sufficiency of the complaint.

The plaintiffs must allege and prove that certificates were issued and more than three years had elapsed since the tax sale. The allegation that such certificates were issued is equivalent to an allegation of all the facts that led up to the issuance of them. *Hibernia S. & L. Soc.* v. *Ordway,* 38 Cal. 679; *Durbin* v. *Plato,* 47 Wis. 484.

The tax certificate is *prima facie* evidence of the validity of the sale, and all facts tending to show their invalidity are matters of defense. The certificate showing a complete case, plaintiff would be entitled to judgment for possession upon default.

The complaint is the statutory form prescribed by chapter 5, Laws of 1901. It cannot be held demurrable as long as it contains the statutory allegations therein provided. The allegations of sale and delivery of the certificates would be simply irrelevant and redundant, to be attacked on motion.

The objection that causes of action are not properly united, cannot be sustained. The relief sought is possession of the premises. If the allegations regarding the certificates are true, plaintiffs are entitled to judgment for possession whether the right rests upon one or more of such certificates. They are not separate causes of action, and if they were, should be attacked by motion, not demurrer.

MORGAN, J. The complaint in this case states the following facts, after proper allegations as to the death of Louis A. Kedney and the appointment of the plaintiffs as the executors of his last will, viz.: (1) That in his lifetime, and in the year 1891, said Kedney purchased the following described premises, to wit: * * * at the sale for delinquent taxes of the years 1889 and 1890, and that a certificate of such purchase and sale was thereupon made and delivered to him by the auditor of Cass county; (2) that said Kedney purchased said lots in the years 1893 and 1894 at the sale for delinquent taxes held for those years, and that said auditor made and delivered to him certificates of such purchases; (3) that no tax deeds have been issued upon either of said certificates, and that plaintiffs are owners and holders of such certificates of sale; (4) that plaintiffs have a lien or incumbrance upon said premises by reason of said certificates of tax sale; (5) that the defendant claims certain estates in and liens upon said premises adverse to the plaintiffs. The relief prayed for is that defendant be required to set forth her adverse claims, and that the same be

adjudged void; (2) that title be quieted as to such claims, and the defendant barred and enjoined from further asserting them; (3) that plaintiffs recover possession of the premises; and (4) general relief, with costs and disbursements.

The defendant demurred to the complaint on the grounds: (1) That plaintiffs have not legal capacity to sue; (2) that several causes of action have been improperly united; (3) that the complaint does not state facts sufficient to constitute a cause of action. The trial court overruled the demurrer, and defendant appeals from the order overruling the demurrer.

The objection to the complaint principally relied on by the appellant is that no facts are alleged showing that the lien on which the action is based is a valid one, and based on valid and regular tax proceedings as to assessment and levy. The statute under which the complaint is framed is chapter 5, p. 9, Laws 1901. That law prescribes a form that may be used in actions to determine adverse claims, and this complaint contains every allegation required by that law to be stated in such an action, and is in fact a full and almost literal compliance with that law so far as the allegations are prescribed by the same. The statute having prescribed a form of complaint in an action to determine adverse claims, and plaintiffs having a complaint fully meeting the requirements of that statute, we hold it not subject to demurrer. It is well settled that the legislature has the power to prescribe forms of complaints, and, having done so, such complaints will be held good if the statutory requirements are complied with, although such prescribed form may not comply with common law rules of pleading.

It is urged that the complaint is not framed under chapter 5, p. 9, Laws 1901, for the reason that it alleges that the lien relied on is a tax lien. The contention is that plaintiffs have set forth more facts than are required by law, and are therefore not within its provisions. We see no force in the contention. The fact that the complaint alleges that the lien relied on is held "by reason of each of said certificates of tax sale" is not sufficient to warrant us in holding that a cause of action to determine adverse claims is not pleaded, in view of all the other allegations of the complaint. These additional words do not make the complaint other or different than a complaint under chapter 5, Id. The allegations show a cause of action based on a lien. *Wilson* v. *Hooser,* 72 Wis. 420, 39 N. W. 772. If the complaint showed on its face that the lien pleaded is

an invalid one, the rule would be different. The fact that more facts are pleaded than necessary under the statute does not render the complaint demurrable if the required facts are stated and no other or different cause of action is stated. We find no warrant for holding that the plaintiffs have waived the statutory form of complaint or elected to plead another. The defendant relies on the case of *Swenson* v. *Greenland,* 4 N. D. 532, 62 N. W. 603. That case is not applicable to this one. This complaint is authorized and its form prescribed by statute. It is therefore excepted from the principles applied in that case to an action for the foreclosure of a tax lien. The case of *Walton* v. *Perkins,* 28 Minn. 413, 10 N. W. 424, is also claimed to be in point. But we do not so understand it. In that case the complaint was defective as a complaint in an equitable action to cancel a mortgage which was a cloud upon a title to land. The court refused to sustain the complaint as sufficient under the statute which provided for settlement of adverse claims. The case of *Bell* v. *Dangerfield,* 26 Minn. 307, 3 N. W. 698, is also relied on to support appellant's contention on this point. That was a case in which the general rules of pleading applied. In this case the statute provides what the complaint shall state. The case is not therefore in point.

The next objection urged against the complaint is that several causes of action are therein improperly united. The contention is that a cause of action is stated as to the lien derived from the sale during each of the years mentioned in the complaint. The liens mentioned in the complaint, do not constitute a cause of action. The cause of action is that defendant claims an interest in the lots adverse to plaintiffs' interest therein as represented by the several tax liens. The relief sought is that the defendant be required to set forth those adverse claims, and that they be declared invalid by the court, and that plaintiffs have possession of the lots. No different relief is sought or can be granted than would follow if one lien only had been pleaded. The facts stated in the complaint do not state more than one cause of action.

The last objection urged to the complaint is that the plaintiffs have not legal capacity to sue, that the action pertains to real property, and that executors have no authority to bring such actions, but that such actions can be brought only by the heirs. The powers and duties of executors and administrators are prescribed by statute, and, unless such actions are authorized to be brought and maintained

by executors or administrators, the demurrer must be well taken. Sec. 6372, Rev. Codes 1899, provides as follows: "The executor or administrator is entitled to possession of all the real and personal property of the decedent except the homestead and other exempt property reserved by law to the surviving husband or wife or children; and must protect the real property from waste or other injury and collect the rents and profits thereof until ordered to surrender the same, and collect the goods, chattels and others effects of the decedent and the debts and demands of every description due to the decedent or accruing to the estate in his right, and safely keep and dispose of the same according to law." Under section 6380, Id., the executor or administrator is required to make and return to the county court a true inventory and appraisement of all the real and personal property of the decedent. Section 6460 provides as follows: "The heirs or devisees may themselves or jointly with the executor or administrator maintain an action for the possession of the real estate or for the purpose of quieting title to the same against any one except the executor or administrator. For the purpose of bringing suits to quiet title or for partition of such estate the possession of the executor or administrator is the possession of the heirs or devisees. Such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator for the purposes of administration as provided in this Code." Section 6461 provides that: "Except as otherwise prescribed in the next section, action for the recovery of any property real or personal, or for the possession thereof and all actions founded upon contracts may be maintained by and against executors and administrators in all cases and in the same courts in which the same might have been maintained by or against their respective testators or intestates." Under the foregoing provisions of the Code the executor is entitled to the possession of all the real and personal property of the testator that the decedent would have been entitled to if alive. These representatives may bring and maintain any action for the recovery of the possesion of any real property the possession of which might have been obtained by the decedent in his lifetime. The entire assets of the estate, except those mentioned in section 6372, *supra*, pass into the possession of the executor or administrator, to be held for the use of the estate, and finally to be distributed to the heirs or devisees under the order of the county court. These sections of the Code changed entirely the common-law rule governing the pos-

session and control of real property pending administration. Under the common law the heir or devisee has sole control of the real estate, as the same was not subject to the payment of debts or the expenses of administration under any circumstances. *Meeks* v. *Hahn,* 20 Cal. 620. The statute of California prescribing the powers and duties of executors and administrators is practically the same as that of our own state, mentioned above. The Supreme Court of California has frequently construed these sections and defined the powers and duties of administrators and executors respecting real property of deceased persons pending the administration of the estate. In *Beckett* v. *Selover,* 7 Cal. 238, 68 Am. Dec. 237, the court said "that both real and personal estate of an intestate vest in the heir, subject to the lien of the administrator for the payment of debts and the expense of administration, and with the right in the administrator of present possession." In *Meeks* v. *Hahn, supra,* it was said that: "By the express terms of the statute for the settlement of the estates of deceased persons, the administrator has the right to the possession of the real and personal property of the intestate, and to receive the rents and profits of the real property until the estate is settled or delivered over to the heirs by order of the probate court. He is, besides, required to take possession of all the estate, real and personal, and is authorized to maintain actions for such possession in all cases where his intestate might have maintained such actions. And though by the statute concerning descents and distributions it is also provided that the estate of an intestate shall descend to the heirs, subject to the payment of his debts, yet this provision must be read in connection with the clauses of the other statute to which we have referred, which place the right of present possession in the administrator." Have the plaintiffs the right to maintain this action as an action to quiet title by the determination of adverse claims? Chapter 5, p. 9, Laws 1901, provides that: "An action may be maintained by any person having an estate or an interest in or lien or incumbrance upon real property whether in or out of possession thereof, and whether said property is vacant or unoccupied against any person claiming an estate or interest in or lien or incumbrance upon the same for the purpose of determining such adverse estate, interest, lien or incumbrance." The plaintiffs' testator had a lien upon the property described in the complaint by virtue of having purchased at a tax sale of said premises, and by virtue of having received a

certificate of sale at such sale, and which said certificate was in his possession and held by him three years prior to his death. This lien passed to the executors upon the testator's death, and his executors became vested with all rights of action by virtue of such certificate which were possessed by Louis A. Kedney prior to his death. Section 6460, *supra,* chapter 5, of the Laws of 1901, *supra,* gives any person having a lien upon property a right to maintain an action to determine adverse claims against the same. If Louis A. Kedney were alive, this action could be maintained by him. Under the statute this right of action goes to the executors; the lien given by virtue of the certificate of sale is the foundation of the action to determine adverse claims and quiet title as against them. It is true, such a lien would not support an action to determine adverse claims under statutory provisions existing before the statute of 1901. But this statute specifically gives the right to base such an action upon the lien or incumbrance. The right of an executor or administrator to maintain such an action has been held in California under similar statutes. In *Pennie* v. *Hildreth,* 81 Cal. 127, 22 Pac. 398, it was said: "We are not inclined to give it (the statute) this broad construction, but it is clearly not necessary that he (the administrator) have title to the property. If he has the right to the possession, and another is claiming an estate or interest adverse to such right, he may maintain an action. The language of the Code is broad enough to cover every interest or estate in lands of which the law takes cognizance. *Pierce* v. *Felter,* 53 Cal. 18; *Stoddart* v. *Burge,* Id. 398; *Smith* v. *Brannan,* 13 Cal. 107; *Liebrand* v. *Otto,* 56 Cal. 247. An administrator has an interest in the decedent's real estate within the meaning of this statute, and if another is asserting a claim adversely to such interest he may maintain an action." See, also, *Curtis* v. *Sutter,* 15 Cal. 259.

Counsel relies on section 6460, *supra,* as sustaining his contention that plaintiffs cannot maintain this action. The heirs may maintain such an action, but not as against the possession of the administrator or executor. The possession of the real estate goes to the administrator or executor, pending administration, and the heirs cannot disturb such possession of the personal representatives, nor maintain an action to secure such possession as against them. The administrator or executor may maintain an action for the possession of real estate as against the heirs or devisees, pending administration. Under said section the heirs may themselves recover posses-

sion of real estate against third persons, but not against the personal representatives. *Page* v. *Tucker,* 54 Cal. 121. Statutes relating to the powers of administrators and executors, similar to ours, have been construed in the states of Washington and Montana. It is there held that administrators and executors may maintain actions to quiet title and for possession of decedent's lands while administration of the estate is pending, and that such actions are not maintainable by the heirs as against administrators or executors. *Hazelton* v. *Bogardus,* 8 Wash. 102, 35 Pac. 602; *In re Higgins' Estate,* 15 Mont. 474, 39 Pac. 506, 28 L. R. A. 116; *Black* v. *Story,* 7 Mont. 238, 14 Pac. 703.

The order appealed from is affirmed, and leave granted defendant to answer, within ten days from the filing of the remittitur, on the terms named in the order of the district court overruling the demurrer.

(96 N. W. Rep. 1029.)

HARRISON WILSON *v.* ATLANTIC ELEVATOR CO., A CORPORATION.

Opinion filed October 30, 1903.

Appeal From Justice—Bond—Approval—Service.

1. In appealing from a justice to the district court, it is not necessary that the undertaking on appeal be approved and filed in the office of the clerk of the district court before it is served.

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

Action by Harrison Wilson against the Atlantic Elevator Company. Judgment for defendant before a justice, and on appeal by plaintiff the appeal was dismissed, and he again appeals.

Reversed.

Lockerby & White and *E. H. Wright,* for appellant.

Lee Combs, for respondent.

Cochrane, J. Plaintiff's action originated in justice's court. A judgment was rendered dismissing the action, and for costs against the plaintiff. Within proper time, plaintiff served on defendant's attorney a notice and undertaking on appeal from the judgment of the justice. Service of the same was admitted in writing by defendant's attorney, and thereafter, on the same day, the notice and undertaking, with proof of service thereof, were filed with the clerk

of the district court of Barnes county, to which the appeal was taken. The undertaking was approved by the clerk, and the indorsement of his approval made thereon, at the time the papers were presented for filing; but the indorsement of filing was first made by the clerk, followed immediately by the indorsement of his approval on the undertaking. On the opening day of the June term of the district court, defendant moved to have the appeal dismissed because the appellant had neglected to serve a proper undertaking on appeal. The point made was that the undertaking on appeal was not approved by the clerk of the district court, or filed in his office, before it was served. The motion was granted, and a judgment entered dismissing the appeal, and for $8 costs against plaintiff. Plaintiff appeals from this judgment.

This action was decided at the same term of the district court as the case of *Eldridge* v. *Knight*, which was afterwards reversed on appeal by this court. 11 N. D. 552, 93 N. W. 860. The same point is here involved, and that case is in all respects decisive of this. The fact that the indorsement of approval upon the undertaking was made after it was marked "Filed"—the acts being practically simultaneous—in no way distinguishes this from the former case. The fact that the respondent offered to stipulate for the reinstatement of this case upon the calendar of the district court, but without costs to appellant, cannot avail respondent to escape the costs of appeal, when the offer came after the appeal had been perfected and costs incurred.

The judgment of the district court dismissing the appeal from justice's court is reversed. All concur.

(97 N. W. Rep. 535.)

SIMON E. PERSONS *v.* CHARLES G. SMITH, MARY L. SMITH AND PHINEAS P. PERSONS, DEFENDANTS AND PHINEAS P. PERSONS, APPELLANT.

Opinion filed November 3, 1903.

Evidence of Deceased Witness at Former Trial Between Same Parties, Admissible.

1. The evidence of a witness given upon a former action between the same parties, involving the same issues, in a court of competent jurisdiction, is admissible on a subsequent trial when it is shown that the witness who gave such evidence is dead.

Res Adjudicata—Oral Testimony as to Former Trial.

2. Where it is proven by the mouth of a party on cross-examination that the litigated question was the subject of another litigation between the same parties on the same issues, in a court of competent jurisdiction of another state, where the matter in dispute was determined, and judgment entered, and the same complied with, such question will not again be investigated upon a subsequent suit, even though the former adjudication is not pleaded in bar or the judgment in the former case proven upon the trial.

Assignment of Notes and Mortgage—Sufficiency of Description.

3. A bill of sale which describes certain notes and mortgages by naming the parties thereto, and giving their place of residence and the county in which the mortgages are recorded, and which is in the possession of the grantee, is *prima facie* sufficient to identify the notes and mortgages, and to convey the title thereto, and is admissible as evidence of the grantee's ownership.

Fraudulent Release of Mortgage.

4. Under the facts appearing in the opinion, a judgment for the amount of the mortgage debt and interest was properly entered against the defendant, who had fraudulently made use of a power of attorney from the mortgagee to release the mortgage of plaintiff after it was assigned to him.

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

Action by Simon E. Persons against Charles G. Smith, Mary L. Smith and Phineas P. Persons. A judgment was entered dismissing the case as to the defendants Smith, and for a money recovery against defendant Phineas P. Persons. The defendant Persons appealed from the judgment.

Affirmed.

Winterer & Winterer, for appellant.

The question of *res adjudicata* can only be applied where there is an identity of parties, and an identity of issues involved. 2 Black on Judgments, Par. 534 and cases cited; same, Par. 610; *Cromwell* v. *County of Sac,* 94 U. S. 351, 24 L. Ed. 195.

But where the subject is exclusively within equity cognizance, the case is different. Its final decision at law will not preclude a re-examination in equity. 2 Black on Judgments, Par. 518; *Pollock* v. *Gilbert,* 60 Am. Dec. 732; *Bogart* v. *Hunter,* 3 Wash. C. C. 48; *Wetumpka* v. *Wetumpka Wharf Co.,* 63 Ala. 611; *Hawkins* v. *Deprist,* 4 Munf. 469; *Bigelow on Estoppel* (3d Ed.) 104; *Bos-*

quett v. *Crane,* 51 Col. 505; *Bush* v. *Merriman et al.,* 49 N. W. Rep. 567.

Defense of *res adjudicata,* or the estoppel of a former judgment, must be specially pleaded to be available. 9 Enc. of Pl. & Pr. 617, 614; *Davis* v. *Davis,* 26 Cal. 39; *Howard* v. *Mitchell,* 14 Mass. 242; *Bartholemew* v. *Condie,* 14 Pick. 167; *Hostler* v. *Hayes,* 3 Cal. 308; *Parliman* v. *Young,* 4 N. W. Rep. 139, 2 Dak. Ter. 175; *Manna et al.* v. *Ewing,* 76 N. W. Rep. 1047.

Matters creating estoppel must be specially pleaded. *Fraine et al.* v. *Burgett,* 52 N. E. Rep. 395; *Burwell Irr. Co.* v. *Alashmett,* 81 N. W. Rep. 617; *Clark* v. *Huber,* 25 Cal. 594; *Interstate Savings and Loan Ass'n* v. *Knapp et al.,* 55 Pac. 48; *Palmer Oil and Gas Co.* v. *Blodgett et al.,* 57 Pac. 947.

Where the reply contains no plea of waiver or estoppel, plaintiff is precluded from introducing proof of the same. *Whiteside* v. *Magruder,* 75 Mo. Appeals 364; *Preferred Acc. Ins. Co. of New York* v. *Parker,* 93 Fed. 158; Black on Judgments, Par. 789; *Fanning* v. *Ins. Co.,* 37 Ohio 344, 41 Am. Rep. 517; *DeVotie* v. *McGerr,* 24 Pac. 923; *Cloud* v. *Malvin,* 75 N. W. Rep. 645; *Center School Twp. et al.* v. *State et al.,* 49 N. E. 961; *Nichum* v. *Burchardt,* 47 Pac. Rep. 788; *Cockrill et al.* v. *Hutchins et al.,* 36 S. W. Rep. 375; *Mabury* v. *Farrey Co. et al.,* 60 Fed. Rep. 645; *Dean* v *Crall,* 57 N. W. Rep. 813; *Appeal of Thompson,* 17 Atl. Rep. 643.

Estoppel *in pais* cannot be proved under a general denial or as new matter. Pomeroy's Remedies and Remedial Rights, Sec. 712; *Davis* v. *Davis,* 26 Cal. 23; *Wood* v. *Ostram,* 29 Ind. 177; *Etchebone* v. *Auzerias,* 45 Cal. 121; *Clark* v. *Huber, supra.*

Under the reformed procedure as to pleading new matter, in vogue in North Dakota, *res adjudicata* must be specially pleaded following the view prevailing in other code states. *Bowe* v. *Minnesota Milk Co.,* 44 Minn. 460, 47 N. W. Rep. 151; *Glen* v. *Priest,* 48 Fed. 19.

The better opinion is that judgment cannot be given in evidence to support the defense of former recovery, or adjudication in a previous suit between the same parties, unless specially pleaded. *Porter* v. *Leache,* 22 N. W. Rep. 104.

Plaintiff cannot avail himself of the question of *res adjudicata* for the reason that there is a total want of proof. Plaintiff sought to offer the printed abstract used in *Persons* v. *Persons* in U. S. Circuit Court. Copies of records and judicial proceedings in the

courts of the United States, as of a state or territory of the United States, can only be used as evidence, when attested by the clerk of such court with its seal annexed, together with the certificate of the judge thereof, that the attestation is in due form. Rev. Codes 1899, Sec. 5691.

This proof was objected to, and is not a part of the record. A plea of *res adjudicata* cannot be supported where neither the pleadings nor judgment in the former suit are introduced in evidencre. *Walker* v. *Redding,* 23 So. 565; *Keech* v. *Beatty et al.* 59 Pac. 837; *Bullet* v. *Taylor,* 69 Am. Dec. 412; *Glaze* v. *Bogle,* 31 S. E. Rep. 169; *Cherry* v. *York,* 47 S. W. Rep. 184; *City of New York* v. *Brown,* 57 N. Y. S. 742; *Clariday* v. *Reed,* 53 S. W. Rep. 302; *Jones on Evidence,* Sec. 644.

A trust relating to personal property may be shown by parol evidence. *First National Bank* v. *Moss,* 80 Mo. App. 408; *Skeen* v. *Marriott,* 61 Pac. Rep. 296; Pom. Eq. Jur., Sec. 1008; Perry on Trusts, Sec. 98; Beech on Trusts and Trustees, Sec. 52; *Vance* v. *Park,* 7 Ohio Dec. 564; *Thompson* v. *Carruthers,* 50 S. W. Rep. 331; *Woods* v. *Matlock,* 48 N. E. Rep. 384; *Stubblefield* v. *Stubblefield,* 49 N. W. Rep. 565; *Eiber* v. *Benner,* 71 N. W. Rep. 511; *Cooper* v. *Thompson,* 45 Pac. 296; *Allen* v. *Withrow et al.,* 3 U. S. Sup. Ct. Rep. 517; *Pitney* v. *Bowdon,* 18 Atl. Rep. 211; *Williams* v. *Haskins,* 29 Atl. Rep. 371; *Bostwick et al.* v. *Mahaffy,* 12 N. W. Rep. 192.

The assignment was a gift *causa mortis* by Thomas Persons to his son Simon E. Persons. Rev. Codes 1899, Sec. 3558, 3559, 3560. As there was no delivery in the lifetime of the donor, the transfer must fail. *Luther* v. *Hunter,* 7 N. D. 544, 75 N. W. Rep. 916, 14 Am. & Eng. Ency. of Law 1056.

Since the gift *causa mortis* failed for lack of delivery and there was no gift *inter vivos* the transfer fails. *Luther* v. *Hunter,* 7 N. D. 544, 75 N. W. Rep. 916; *Appeal of Walsh,* 15 Atl. 470; *Dunbar* v. *Dunbar,* 13 Atl. 578; *Gano* v. *Fisk,* 3 N. E. Rep. 532; *Trenholm* v. *Morgan,* 5 S. E. Rep. 721; *Yancy* v. *Field,* 8 S. E. Rep. 721; *Basket* v. *Hassell,* 107 U. S. 602-415, 27 L. Ed. 500; *Harris* v. *Clark,* 3 N. Y. 93; *Knight* v. *Tripp,* 49 Pac. 838; *Knight* v. *Tripp,* 54 Pac. 267.

If there was a gift *causa mortis,* it failed by the recovery of the donor. Rev. Codes 1899, Sec. 3560; *Van Dusen* v. *Rawley,* 8 N. Y. 358.

Lee Combs, for the respondent.

Exhibit K being copy of the deposition of Maria Persons in case of Persons v. Persons in U. S. Circuit Court, District of Minnesota, and L being the pleadings in same action, being judicially determined in that case to be competent testimony, are properly in evidence, and must be considered by this court, and also because their competency is clearly established in this action by the testimony of Page Persons and his witnesses. Parol testimony of a person who heard it is always admissible to show what facts were adjudicated in a judgment. *Taylor* v. *Neyes,* 79 N. W. Rep. 998.

Under an issue in *assumpsit,* any fact tending to disprove the plaintiff's right of recovery, is admissible under a general denial, including matter *res adjudicata. Young* v. *Rummell,* 2 Hill (N. Y.) 478; *Niles* v. *Totman,* 3 Par. (N. Y.) 594; *Cook* v. *Vimont,* 6 T. B. Mon. (Ky.) 284; *Gray* v. *Pingry,* 17 Vt. 419; *Cook* v. *Field,* 3 Ala. 53; *Little* v. *Barlow,* 37 Fla. 232; *Hempstead* v. *Stone,* 2 Mo. 65; *Wood* v. *Jackson,* 8 Wend. 9; *Reynolds* v. *Stansnury,* 20 Ohio 344; *Finley* v. *Handest,* 30 Pa. St. 190; *Bartels* v. *Scheel,* 16 Fed. 341; *Fitz* v. *Clark,* 7 Minn. 217; Herman on *Res Adjudicata* and Estoppel, Sec. 1274; *Whitney* v. *Clarinden,* 18 Vt. 252; *Clark* v. *Thurston,* 47 Cal. 21.

The court erred in denying plaintiff's request to amend by pleading former recovery. *William* v. *Bethany,* 1 La. 315; *La Croix* v. *Macquart,* 11 Miles (Pa.) 42; *Garvin* v. *Dawson,* 13 S. & R. (Pa.) 276.

The assignment was sufficient in law, and appellant failed to establish that it was burdened with a trust. The finding and judgment are overwhelmingly supported. *Jasper* v. *Hazen,* 4 N. D. 1, 58 N. W. Rep. 454; *Lockwood* v. *Canfield,* 20 Cal. 126; *Silvey* v. *Hodgdon,* 52 Cal. 363.

Cochrane, J. Plaintiff's action is to foreclose a mortgage upon real estate in Barnes county, N. D., and for general relief. His ownership of the note and mortgage is through a written assignment of them made by Thomas Persons, the payee and mortgagee named in the instruments. The mortgagors, Charles G. Smith and Mary L. Smith, answered, alleging that the note and mortgage had been fully paid and satisfied prior to the commencement of the action. Phineas P. Persons, also a defendant, answered separately, alleging that the note and mortgage in suit were fully paid and satis-

fied, and that the assignment of the note and mortgage was made by the payee and mortgagee therein to plaintiff in trust. Paragraph 4 of his answer is as follows:

"That on the said 23d day of January, 1897, and some time prior thereto, the said Thomas Persons, being the father of plaintiff and this defendant, was seriously ill in the town of Alma, in the state of Washington, with the expectation of living but a very short time, and, desiring that the expenses of his said sickness and last sickness, and, in case of his death, the expenses of his funeral, and the cost of removing his remains to the state of Minnesota, and also the necessary expenses of taking Maria Persons, the aged wife of said Thomas Persons, and the mother of this plaintiff and this defendant, from said state of Washington to the state of Minnesota, and also the expenses of the plaintiff and this defendant in traveling to and from said state of Washington to said state of Minnesota, be paid out of the property of the estate of said Thomas Persons, then and there, on said 23d day of January, A. D. 1897, in the presence of this plaintiff and this defendant, and agreeable to the same, set aside, composed, and constituted the balance of said mortgage, and the net proceeds of the same, as part of a fund or means to pay all said expenses and costs, and, in order to aid in, and more effectually carry out, the intention, purpose and understanding of said Thomas Persons with reference to the said fund, said Thomas Persons assigned his interests in the balance of the said mortgage, and the net proceeds of the same, without any consideration whatsoever, to this plaintiff, upon the express condition and understanding, however, that the said assignment should not be delivered or take effect until after the death of the said Thomas Persons, and upon the death of the said Thomas Persons, the said Simon E. Persons, this plaintiff, should have charge and control of the balance of the said mortgage, and the net proceeds of the same, as a part of the trust fund to pay the expenses and matters herein above mentioned."

By counterclaim, defendant sought to recover from the plaintiff certain expenditures alleged to have been made pursuant to the instructions of plaintiff's assignor. The counterclaim was denied by plaintiff. The case was tried to the court without a jury, pursuant to section 5630, Rev. Codes 1899, and resulted in a judgment dismissing the case as against the defendants Smith, and in a money judgment against the defendant Phineas P. Persons for the amount

of the mortgage indebtedness, with interest and costs, amounting to $1,129.95. The appeal is by Phineas P. Persons, and he demands a review of the entire case upon all of the testimony taken below.

Thomas Persons, the father of the parties to this appeal, in expectation of immediate death, made the assignment in question to his son Simon Persons, the plaintiff, on the 23d day of January, 1897, at Alma, in the state of Washington. It was in the form of a bill of sale, and described the property as a "real estate mortgage given by H. E. Keene and wife, of Barnes county, North Dakota; also one given by Charles G. Smith and wife. All of said mortgages are recorded in the county of Barnes, Town of Valley City, North Dakota." This instrument was duly signed by Thomas Persons and by Maria Persons, his wife, in the presence of subscribing witnesses, and duly acknowledged, and subsequently, on March 1, 1897, delivered by the defendant upon the express instructions of Thomas Persons. This assignment was sufficient, both in law and in fact, to transfer the ownership of the mortgage in suit, and the note secured thereby, as against the objections of defendant. The fact of the assignment is admitted by the pleadings, and its legal sufficiency has been determined beyond question, so far as these parties are concerned. *Persons* v. *Persons,* 105 Fed. 39, 44 C. C. A. 348. The real point in issue is whether or not this assignment was burdened with a trust. If not burdened with the trust claimed by the defendant, the plaintiff is entitled to a judgment free from all alleged counterclaims, for the reason that the sums attempted to be counterclaimed by defendant are for services and advances alleged to have been made by defendant for and at the request of Thomas Persons, to be reimbursed out of the fund realized from the Keene and Smith mortgages. The items counterclaimed were litigated in an action between these parties in the United States Circuit Court for Minnesota, in which action Simon Persons sued to recover from his brother Phineas the amount of the Keene mortgage, transferred by the same instrument of assignment as the mortgage here in question. In that case Phineas pleaded the same defenses, and the same items of alleged expenditures as counterclaims, that he sets forth in this action. The issues were there determined against him, and judgment awarded against him in favor of the plaintiff for the value of the Keene note. This judgment was affirmed on appeal, and the judgment was paid by defendant. These matters of counterclaim cannot again be litigated.

The plaintiff never became responsible for them, and in no view could they be recovered against the plaintiff. The burden of proof was on the defendant to show both the defense of payment and the alleged trust.

For an understanding of the case, a review of the circumstances leading up to and accompanying the assignment is necessary. Thomas Persons resided at Valley City, N. D., for six years prior to October 18, 1892. He was a man of considerable means, and loaned his money upon real estate security. His son Phineas, the appellant, also resided at Valley City, and assisted his father in the making of loans and the collection of interest; and, during the six years of his father's residence there, Phineas handled for him a business aggregating from forty to fifty thousand dollars. The loan to Charles G. Smith in November, 1892, was made, and the note and mortgage in suit taken, by Phineas Persons, for, and in the name of his father, Thomas Persons. From October, 1892, until March 1, 1897, Thomas Persons resided at Alma, in the state of Washington, and during this time Phineas continued to transact business for his father in the making of collections and remittances upon unclosed business in North Dakota. He did this under a general power of attorney executed and delivered to him by Thomas Persons and wife on the 28th day of October, 1892. At the time of the making of the assignment herein mentioned, the note and mortgage, the subject thereof, were, and at all times had been, in the physical custody and possession of Phineas Persons. On January 23, 1897, Thomas Persons, then 83 years of age, was sick, and believed himself about to die. His sons Simon and Phineas were summoned to his bedside. Phineas arrived first, and was consulted by his father as to the disposition of his estate. He was advised by Phineas to transfer his property directly to the beneficiaries, and thus save the cost of probating the same in the four states in which it was situated. Phineas, in these preliminary talks, doubtless mentioned the Keene and Smith notes, and suggested that he be permitted to use them. It is upon this conversation, on the morning of January 23d, that he bases his claim that these notes were made a special trust for his benefit. In answer to questions by his counsel, Phineas testified: "Q. What was said, if anything, by your father, relative to the Keene and Smith notes, and when? A. He said during the conversation that occurred before he went for Mr. Wakefield— He said he didn't want to make the papers to myself; he

wanted to pay me out of the property that was left, as I have always said there is no trouble about that. I said, 'I will cash the Keene and Smith notes as fast as I need the money.' He said he set them aside to pay all my debts. He owed some little bills, and he set them aside to pay all these bills, and give what money there is to mother. Q. Did he say anything at that time as to what kind of expenses were to be paid? A. Explained all his indebtedness that he had incurred—as doctor's bills, nurses, drug-store bills, and all his expenses; all his debts. Q. What did he say at the time relative to paying two hundred dollars to each of the boys? A. He said to give Edgar $200—He had already given Simon $200, that I had sent him in the fall—and to take $200 myself, to pay us for leaving our business at this time, and the trouble he had put us to. Q. He made a present of $200 to each of you boys? A. Yes, sir. Q. You were to pay that out of what? A. The Keene and Smith notes, and pay all of his indebtedness. Q. This conversation occurred in the presence of whom? A. In the presence of Simon, and in the presence of my mother, and a portion of it in the presence of my brother Edgar. He was not there all of the time. He went out to milk the cows, or something. Q. This item of the Keene and Smith note and mortgage he wanted to be used up for expenses, and to make this $600 out of? A. Yes, sir. Settle his accounts, all he owed me, and all the debts he had. Q. At that time, what was said in regard to a settlement between you and your father, if anything, for settling the business between you? A. Nothing whatever; nothing about settling the business between us." A notary was sent for, who received his instructions from the mouth of Phineas, but in the presence of Thomas Persons, Maria Persons, Edgar Persons, and other persons hereinafter named. Transfers were made by Thomas Persons of his property, real and personal. Mr. Wakefield, the notary, testified: "I heard P. P. Persons ask what was to be done with the Smith and Keene notes, and he (Thomas) said, 'I want you to let Simon have them.' Then Phineas came in and said, 'You make out a bill of sale of Smith and Keene notes.'" Whereupon the foregoing assignment was drawn, and signed by both Thomas and Maria Persons. During the time the papers were being prepared, no word of explanation is testified to, showing any intention on the part of Thomas Persons to have these notes used for the payment of debts or expenses. Phineas Persons the party directly interested, makes no such claim. The witnesses

Price, Gaskell, Harding, and Wakefield, who were invited in to witness the papers, and who were present while the papers were being drawn and executed, heard nothing of such a purpose. After the papers were signed, and the notary had affixed his certificate of acknowledgment to them, they were left in the hands of Phineas Persons, to be retained until his father's death. Thereafter, and on the 1st day of March, and on the eve of the father's removal to Afton, Minn., Thomas Persons instructed Phineas, in the presence of his family, to deliver the bill of sale to Simon, and the delivery was accordingly made. At this time Thomas had rallied from his sickness, and it was his intention to, and he did, by this delivery, put the ownership of the note and mortgage in Simon. Between January 23d and the time when the old people arrived in Afton, Minn., in April, Phineas and Simon remained with their parents. On November 14, 1896, Phineas Persons, in his own interest, but assuming to act under the general power of attorney given him in 1892, negotiated with the Smiths to take from them a warranty deed of the land covered by their mortgage, and to release the mortgage. There was due at that time upon the mortgage debt $775 and one year's interest, which amount Phineas testified he agreed with the Smiths to pay to his father. A deed was made out by the attorneys for the defendant, dated November 14, 1896, in which Phineas Persons was named as grantee. This deed was not finally executed and acknowledged by the Smiths until the 17th day of June, 1897, and the deed was recorded on January 17, 1898. After this deed was delivered to him, Phineas surrendered to the Smiths their note, and also executed a satisfaction of the mortgage; signing his father's name thereto, and acknowledging it as attorney in fact for his father. This satisfaction was acknowledged on November 14, 1897, about one month before Thomas' death, and was not recorded until May 11, 1901, a date subsequent to the commencement of this action. The Keene mortgage described in the foregoing assignment was also released by Phineas, signing his father's name by himself as attorney in fact, just prior to his father's death. The evidence clearly shows that these releases were made without the knowledge or consent of either Thomas Persons or of Simon Persons, and with the intent to cheat and defraud the plaintiff. Phineas testified that he did not pay the amount of the Smith mortgage to his father at the time of the release, and there is no competent evidence that he paid it at any time, before or since.

Giving the testimony of Phineas Persons the interpretation most favorable to his present contention, and treating the preliminary talks between himself and his father, as testified to by him, as matters of substance, and not as merged in or superseded by the subsequent execution and delivery of the assignment to Simon, nevertheless there was no authority shown in Phineas to convert these securities into cash, or to disburse their proceeds. Neither the answer nor the testimony of defendant states a defense in this particular. All rights of Phineas Persons to deal with these securities was ended by the delivery of the assignment to Simon without qualification or condition. The general power of attorney held by Phineas was thereby revoked, so far as these securities were concerned. If Thomas Persons had a right to revoke the gift, he never exercised it. That Thomas intended this delivery as a final and absolute one is amply proven by the evidence, and the same evidence discloses the bad faith of Phineas, who also knew the property to be in Simon. It is in proof that, subsequent to this assignment, Simon asked his brother about the Smith note in their father's presence. Phineas answered that he had talked to Smith, and he was going to take a deed of 160 acres to satisfy this mortgage, and then sell the land back to Smith on the crop-payment plan, " 'but, ' he said, 'the trade is off now. I guess Smith will be disappointed.' Father said: 'It was Simon and Smith now. I have nothing to do with it.' " Simon then agreed that he would take a deed of the land from the Smiths, and sell the land back to them on a crop-payment contract, and Phineas said, "I will have that done when I get back." After Thomas Persons had been removed to Simon's home, in Afton, Phineas returned to Valley City. On April 22, 1897, he wrote his father in the following language: "Dear Father and Mother: I send you check for $180.00, the Keene interest, to hand to Simon." And again, under date of May 31, 1897, he wrote his father; the concluding sentence of this letter being: "Tell Simon I saw Smith and as soon as he is done seeding will have the matter fixed with him." These letters were given to Simon by his father, and the check for the Keene interest was also given to him. This evidence conclusively establishes the fact that Thomas Persons and Phineas fully understood the property in these notes to be in Simon. Edgar and Nettie Persons and S. M. Prince corroborated the testimony of Phineas Persons as to the conversation had on the morning of January 23d, before the notary was called and the writings drawn,

to the effect that Thomas expressed a desire to have his debts paid out of the Smith and Keene notes. Simon Persons and Maria deny that Thomas made use of any expression upon the subject, and positively and directly deny that the gift to Simon was burdened with any trust. That Phineas did state to his father a desire to convert and use the Smith and Keene notes for his own purposes can readily be believed, and it is quite likely that the witnesses to the conversation might, after the lapse of time before their testimony was taken in this case, have become confused in their recollection as to what was said by Phineas Persons, and what by the father. But whatever was said on this subject before the notary was called in, and the matters reduced to writing, it is clear that Thomas Persons did not intend to have these securities used by Phineas at the time the assignment was drawn, or at the time it was delivered. All preliminary talks were disregarded, and the suggestions made to him rejected, when he executed the assignment. No witness testifies that in the presence of the notary he expressed any purpose to have these notes used to pay debts or expenses. Phineas, interested in securing the notes to himself, did not tell the notary of any understanding, other than that expressed in the writing. Not a single expression was there used by any one counter to the direction of Thomas that Simon was to have the notes. Had Phineas understood that he was empowered to use these securities for any purposes whatever, some mention of it would have been made to his brother when the assignment was delivered, or between its delivery and the time of his father's death. Some explanation would have been made of the debts he was expected to pay. Simon would have been consulted before the mortgages were released. The secret method of releasing them is strong evidence of the bad faith of Phineas' present claim. Thomas Persons owed no debts at the time this assignment was made, and it is not fair to presume that he would set aside $2,800 of securities to pay the expenses of his funeral, and the removal of his family to Minnesota.

It will be observed that, under the averments of his answer, the only expenses which Thomas Persons desired to have paid from these notes were the expenses of his then and last sickness, and, in case of his death, the expenses of his funeral, the costs of removing his remains to the state of Minnesota, and also the necessary expenses of taking Maria Persons from Washington to Minnesota, and the expenses of plaintiff and defendant to Washington and

return. The pleading expressly limits the purpose of the trust claimed by defendant to these purposes. The testimony, therefore, of Phineas, hereinbefore quoted, to the effect that Thomas was indebted to him, and that the notes were set aside to pay all his debts, and also the testimony of defendant that his father owed him $750 for services at this time, which was to be paid from these notes, can only be considered as bearing upon his credibility, as such evidence is incompetent under his pleading, and does not tend to substantiate any issue tendered thereby. The evidence does not show that Thomas was indebted for the purposes mentioned when he caused the assignment to be delivered to Simon, in March, unless it was for the $200 given to Simon, and the like amount given to Phineas, to pay the expense of their visit, and which defendant testifies he advanced, to be paid from the proceeds of these mortgages. We think the evidence not only fails to support the allegations of the answer, but is irreconcilably opposed to it. As before stated, the proofs of this trust must rest largely upon the weight to be given defendant's testimony, and the facts and circumstances as they then existed. The admitted conduct of the defendant was so duplicitous, overreaching, and dishonest, that, even if he were not positively contradicted in his assertions by credible witnesses and facts and circumstances in the case, the issues tendered by him could not be considered as proven. Notwithstanding the statements of his verified answer as to the purpose of the alleged trust, when inquired of as a witness as to what was said by his father relative to the Keene and Smith notes, he evaded a direct reply to the question, and attempted to show that his father was indebted to him, and assented to the use of these notes to pay a debt to him. His answer was, in part: "He said he did not want to make the papers to myself; he wanted to pay me out of the property that was left, as I have always said there is no trouble about that. I (Phineas) said, 'I will cash these Keene and Smith notes as fast as I need the money.' He said he set them aside to pay all my debts." If this was even in part the language of his father, defendant knew it when he drew his answer, but it contains no averments to sustain this evidence. By the statement that he would cash the Keene and Smith notes, the impression would be conveyed that they were at that time intact. Further on in his evidence, defendant testified that they were wholly unpaid at this time. Yet, by his verified answer, he had before sworn that, on the authority of his father, he

had collected and received on November 14, 1896, the sum of $775 in payment of the Smith mortgage, and had applied the same according to his father's instructions. By these sworn statements of his answer, which he subsequently attempted to verify upon the trial, but which the documentary proofs refute, and which he was forced to retract, he attempted to impute to his father the intentional deception of giving to Simon a mortgage which he knew to be paid and satisfied. Thomas was not indebted to Phineas at this time, and he did not believe himself to be so indebted. On the contrary, Phineas was indebted to his father in an amount exceeding $5,000. His father had repeatedly endeavored to get an account of these moneys from him, and to get him to pay up, but without avail. At this time, in January, when Thomas was finally arranging his affairs, he mentioned the fact of Phineas' indebtedness to him, showing that he had it in mind; and Phineas expressly recognized the obligation to his father in the presence of his mother and brother, and did not attempt to repudiate it until after his father's death. Phineas testified that he had no settlement with his father since 1892, and that there was no accounting between them at this time in Alma. Up to the time his father moved from Valley City, N. D., to Alma, Wash., defendant handled from $40,000 to $50,000 of his father's money. Before his father left Valley City, defendant claims to have had a full accounting with him. Maria Persons denies that any such account was had. On the 28th day of October, 1892, the day before his father left Valley City, the power of attorney before mentioned was executed and delivered by his father and mother to defendant, to enable defendant to close up their business in Minnesota and North Dakota. At the same time his father deeded to him seven quarter sections of land in Barnes county. The consideration named in the deeds was $10,500. The Middlesex Banking Company had held a mortgage upon defendant's farm for $3,500, which Thomas purchased, and had assigned to himself. There was due on this mortgage at this time $4,000. Seventeen days after the power of attorney was executed, and Thomas had removed from Valley City, defendant filed for record in the office of the register of deeds a satisfaction of this mortgage, which was signed with his father's name by Phineas Persons, as attorney in fact. Without considering the remarkable circumstances under which this release was made, we find here $14,500 which defendant should have accounted for to his father. He testified that between

October, 1892, and January 23, 1897, he remitted to his father about $7,500. No explanation is given as to the balance. Defendant also testified that during his father's residence in Washington his mother conducted with him all correspondence. His father did not write. Maria Persons, under these circumstances, was familiar with her husband's business transactions with the defendant. When this case was tried, Maria Persons was dead. Her testimony was taken in a case between these parties in the United States Circuit Court for Minnesota, growing out of the conversion of the Keene note transferred to Simon by the same assignment as the Smith note now in suit. The issues in that case were the same as in this. It was competent to prove her testimony in that case upon this trial. 11 Am. & Eng. Enc. of Law, 523, and cases cited: *Atchison, etc., Ry. Co.* v. *Osborn* (Kan.) 67 Pac. 547; *Fredericks* v. *Judah* (Cal.) 11 Pac. 133; *The Indianapolis, etc., Ry. Co.* v. *Stout*, 53 Ind. 143, 157; *Orr* v. *Hadley*, 36 N. H. 575; *Reynolds* v. *United States*, 98 U. S. 145, 25 L. Ed. 244. What she testified was proven by the mouth of Phineas Persons himself on his cross-examination, and without objection. Maria testified that Phineas never paid his father this mortgage on his farm. The following questions and answers appear in his cross-examination: "Q. Do you recollect of her testifying anything about this mortgage you say you satisfied with that power of attorney on the 17th day of November, 1892—recollect about what she testified in regard to that? A. I don't know as I could repeat the words. She testified there was a mortgage there, and father paid it. Q. Testified you had never paid it back to her or your father? A. I think she testified to that. Q. Do you recollect of her stating, also, there, that your father had frequently called for statements of account from you, and you never gave them? A. I think she testified to some such thing; yes sir. Q. What other disposition of his property did he make there? A. Phineas asked him, after he got through with his disposition, what he was going to do with the money. My husband answered, "He gave that to mother," meaning me.' Recollect her stating that? A. I think she did. Q. 'What did Phineas say to that? A. Phineas answered he did not have money with him, but he had it in the bank in Dakota; that he would pay it whenever I wanted it, or give me five per cent. As long as he had it, it would enable him to keep me as long as I live.' Recollect her testifying to that? A. I think she did. Q. 'Phineas said he would give banking interest, the

same as the bank gave.' Did she say that? A. I think she did." Defendant admits that his mother further testified that, in a conversation between herself and him, when he was at Afton, at a time when her husband was sick, "Phineas asked me how much money I wanted, and I told him I wanted a hundred dollars to pay the doctors; that I wanted to pay that, and didn't want my husband to be indebted. He said he had that much with him, and took it out of his pocket and handed it to me. He said the rest of my interest money was in the bank. When he came again he was going to bring what he owed father, and what he owed me." "He attended the funeral. He left the next morning. He returned on February 22, 1898, and I had a talk with him about money matters. He denied, like the scoundrel he was—said he didn't owe me a cent. He never paid me a cent but the hundred dollars I spoke of." "Q. You say your husband paid a mortgage on Phineas' home farm. Do you know how much it was? A. No; suppose the records would tell. I simply know the fact that he did. Q. Do you know whether Phineas ever paid it back to Thomas? A. I know he never did. As quick as father died, Phineas undertook to take everything from him. No difficulty before he died." Simon Persons testified, as to the occurrences at the time in question, that, after the transfers were drawn by Wakefield, and signed and witnessed, Phineas went to his father and asked him if that was all. "He said he thought it was. Phineas said: 'What am I going to do with the money that I owe you?' He said: 'Give it to mother. I want mother to have that.' He turned around to his mother and says: 'That is all right, but I have not got that amount of money with me. When I get back I will pay you, and I will give you five per cent interest, or will pay you all or part at any time.' Mother said that was all right." It also appears in proof that Phineas stated to plaintiff at this time that he had plenty of his father's money in his hands to pay all expenses. This shows satisfactorily that Phineas Persons was largely indebted to his father, and that his claim that his father owed him is untrue. It also explains why Thomas relied upon him to pay the expenses of his last sickness, and the gifts of $200 to each of his sons. At the very time this arrangement was made, Thomas Persons turned over to his wife $1,650 in gold, and a certificate of deposit on a bank in Hudson, Wis., for $10,500. The bank had recently failed. He also gave to Phineas a large amount of secured

notes against parties in Washington, of the face value of more than $2,000, upon real estate in the states of Washington and Oregon, consisting of several houses, a mill, and other property, in which property, if defendant is to be believed, he had never taken sufficient interest to enable him to testify as to its kind, location, amount, or value. With such means at hand, and in the face of the then conditions and his subsequent acts, it cannot be believed that Thomas Persons intended or said that Phineas should have any control of the Keene and Smith notes, or that he set them aside for any purpose other than that expressed in the written assignment.

The evidence clearly establishes that the mortgage this action was brought to foreclose was released without the knowledge or consent of either Thomas Persons or the plaintiff. Defendant had been at Afton and in daily contact with his brother and father from the time the assignment was made, without mentioning to them any of his prior or subsequent acts concerning these securities, but took advantage of their confidence, and of the fact that the note and mortgage were in his possession, that the assignment to Simon was unrecorded, and that the power of attorney given him in 1892 was of record, and unrevoked in writing. He secured a settlement with the mortgagors, took a deed of the land to himself, and surrendered the note and mortgage in suit to the makers, and then resold the land. His actions show a systematic endeavor to secure to himself the entire of his father's estate, much of it by dishonest means. The Keene note and mortgage, transferred to his brother in the same instrument as the one in suit, was released and its proceeds appropriated by him in the same way. The $10,500 certificate of deposit of his mother was likewise compromised by him under the ostensible authority of his power of attorney, without her knowledge or consent, and the proceeds appropriated to his own use, and his aged mother left to die a dependent upon the generosity of the plaintiff.

The judgment of the trial court is amply and fully sustained by the evidence. Defendant is indebted to plaintiff for the full amount of the mortgage debt, with interests and costs. The judgment appealed from is in all things affirmed. All concur.

(97 N. W. Rep. 551.)

JOHN JOHNSON *v.* THE GREAT NORTHERN RAILWAY COMPANY.

Opinion filed November 3, 1903.

Motion to Make Pleadings More Definite.

1. In a case where the complaint states that a fire was negligently started by one of defendant's engines on September 18, 1902, and plaintiff's property thereby destroyed, a motion to make the complaint definite and certain, by stating the time of day when the engine passed the point where the fire originated, is not the proper remedy.

Same.

2. The complaint is not indefinite or uncertain so far as the nature of the cause of action is concerned, within the meaning of section 5284, Rev. Codes 1899.

Indefinite and Uncertain as to Nature of Charge or Defense.

3. It is only when the complaint or answer or reply is indefinite or uncertain so far as the nature of the charge or defense is concerned that the remedy offered by section 5284 applies.

Where Pleading Is Definite and Certain as to Charge or Defense—Bill of Particulars.

4. In cases where the pleadings are definite and certain as to the nature of the charge or defense, but further particulars are required for further pleading, or for due preparation for trial, the remedy is by asking a bill of particulars to be furnished.

Same.

5. The remedies afforded by sections 5282 and 5284, Rev. Codes 1899, are distinct, and to be applied exclusively under circumstances therein pointed out.

On Application for Remedy Under Sec. 5282, Those Under Sec. 5284 Refused.

6. If the remedy under either section is prayed for when the other should have been prayed for, the application must fail, and the remedy provided for by the other should not be granted under such application.

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

Action by John Johnson against the Great Northern Railway Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

C. J. Murphy, for appellant.

Under the statute the trial court should require pleading to be made certain and definite, where the claim of the pleader or facts

upon which it is based, are not apparent. In any event, the court can require him to furnish his opponent the particulars with respect to the claim or demand made. Rev. Codes 1899, sections 5282 and 5284.

The discretion is not an arbitrary one, and its abuse, by the lower courts, should be corrected on appeal. *Spenseley* v. *Janesville Cotton Manufacturing Co.,* 22 N. W. Rep. 574; *Lowenthal* v. *Works,* 18 N. Y. Sup. 523; *Goodman* v. *Robb,* 41 Hun. 605; *Pugh* v. *Winona & St. Peter R. Co.,* 13 N. W. Rep. 189; *Witkowski* v. *Paramore,* 93 N. Y. 467.

Failure to appeal from an order overruling motion to make pleading more certain, and interposing an answer, is a waiver of any error committed. *Coakley* v. *McCarty,* 34 Iowa 107; *Kline* v. *Railway Co.,* 50 Iowa 657; *Hurd* v. *Ladner et al.,* 81 N. W. Rep. 470.

N. A. Stewart, for respondents.

The indefiniteness, or uncertainty, to be relieved against on motion, must appear on the face of the pleading itself, and not from extrinsic facts. *Todd et al.* v. *Minneapolis & St. L. R. R. Co.,* 35 N. W. Rep. 5; *Lee* v. *Minneapolis & St. L. R. R. Co.,* 25 N. W. Rep. 399; *Wabash & W. Ry. Co.* v. *Morgan,* 32 N. E. Rep. 85; *Grinde* v. *Milwaukee & St. P. R. R. Co.,* 42 Iowa 376; *Tierney* v. *Burlington, C. R. & N. Ry. Co. et al,* 15 Am. & Eng. Railway Cases, 290, 17 N. W. Rep. 377.

The pleader should not be called upon to furnish his opponent with information peculiarly within the latter's knowledge.

MORGAN, J. In this case plaintiff seeks to recover damages for the destruction by fire of his property, alleged to have been caused by the negligence of the defendant in running an engine not in proper repair, and in negligently operating such engine; that, by reason of such negligence, sparks of fire escaped from such engine, and set fire to the dry grass and other combustible material negligently permitted to accumulate and remain on the right of way, and was negligently permitted by the defendant to escape from said right of way to plaintiff's property. The complaint alleges that such engine started the fire which burned plaintiff's property while going east on September 18, 1902. No objection is raised to the complaint, except that the time of day when such fire was set should be made certain and specific, and the hour when the engine

passed the point where the fire originated stated. Before the time for answering expired, defendant procured an order to show cause why the complaint should not be made specific and certain in respect to time. Such order to show cause was based on the affidavit of defendant's attorney, stating that such specific information as to time was necessary before defendant's answer to the complaint could be properly prepared; that four trains passed the point in question on September 18th going east; and that the complaint should be made more specific, so that the defendant could properly prepare its answer and prepare for trial, by procuring the attendance at the trial of the employes that were in charge of and operating said train and engine. The district court denied the application, and the defendant has appealed from the order denying the application.

No motion to dismiss the appeal was made by plaintiff, nor is the appealability of the order argued by him. The defendant claims that the order is appealable, and cites authority for his contention. Whether the order is appealable, or not, is a doubtful question, under the decisions of the different courts based on similar, if not identical statutes with ours. In Minnesota the order was first held appealable in *Pugh* v. *Ry. Co.*, 13 N. W. 189. That decision was disapproved in *American Book Co.* v. *Kingdom Pub. Co.*, 71 Minn. 363, 73 N. W. 1089, and was expressly overruled in *State* v. *O'Brien et al.*, 83 Minn, 6, 85 N. W. 1135. See, also, *Spensley* v. *Janesville Cotton Mfg. Co.*, 62 Wis. 649, 22 N. W. 574; *Young* v. *Lynch*, 66 Wis. 514, 29 N. W. 224; *Adamson* v. *Raymer*, 94 Wis. 243, 68 N. W. 1000; *Witkowski* v. *Paramore*, 93 N. Y. 467; *The Hanover Fire Ins. Co.* v. *Tomlinson*, 58 N. Y. 651. The question of the appealability of the order not having been raised or argued by respondent, and in view of the doubt involved as to the construction to be given to subdivision 4 of section 5626, Rev. Codes 1899, and in view of the importance of this question of practice, and inasmuch as the order appealed from must be affirmed in any event, we have deemed it best to dispose of the question presented, on the merits, without committing ourselves to the view that such an order is appealable, should the question be directly raised in another case in the future.

It remains to be determined whether the trial court erred in refusing to make the complaint definite and certain as to the time of day when the engine that caused the fire, as alleged, passed

the point where the fire is alleged to have originated. It is claimed by appellant that specifying the day generally, instead of specifically pointing out the precise time of day, renders the complaint indefinite and uncertain. Section 5284, Rev. Codes 1899, under which the motion is made, provides: "And when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment." In this case the cause of action pleaded is the negligence of the defendant. No objection is raised against the complaint so far as the allegations of negligence are concerned. There is no indefiniteness in the statement of the cause of action, so far as its nature is concerned. The nature of the charge against the defendant is negligence resulting in the destruction of plaintiff's property. The precise time of day when the train passed that started the fire pertains to the circumstances or details or evidentiary matters that together comprise or make up the cause of action. The time called for is one of the many particular facts that together constitute the cause of action specifically pleaded, so far as its nature is concerned. Under said section of the statute, the nature of the cause of action is not apparent when material facts are stated in the alternative, so that it is not apparent on which averment the pleader relies, or when the allegations are so confused that it is not apparent what facts are intended to be charged, or when distinct causes of action are not separately stated, and in other cases where the cause of action stated is not apparent, owing to some indefiniteness that cannot be taken advantage of by demurrer. 6 Enc. Pl. & Pr. 274, and cited cases. In denying a motion to make a complaint definite and certain, the Supreme Court of Minnesota, in *Lee* v. *Minneapolis, etc., Ry. Co.*, 34 Minn. 225, 25 N. W. 399, said: "The uncertainty is not as to what the complainant alleges, but as to the particular evidence which the plaintiff will produce to support it. But we apprehend that the indefiniteness or uncertainty to be relieved against on motion is only such as appears on the face of the pleading itself, and not an uncertainty, arising from some extrinsic facts, as to what evidence will be produced to support it." See, also, *Todd* v. *Minneapolis, etc., Ry. Co.*, 37 Minn. 358, 35 N. W. 5. In *Tilton* v. *Beecher*, 59 N. Y. 176, 17 Am. Rep. 337, the court said, in considering the scope of a section of the New York Code identical in wording with our section 5284, *supra*: "It will be observed that it is

only where the precise nature of the charge is not apparent that an application can be made under this section. It enables a party to obtain a definite statement in the pleading of the nature of the charge intended to be made against him, but not of the particulars or circumstances of time and place. For this purpose a different proceeding is pointed out, viz., an application under section 158, which provides, among other things, 'the court may in all cases order a bill of particulars of the claim of either party to be furnished.' It is evident that in the present case there was no occasion for an application under section 160 to make the complaint more definite and certain. There is no uncertainty or indefiniteness in respect to the nature of the charge made against the defendant. The difficulty under which he claims to be laboring is that the complaint does not point out the times or occasions when the alleged offenses are claimed to have been committed." In the same case the court said: "But it is an error to suppose that bills of particulars are confined to actions involving an account, or to actions for the recovery of money demands arising upon contract. A bill of particulars is appropriate in all descriptions of action where the circumstances are such that justice demands that a party should be apprised of the matters for which he is to be put to trial with greater particularity than is required by the rules of pleading." In *Dwight* v. *Ins. Co.*, 84 N. Y. 493, the court said: "First, unless changed by staute law, the power of the Supreme Court to order bills of particulars is not confined to actions upon demands for money, made up of various items. It extends to all descriptions of actions when justice demands that a party should be apprised of the matter for which he is to be put for trial with more particularity than is required by the rules of pleading." Section 158 of the New York Code, above partly quoted, is practically similar to section 5282 of our Code, and is identical, so far as quoted above. The reading of section 5282 and 5284 of our Code shows that these sections provide separate and distinct remedies available by motion when a pleading is not sufficiently definite to permit the adverse party to answer, reply, or prepare for trial without a statement of additional facts, or an amendment to the pleading, so far as its allegations are concerned. If the nature of the cause of action is uncertain, it must be made certain by amendment of the pleading. If facts or circumstances of time or place are stated generally or indefinitely, the claim of either party may be particularized by

furnishing a bill of particulars of the facts. But the pleading stands unchanged. Each remedy is distinct, and applies in its own sphere as laid down by these sections. The remedies are not interchangeable. If one is prayed for, the other cannot be properly granted. In *Rouget* v. *Haight,* 57 Hun. 119, 10 N. Y. Supp. 751, the court said: "The purchase and sales alleged to have been made under the agreement are not stated in detail, but nevertheless the cause of action is stated with sufficient definiteness to make apparent what the defendant claims. It is stated generally, it is true, and in such a mode as to show that there are items constituting it. That, however, does not give the right to the remedy which may sometimes be invoked of making the averment more definite and certain. It can only be sought when the allegations are so indefinite that the precise nature of the charge or defense is not apparent. Here there is no doubt of the nature of the defense. The plaintiff is not, however, remediless, inasmuch as he may ask for the particulars and obtain them." See, also, *Jackman* v. *Lord* (Sup.) 9 N. Y. Supp. 200; *Lowenthal* v. *Phila. Rubber Co.* (Sup.) 18 N. Y. Supp. 523; *Tilton* v. *Beecher, supra; Barney* v. *Hartford,* 73 Wis. 95, 40 N. W. 581.

It therefore follows that defendant's remedy was not by motion to make the complaint definite and certain. The order is affirmed. All concur.

(97 N. W. Rep. 546.)

THE STATE OF NORTH DAKOTA *v.* WILLIAM B. TOUGH.

Opinion filed November 4, 1903.

Indictment Set Aside on Statutory Grounds Alone.

1. The statute (section 8082, Rev. Codes 1899) specifies the grounds upon which an indictment may be set aside on motion of the defendant, and these are exclusive of all other grounds.

Appearance of an Assistant to State's Attorney, With Consent of the Court, Presumed Lawful, Unless Record Shows Otherwise.

2. Where a duly licensed and practicing attorney appeared with and assisted the state's attorney in the prosecution of a criminal case in the district court, with the consent of the presiding judge of the district, it will be presumed, in the absence of a showing to the contrary, that he was rightfully there, either under an order of the court made pursuant to and for one of the causes specified in the statute, or because

of an employment by the county commissioners of the county, with the advice and consent of the state's attorney. If any error was committed by the trial court in overruling defendant's objection to the participation of such attorney in the trial of the case against him, it is not available to defendant, because not made to appear upon the record on his appeal.

Indictment for Breaking and Entering With Intent to Steal, Includes Entering With Such Intent.

3. An indictment for burglary in the third degree for breaking and entering a railroad car with intent to steal, as defined in section 7406, Rev. Codes 1899, will sustain a conviction for the minor and constituent offense defined by section 7411, Id., of entering a railroad car with intent to steal.

Sufficiency of Evidence.

4. A conviction for entering a railroad car with intent to steal will be sustained against the objection that the evidence is insufficient to show a burglary, the verdict amounting to an acquittal of burglary.

Sufficiency of Instructions.

5. Upon a trial for burglary, the accused was charged with breaking and entering a railway car in which property was kept, with intent to steal therein, under section 7406, Rev. Codes 1899, and in defense testified, in effect, that he entered the car to obtain coal, in reliance upon statements made to him by the person who accompanied him and assisted in taking the coal that such person had a license to take coal from the car. Accused was entitled to have the jury instructed, upon his request, as to the statutory definition of larceny, in order that they might be informed that, to convict, they should find he intended all that is essential to constitute larceny.

Defendant's Testimony as to His Intent—Instructions.

6. A defendant has a right to have an instruction based on his own testimony, and to testify as to his intent.

Error to Refuse Instructions Based on Defendant's Theory, Warranted by the Evidence.

7. On the trial of a party for burglary with intent to steal, where the evidence upon material points in the case is conflicting, it is error to refuse an instruction for the defendant fairly presenting the law on the theory of the case contended for by him, having a basis in the evidence on which to rest.

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

William B. Tough was convicted of entering a railroad car with intent to steal, and appeals.

Reversed.

George A. Bangs, for appellant.

At common law a second indictment might be returned, but the practice cannot be sustained in this state. The Code of Criminal Procedure governs all criminal actions. Under our code provisions, it is disclosed that a person charged with crimes cannot be harrassed with repeated indictments. Under section 8033 Rev. Codes, if the grand jury returns no indictment, the case is dismissed; under section 8033, the dismissal does not preclude the court from submitting repeatedly to the grand jury; but without such direction on the part of the court, it cannot be resubmitted. Under section 8081, defendant must either move to set aside indictment, plead thereto, or demur. This he must do to each indictment, or the officers of the court must ignore or refuse to obey the plain provisions of law. By section 8086, if the motion to set aside an indictment is granted, the defendant must be discharged, "unless the court directs that the case be submitted to the same or another grand jury." Under section 8095, if demurrer is sustained, such action is a bar to another unless the court directs that the case be resubmitted to the same, or another grand jury.

There is no room for the returning of a second indictment unless the court resubmit the same to the same or another grand jury. See *People* v. *Clement,* 5 N. Y. Cr. Rep. 288.

The court erred in sustaining objections to questions tending to elicit proof of the course of dealings between Lockwood and defendant, respecting the purchase and delivery of coal from cars on the track. *Robinson* v. *State,* 53 Md. 151, 36 Am. Rep. 399; *State* v. *Shores,* 31 W. Va. 491, 7 S. E. Rep. 413, 13 Am. St. Rep. 875; *Charles* v. *State,* 36 Fla. 691, 18 So. 369; *State* v. *Carpenter,* 1 Hous. Cr. Cases, 367; Abbott's Trial Brief, criminal cases, section 392, 608, 609, 610, 611; *State* v. *Waltz,* 52 Iowa 227, 2 N. W. Rep. 1102.

The defendant cannot be indicted or informed against under section 7406, Rev. Codes, subdivision 2, defining burglary in the third degree, and convicted under section 7411, for entering with intent to commit larceny. *State* v. *Johnson,* 3 N. D. 150, 54 N. W. Rep. 547; *State* v. *Marcks,* 3 N. D. 532, 58 N. W. Rep. 25; *State* v. *Maloney,* 7 N. D. 119, 72 N. W. Rep. 927; *State* v. *Young,* 9 N. D. 353, 82 N. W. Rep. 420; *State* v. *Belyea,* 9 N. D. 353, 83 N. W. Rep. 1.

There was error in the refusal of the court to give the instruction set forth in the opinion, and requested by defendant. The points embodied in the request were proper and were not covered in the general charge. *Walton* v. *State,* 29 Tex. App. 163, 15 S. W. Rep. 646; *Castanda* v. *State,* 11 Tex. App. 390; *State* v. *Yohe,* 53 N. W. Rep. 1088.

B. L. Shuman, State's Attorney, for Pierce county, for respondent.

The grand jury may withdraw an indictment from the files, for amendment without a re-examination. *State* v. *Hasledahl,* 3 N. D. 36, 53 N. W. Rep. 430. One indictment may be substituted for another, for the purpose of formal amendments, where rights of accused are not interfered with. *State* v. *Stebbins,* 78 Am. Dec. 223, 10 Am. & Eng. Enc. of Law, 538, 339, 340 (1st Ed.) Rev. Codes 8048.

Former indictment pending for same offense, no ground for abatement. *State* v. *Security Bank of Clark,* 2 S. D. 538, 51 N. W. Rep. 337. Statements made in one's own interest are self-serving and not a part of the *res gestae,* and are not admissible as evidence. 4 Am. & Eng. Enc. of Law (1st Ed.) 862; *Smith* v. *State,* 85 N. W. Rep. 49.

A party cannot state his own motives directly, for such testimony cannot be directly contradicted. Jones on Evidence, section 167, 351.

Where there is evidence on which instruction as to lower grades of offense can be based, court should give them. *State* v. *Young,* 99 Mo. 666; *Territory* v. *Romero,* 2 N. M. 474; *People* v. *Palmer,* 96 Mich. 580, 55 N. W. Rep. 994; *State* v. *Partlow,* 90 Mo. 608; Blashfield's Instruction to Juries, section 192. Defendant is not prejudiced by instructions as to lower grades, when he has not asked that they be confined to the crime charged. *State* v. *Keele,* 105 Mo. 38; Blashfield's Instructions to Juries, Sec. 192; *State* v. *Johnson,* 8 Iowa 525. Jury may find defendant guilty of an offense included in the one charged, Rev. Codes 8244; *People* v. *Odell,* 1 Dak. 197, 46 N. W. Rep. 601; *Brantly* v. *State,* 61 Pac. Rep. 139; *State* v. *Maloney,* 7 N. D. 119, 72 N. W. Rep. 92.

COCHRANE, J. Defendant was indicted for the crime of burglary in the third degree, under section 7406, Rev. Codes 1899. When arraigned, he moved to set aside the indictment, setting forth as

grounds therefor that (a) the grand jury which returned the indictment was not legally called, in that the district judge, in ordering the jury drawn, did not do so upon a finding that the same was necessary for the due enforcement of the laws of the state; (b) because at the time of the finding of the indictment another indictment against defendant, for the same offense, returned by the same grand jury, was outstanding and undisposed of. Error is assigned upon the order overuling this motion.

A grand jury can only be drawn and summoned in this state when directed by the district judge by an order in writing, signed by him, and filed with the clerk. That a judge deems the attendance of a grand jury necessary at a term of court is sufficiently evidenced by the order directing it to be called, without any recital of his finding. Subdivisions 2 and 3 of section 7989, Rev. Codes 1899, furnish a method of securing an order for the calling of a grand jury when the judge might not otherwise order one.

The second ground of defendant's motion to set aside the indictment proceeds upon the assumption that the grand jury exhausted its authority as to the burglary charge against defendant when the first indictment was returned into court, and that it could not return a second indictment until the first had been set aside by the court, either upon motion or on demurrer, and the case ordered resubmitted by the court. This objection to the indictment is not one of those specified in the statute which may be made by motion to set the indictment aside. Section 8082, Rev. Codes 1899, provides that an indictment must be set aside by the court in which the defendant is arraigned upon his motion: "(1) When it is not found, indorsed and presented or filed as prescribed by this Code. (2) When the names of the witnesses examined before the grand jury are not inserted at the end of the indictment or otherwise exhibited thereon. (3) When a person is permitted to be present during the session of the grand jury, while the charges embraced in the indictment are under consideration. (4) When the defendant had not been held to answer before the finding of the indictment, on any ground which would have been good ground for challenge, either to the panel or to any individual grand juror." The courts of several states where there are similar statutory provisions hold that the enumeration in the statute of the grounds upon which an indictment will be set aside excludes all others. *State* v. *Security Bank,* 2 S. D. 538, 51 N. W. 337; *People* v. *Southwell,* 46 Cal. 141;

People v. *Schmidt,* 64 Cal. 260, 30 Pac. 814; *State* v. *Whitney,* 7 Or. 386; *State* v. *Justus,* 8 Pac. 337, 50 Am. Rep. 470; *State* v. *Baughman* (Iowa) 82 N. W. 452; *People* v. *Petrea,* 92 N. Y. 128. The motion was properly overruled.

Error is assigned upon the fact that P. J. McClory was permitted to participate in the trial of the case as assistant to the state's attorney, over defendant's objection. The reason assigned in his objection by counsel for appellant was "that the cause, if any existed, for the appointment of Mr. McClory as special prosecutor in this case, has passed over; that the duly elected, qualified, and acting state's attorney of the county of Pierce is now able to take charge of his duties, and has been present in this courtroom, and assisted in the trial of the case up to this time." The statute (chapter 178, p. 234, Laws 1901) upon which counsel relies provides that the state's attorney, as public prosecutor, must attend the district court, and conduct, on behalf of the state, all prosecutions for public offenses. It declares the intent of the act to make the attorney general, his assistants, and the state's attorney the only public prosecutors in all cases, civil and criminal, wherein the state is a party, and that they only shall be authorized to perform the duties set forth in the act, except as in the act provided. When the state's attorney refuses or neglects to draw indictments and informations (or to perform other enumerated acts, of no materiality to the point under consideration), the judge of the district court may, by order entered on the minutes of the court, appoint a suitable attorney at law, who shall be thereupon vested with all the powers of the state's attorney for that action. The act also provides "that nothing therein shall prevent the county commissioners of any county, in cases of public importance, with the advice and consent of the state's attorney, employing such additional counsel as may be deemed advisable to assist the state's attorney." It does not appear how or in what manner Mr. McClory's services were secured. The language of counsel's objection would indicate that an order of court was made appointing Mr. McClory to take charge of the prosecution. It was presumptively made upon the statutory ground. If the order was made without legal authority, or if no order was in fact made, the error, if any, should be made affirmatively to appear. It will not be presumed. *State* v. *Campbell,* 7 N. D. 64, 72 N. W. 935; *State* v. *Maloney,* 7 N. D. 122, 72 N. W. 927; *State* v. *Haynes,* 7 N. D. 70, 72 N. W. 923. There is nothing to show that Mr. McClory

was not employed by the county commissioners upon the advice and consent of the state's attorney.

The indictment was drawn under section 7406, subd. 2, Rev. Codes 1899, and charged the defendant with the crime of burglary in the third degree, committed by breaking and entering in the nighttime a railroad car, in which property was kept, with intent to steal therein. The jury were instructed that: "The indictment, in addition to charging burglary in the third degree, also charges, as lesser offense, the offense of entering a railway car with intent to commit larceny; that is, with the intent to steal coal. Stealing of coal is larceny. In the crime last referred to you will notice that the element of breaking into the car is omitted, so that, if the jury has a reasonable doubt of the defendant's breaking into the car in question, the jury may consider the lesser crime, and say by its verdict whether he entered the car with intent to steal coal." The jury returned a verdict in the following language: "We, the jury, find the defendant guilty of the crime of entering a railroad car with intent to commit larceny, as charged in the indictment." Appellant excepted to these instructions, and now challenges the verdict as illegal, and not responsive to the indictment. Section 7411, Rev. Codes 1899, upon which this verdict is based, declares: "Every person who, under circumstances not amounting to any burglary, enters any building or part of any building, booth, tent, warehouse, railroad car, vessel or other structure or erection with intent to commit any felony, larceny or malicious mischief, is guilty of a misdemeanor." Section 8244, Id., permits the jury to find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment or information. The only element of burglary in the third degree defined in subdivision 2, section 7406, and charged in the indictment, which is wanting in the statutory misdemeanor of which defendant was found guilty, is the "breaking." Strike from the indictment the word "break" where it appears in the charging part of this accusation, and there remains a good charge of the misdemeanor defined in section 7411, Id. This is the test applied by the Court of Appeals of New York, from which the statutes under consideration were taken. *People* v. *Meegan,* 104 N. Y. 529, 11 N. E. 48. The charge of breaking and entering a railroad car with intent to steal of necessity includes the charge of entering the railroad car with intent to steal. *State* v. *Maxwell,* 42 Iowa 213. The

verdict returned operated as an acquittal of the burglary charged. *State* v. *Johnson,* 3 N. D. 151, 54 N. W. 547; *State* v. *Maloney,* 7 N. D. 126, 72 N. W. 927. But the indictment charges every element of the statutory misdemeanor without being duplicitous. *State* v. *Climie* (N. D.) 94 N. W. 574. It is sufficient to sustain the judgment, the same as though the indictment had in express terms charged the offense named in section 7411, Rev. Codes 1899, and nothing else. *State* v. *Johnson,* 3 N. D. 150, 54 N. W. 547; *People* v. *English,* 30 Cal. 218; *Mulloy* v. *State* (Neb.) 78 N. W. 525.

It is specified for error that the evidence is insufficient to sustain the verdict, in that there was no evidence of a burglarious intent on the part of defendant in entering the car. The verdict acquitted defendant of the burglary, thus giving him the benefit of this point. The intent found was an intent to steal.

Appellant assigns error upon the refusal of the court to give the following instruction, requested by him: "I charge you, gentlemen of the jury, that, in order to obtain at your hands a verdict of guilty, the state must establish by competent evidence to your satisfaction beyond a reasonable doubt every essential element of the crime of burglary. One of the essential elements of the crime of burglary, as charged in this indictment, is that, after breaking by force the car described in the indictment, under circumstances such as would constitute a burglarious breaking under the instructions already given you, the defendant entered into such car with intent to steal the coal therein contained. This intent to steal thus required to be established by the state to your satisfaction beyond a reasonable doubt on the part of the defendant at the time of breaking and entering the car must have been the intent on the part of the defendant to take, steal, and carry away the coal in said car contained, without the consent of the owner, and with the intent to deprive him thereof; such taking, stealing, and carrying away to be accomplished by fraud and stealth. If, therefore, the defendant's intent at the time of entering said car, or at the time of forcibly breaking the same, if you find he did so forcibly break the car under the instructions already given you, was not to steal the coal therein contained, but that such entry was made under the belief that he had a right to take the coal, or if you have a reasonable doubt that it was his intent to steal the coal, then your verdict must be not guilty." The substance of this request is not covered by the charge given.

It was applicable to the facts as testified to by the defendant, and its refusal was error.

The defense was centered upon the proposition that the defendant did not intend to steal the coal taken from the Great Northern car; that he went with one Marcus Coons to get the coal upon the representation made to him by Coons that one Kilpatrick had a car partly loaded with coal in the yard, out of which he (Coons) thought it would be all right to take coal; that he did not know the car entered contained coal of the railway company; and that he would not have entered the car had he known the coal therein belonged to the railway company. True, the evidence does not disclose that Coons gave him any reason why he thought himself entitled to take Kilpatrick's coal, but defendant was asked, when on the stand, the following question: "Q. Mr. Tough, whose car of coal did you suppose the car to be at the time you went into it?" This question was objected to by the state's attorney as incompetent, irrelevant, immaterial, and no foundation laid for the proof. The objection was sustained by the court, and defendant was not permitted to answer. He reserved an exception, and error is assigned upon the ruling. In view of the defense made, defendant was entitled to show that his motive was an innocent one in entering the car, and that he was under a mistake of fact in entering it. *State* v. *Waltz,* 52 Iowa 227, 2 N. W. 1102; *State* v. *Shores* (W. Va.) 7 S. E. 413, 13 Am. St. Rep. 875, 885; *Robinson* v. *State,* 36 Am. Rep. 399; Abbott's Crim. Briefs (2d Ed.) 671. Bishop thus states the rule of law for the application of which defendant contends: "The wrongful intent being the essence of every crime, it necessarily follows that whenever one is misled without fault, or carelessness concerning facts, and, while so misled, acts as he would be justified in doing were they what he believes them to be, he is legally innocent, the same as he is innocent morally." 1 Bish. Crim. Law, section 303. The Supreme Court of Florida say: "That the law deals only with the intention, and that a man is not to be punished when he has no guilty intention and acts in good faith, and with an honest belief, although he may not have acted as a reasonable and prudent man in having such faith and belief." *Charles* v. *State* (Fla.) 18 South. 369. Whether or not defendant was careless or without fault in acting on Coons' suggestions, and the questions whether he in fact acted on what Coons told him, or whether Coons in fact told him what he claims, were questions for the jury to decide upon proper in-

structions. The state, under the charge contained in the indictment, imposed on itself the duty of establishing every element of the offense therein set forth. Defendant was accused of breaking and entering the railway car described, in which property, towit, coal, was kept, which coal was the property of the Great Northern Railway Company, with the intent in him, the said William B. Tough, to steal therefrom the said coal. The intention to steal coal was a substantive part of the offense to be proven, and the word "steal" has a legal signification. To steal is to commit larceny. Larceny is defined as "the taking of personal property, accomplished by fraud or stealth, and with intent to deprive another thereof." Section 7445, Rev. Codes 1899. Defendant was entitled to have this definition of the word "steal" given in charge to the jury, so that they could apply the evidence to the charge with a full understanding of its meaning, and say whether defendant, in entering the car and taking the coal, did intend by fraud and stealth to take the property of the Great Northern Railway Company, and deprive it thereof, or to take the coal of Kilpatrick, which Coons had license to take. In *Walton* v. *State,* 29 Tex. App. 163, 15 S. W. 646, the defendant was charged with burglary with intent to commit rape. The court there said: "The gist of the offense charged was the intent to commit rape. Rape was the substantive crime which he was charged with intending. To warrant his conviction, the jury should have been fully informed as to what would be essential to constitute this substantive crime of rape, for without such knowledge it would be impossible for them to say that he intended that particular thing. In other words, they should be informed that he must have been guilty of intending all that would have been essential to constitute rape had he succeeded in carrying out his intention." In *State* v. *Yohe,* 87 Iowa 33, 53 N. W. 1088, the defendant was charged with burglary with intent to commit larceny. It was there held that it was the duty of the trial court to define larceny to the jury. The court said: "That was both proper and necessary. The jury could not have determined whether the breaking and entering, if proven, were done with the intent to commit the offense of larceny, without knowing what was required to constitute that offense." See, also, *Stinnett* v. *State* (Tex. Cr. App.) 24 S. W. 908; *Castenada* v. *State,* 11 Tex. App. 390. The jury were instructed in this case that "burglary, as charged in this indictment, was committed if the defendant, Tough, broke and entered the railway car referred

to in the indictment in which the coal was kept, with the intent to steal such coal"; and "as to intent I charge you that the word 'intent,' as used in the indictment and in these instructions, simply means 'purpose,' and the intent of the defendant in breaking and entering into the car is to be gathered from a careful consideration of the evidence, and all the facts and circumstances of the case." This instruction did not convey to the jury the impression that the intent to steal necessarily involved an unlawful taking against the will of the owner, and without claim of right on the part of the taker. As said by the Missouri court, "The instruction given lacked completeness, and was therefore faulty." *State* v. *Moore*, 101 Mo. 328, 14 S. W. 182. The requested instruction would have made good the deficiencies in the instructions given by the court. The defendant was entitled, when the court undertook to define the elements of the offense which it was necessary for the state to prove, to have them fully stated without omission. *State* v. *Green* (Mont.) 39 Pac. 322; *Barnes* v. *State*, 40 Neb. 545, 59 N. W. 125; *Hix* v. *People*, 157 Ill. 382, 41 N. E. 862; 11 Enc. Pl. & Pr. 206. And he was also entitled to have this request given because it was applicable to his theory of defense and his testimony in the case. *State* v. *Partlow*, 90 Mo. 608, 626, 4 S. W. 14, 59 Am. Rep. 31; *Trask* v. *People*, 104 Ill. 569.

For the error in refusing this request, the judgment of conviction should be, and the same is, reversed, and a new trial ordered. All concur.

(96 N. W. Rep. 1025.)

WILLIS H. GRISWOLD, ALBERT DERBY AND GEORGE F. BALL, SUING FOR HIMSELF AND AS TRUSTEE FOR ELIZABETH M. BALL, GEORGE F. BALL, MARGARETE RYDER AND WINNIFRED E. NARAMORE, v. MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY COMPANY, A CORPORATION.

Opinion filed November 4, 1903.

Tenant in Common May Assert Possession in Ejectment Against All But Cotenants.

1. A tenant in common of real estate is entitled to the possession thereof as against all the world save his cotenants, and may maintain an action in the nature of ejectment to recover the possession of the entire tract as against strangers to the title.

Reversion of Title on Breach of Condition Subsequent—Public Policy—Estoppel.

2. The owner of land conveyed the same to a railroad corporation for a right of way upon the express condition contained in the deed that, if the grantee failed to erect and maintain a depot at a point named in the deed, the land should revert to the original owner. The depot was erected but was subsequently abandoned. It is *held* in an action to recover possession: (1) That the above provision constituted a condition subsequent and not a covenant; (2) that the condition, not being restrictive as to the erection and maintenance of depots at other points, is not void as against public policy; (3) that upon the failure of the grantee to maintain the depot the title and right of possession reverted; (4) that on the facts of this case the plaintiffs are not estopped from asserting their right of possession by an action in the nature of ejectment either as against the defendant or the public.

Court of Equity May Stay Execution of Judgment.

3. Where the execution of a judgment of ejectment against a railroad corporation will operate harshly, and seriously affect public interests, a court of equity has power in its discretion to suspend its execution for a period of time sufficient to enable it to prosecute condemnation proceedings. The action of the district court in staying execution of judgment in this case for a period of six months for that purpose is approved.

Appeal from District Court, Richland county; *W. S. Lauder,* J.

Action by Willis H. Griswold and others against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Purcell & Bradley, for appellant.

The condition contained in the conveyance of the right of way to the defendant, was a condition subsequent, and the land owner cannot eject the corporation for a breach of a condition subsequent. Wood on Railway Law, 604; *Hornback* v. *Cincinnati, etc., R. R. Co.,* 20 Oh. St. 81; *Dunn* v. *Railway Co.,* 24 Mo. 493; *Goodin* v. *Canal Co.,* 18 Oh. St. 169; *Roberts* v. *N. P. R. R. Co.,* 158 U. S. 1, 15 Sup. Ct. Rep. 756; *Atlanta, etc., R. R. Co.* v. *Barker,* 31 S. E. Rep. 452; *Indiana, etc., R. R. Co.* v. *Allen,* 53 N. E. Rep. 456.

Failure to bring action, until after public interests have intervened, will prevent its successful prosecution. In such case the plaintiff may recover compensation, but not possession. *Railroad*

Co. v. *Johnston,* 59 Pa. St. 290; *Smart* v. *Railroad Co.,* 20 N. H. 233; *Harrington* v. *Railroad Co.,* 17 Minn. 215; *Harlow* v. *Marquette H. & O. R. Co.,* 2 N. W. Rep. 204; *Maxwell* v. *Bay City Bridge Co.,* 2 N. W. Rep. 639.

Unless acquiescence is prolonged until the statute of limitations has run, an action for damages will lie. *Railway Co.* v. *Butler,* 46 Am. Rep. 580; *Blair et al.* v. *Kiger et al.,* 12 N. E. Rep. 293; *Rusck* v. *Milwaukee L. S. & W. R.,* 11 N. W. Rep. 253; *Evans* v. *R. R. Co.,* 64 Mo. 453; *N. P. R. R. Co.* v. *Smith,* 171 U. S. 260, 18 Sup. Ct. Rep. 794.

Chas. E. Wolfe, for respondents.

The defendant acquired its right to the land in dispute by contract; the termination of the contract leaves it a trespasser. But it can still exercise the right of eminent domain. *Jackson, etc., Ry. Co.* v. *Adams,* 9 So. Rep. 2, 14 L. R. A. 533.

The plaintiffs—who are with others co-owners—may maintain ejectment against all the world except their co-owners, and recover the whole estate. *Mather* v. *Dunn,* 76 N. W. Rep. 922, and cases cited; *Brady* v. *Krueger,* 66 N. W. Rep. 1083.

A full and complete equitable title will sustain an action in ejectment against a wrong doer not connected with the legal title. *Merrill* v. *Dearing,* 47 Minn. 137, 49 N. W. Rep. 693; *Hancock* v. *McAvoy,* 151 Pa. 460, 18 L. R. A. 781.

The question of misjoiner is waived by not being raised by answer below. Rev. Codes 1899, 5272; *Mather* v. *Dunn, supra; Sykes* v. *First Nat. Bank,* 49 N. W. Rep. 1058.

Under the constitution and statutes of this state, an action in ejectment will lie by a land owner to recover possession of land from a railroad company, the same as from an individual, and such action is the proper remedy. *Ritchie* v. *Kansas, N. & D. Co.,* 39 Pac. 718; *Lewis* v. *St. Paul, M. & M. Ry. Co.,* 58 N. W. Rep. 580 (S. D.); *Sherman* v. *Milw. Lake Shore & W R. R. Co.,* 40 Wis. 645; *Hull* v. *C. B. & Q. R. Co.,* 32 N. W. Rep. 162; *Blaisdel* v. *Winthrop,* 118 Mass. 138; *Railroad Co.* v. *Smith,* 78 Ill. 96; *Railroad Co.* v. *Pres't Knox College,* 34 Ill. 195; *Coburn* v. *Pacific Lumber & Mill Co.,* 46 Cal. 32; *Cloes* v. *B. C. R. & N. Co.,* 64 Ia. 149; *White* v. *Railway Co.,* 64 Iowa 281; *Cox* v. *Louisville R. R. Co.,* 48 Ind. 178; *Jacksonville, etc., Ry. Co.* v. *Adams,* 14 L. R. A. 533; *Pittsburg & S. R. R. Co.* v. *Jones,* 59 Pa.

433; *Pittsburg & L. E. R. Co.* v. *Bruce,* 102 Pa. 23; *Bartleson* v. *Minneapolis,* 33 Minn. 468, 23 N. W. Rep. 839; *Harrington* v. *St. P. & S. C. Ry. Co.,* 17 Minn. 215; *Lohman* v. *St. P., etc., Ry. Co.,* 18 Minn. 174.

Any other remedy but ejectment would be inadequate. *Thomas* v. *Hunt,* 32 L. R. A. 857; *Lyman* v. *Suburban Ry. Co.,* 60 N. E. Rep. 515, 52 L. R. A. 645.

It is proper practice to render judgment as herein entered, and stay execution or proceeding for a reasonable time, to enable the defendant by appropriate proceedings to condemn the land. *Jacksonville, etc., Ry. Co.* v. *Adams,* 14 L. R. A. 533.

YOUNG, C. J. This action was instituted in the district court of Richland county for the purpose of ejecting the defendant railway company from a strip of land used by it for a right of way. The defendant is, and has been since February 12, 1892, a railroad corporation, operating a line of railroad from Sault Ste. Marie, Mich., to Portal, N. D., and over the lands involved in this action, and is a common carrier of freight and passengers, and of the United States mail, and is engaged in interstate commerce. On February 12, 1892, the land in question was conveyed to the defendant by warranty deed containing the usual covenants of warranty. The conveyance was upon a condition subsequent, the condition being contained in the following clause: "Providing a depot and station is erected and maintained on section 21, above described, continuously; otherwise this land shall revert to original owner." Subsequent to the execution and delivery of the deed a depot was constructed, but the same was removed from the land on April 26, 1900. The case was tried to a jury. At the trial the defendant objected to the introduction of any evidence under the complaint "on the ground that such complaint does not state facts sufficient to constitute a cause of action, for the reason that it appears affirmatively from the allegations contained in the complaint that the defendant, the Soo Railway Company, was placed in possession of the premises in controversy by the plaintiff under a warranty deed containing a condition subsequent, and that a possessory action which seeks to deprive the defendant of the possession of its road after it is constructed and operating trains cannot be maintained." This objection was overruled, and exception taken. A motion for a directed verdict upon the same grounds was also overruled, and exception taken. Upon the plaintiff's motion, the court directed a

verdict for the plaintiff for the relief demanded in the complaint, towit, possession of the land in question. Thereafter judgment was entered in favor of the plaintiff for the immediate and exclusive possession of the real estate in question and for costs. The judgment further ordered that execution thereon by stayed for a period of six months from the date of the entry of the judgment to enable the defendant to condemn said land and acquire an easement thereon and thereover under the laws of the state of North Dakota. Defendant has caused a statement of the case to be settled embodying specifications of numerous alleged errors in the admission and rejection of evidence, and upon the court's refusal to direct a verdict for the defendant and to the direction of a verdict in favor of the plaintiff. The appeal is from the judgment.

Two reasons, and two reasons only, are urged in this court by the defendant as grounds for reversing the judgment. The first is that the evidence does not show title in the plaintiffs to the premises in controversy, either legal or equitable, such as will entitle them to maintain an action of ejectment even in case ejectment will lie. The second is that the remedy by ejectment cannot be granted on the facts existing in this case. Neither contention can be sustained. As to the first contention, it may be said that the plaintiffs claim perfect, legal, and equitable title. Whether this be the fact or not, we need not determine. The evidence shows conclusively that the plaintiffs in any event have an undivided interest in the real estate in controversy, and, if not the sole and absolute owners of the entire tract, are tenants in common. It is therefore unnecessary and improper to determine the extent of their interest, for the law is well settled that a tenant in common of real estate is entitled to the possession of the same as against all the world save his cotenants, and may maintain ejectment and recover possession of the entire tract as against strangers to the title. *Sherin* v. *Larson,* 28 Minn. 523, 11 N. W. 70; *Collier* v. *Corbett,* 15 Cal. 183; *Hart* v. *Robertson,* 21 Cal. 346; *Mahoney* v. *Van Winkle,* 21 Cal. 553; *Treat* v. *Reilly,* 35 Cal. 129; *Phillips* v. *Medbury,* 7 Conn. 568; *Robinson* v. *Roberts,* 31 Conn. 145; *Weese* v. *Barker,* 7 Colo. 178, 2 Pac. 919; *Wheeling P. & B. R. Co.* v. *Warrell,* 122 Pa. 613, 16 Pac. 20; *Mather* v. *Dunn,* 11 S. D. 196, 76 N. W. 922, 74 Am. St. Rep. 788; *Allen* v. *Higgins,* 9 Wash. 446, 37 Pac. 671, 43 Am. St. Rep. 847.

The remaining question is whether the plaintiffs may resort to the possessory action formerly afforded by the action of ejectment

to vindicate their rights. The appellant contends that they may not, but must invoke other remedies. Before taking up the consideration of this question, it is proper to state that both parties to this controversy agree that the clause in the deed above quoted constituted a condition subsequent, and that upon the failure of the defendant to maintain the depot the title to the land conveyed by said deed and involved in this action reverted. Neither is there any claim made that the plaintiffs did not promptly assert their alleged right of possession upon the failure of the defendant to maintain the depot, or that after the forfeiture they consented or acquiesced in any way in defendant's possession of the premises. Neither is it claimed that the plaintiffs have omitted to take any steps necessary to terminate the estate granted by the deed, or to authorize them to maintain this action, if it may be maintained. The condition upon which the grant was made, viz., that the title to the land should revert to the original owners if the defendant failed to maintain a depot at the point in question, did not restrict the maintenance of depots at other points, and was a lawful condition. *Lyman* v. *Suburban Ry. Co.*, 190 Ill. 320, 60 N. E. 515, 52 L. R. A. 645; *Gray* v. *C. M. & St. P. Ry. Co.*, 189 Ill. 400, 59 N. E. 950; *Cleveland, C., C. & I. Ry. Co.* v. *Coburn*, 91 Ind. 557; *Louisville, New Albany, etc., Ry. Co.* v. *Sumner*, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719. Defendant does not contend otherwise. The sole contention of the appellant is that this action cannot be maintained. In support of this contention it is urged that the plaintiffs, by their acts, are estopped from maintaining an action for the possession; and, further, that public interests or public policy forbids its maintenance. As applied to the facts as they exist in this case, we cannot agree to this contention. It is true that many cases may be found which sustain the doctrine that a landowner who consents and acquiesces in the entry upon his land by a railroad corporation and in the expenditure of large sums of money thereon by the corporation under a justifiable belief that the owner will not assert his right of possession cannot maintain ejectment. The following cases may be cited as sustaining this view: *Mo. Pac. Ry. Co.* v. *Gano*, 47 Kan. 457, 28 Pac. 155; *McLellan* v. *The St. Louis & H. Ry. Co.*, 103 Mo. 295, 15 S. W. 546; *South & North Ala. Ry. Co.* v. *Ala. Great Southern*, 102 Ala. 236, 14 South. 747; *Avery* v. *Kansas City & S. Ry. Co.*, 113 Mo. 561, 21 S. W. 90; *Louisville N. A. & C. Ry. Co.* v *Soltweddle* (Ind.) 19 N. E. 111,

9 Am. St. Rep. 852. On the other hand, other cases hold that the landowner may stand upon his strict legal rights, and maintain the action. *Allegheny Valley R. Co.* v. *Colwell* (Pa.) 15 Atl. 927; *Smith* v. *Chicago A. & St. L. R. Co.*, 67 Ill. 191; *Chi. & Alton R. Co.* v. *Smith*, 78 Ill. 96; *Hibbs* v. *C. & S. W. Ry. Co.*, 39 Iowa 340; *Conger* v. *B. & S. W. R. Co.*, 41 Iowa 419. Without expressing an opinion upon the doctrine of these cases, it is sufficient for the purposes of this case to state that there are no facts present in this case upon which an estoppel can be based. There is good reason for denying a landowner the right to retake possession of land when he has by his acts or contract induced the belief that he would not do so, and the railroad company has acted upon that belief to its detriment as well as to the detriment of the public, if the owner were permitted to assert his possessory right. That, however, is not this case. In this case the defendant entered into possession under an express agreement that the estate which it acquired should be forfeited if it failed to comply with the condition of the grant, namely, the maintenance of the depot. It assented to the consequences of the default by expressly agreeing that, if the depot should not be erected and maintained continuously, "this land shall revert to original owner." It was within the power of the defendant to avoid the forfeiture of its title, but it elected not to do so, and thus voluntarily subjected itself to a forfeiture of the estate, as it was authorized to do under express terms of the grant. The owners of the land have not misled the defendant in any respect, or caused it to alter its position by inducement, promise, or acquiescence. They are simply asserting the rights which were given under the express terms of the grant.

Neither can we sustain the contention that public policy requires that plaintiffs should be denied the remedy afforded by this action. As already stated, it is conceded that the title to the land in controversy reverted to the original owners. The plaintiffs are therefore entitled to all rights of owners, including the right of possession. They have not parted with the right of possession by deed or contract, or forfeited their right to assert it by consent, acquiescence, or otherwise. The defendant's title and right of possession were voluntarily forfeited by it when it declined to further perform the condition which gave it such title and right of possession. Does public policy require that the plaintiffs shall be remediless? That they shall be stripped of the power to vindicate their rights of property when

they were without fault? The appellant answers that they have other adequate remedies, and that they must resort to them, and not invoke a remedy to recover possession, which may interfere with public interests. Cases are numerous in which the doctrine which is invoked has been applied. They will be found to be cases in which the grantee covenanted and bound himself to perform the conditions; that is, in each case there is both a condition and a covenant (or an absence of an express provision that the title should revert). In these cases the grantor had alternative remedies. He could compel the specific performance of the covenant, or maintain his action for its breach, or forfeit the estate and recover the premises. To avoid a forfeiture of the estate, which is always odious in the eyes of the law, and in some cases from consideration for public interests, courts have compelled grantors to rely either upon their action for specific performance or for damages. The doctrine of these cases, however, has no application to the facts of this case. This deed contains no covenant, but merely a condition. The defendant did not covenant or agree to maintain the depot, and in no way bound itself to do so. It merely accepted the grant of the land in question upon the condition that, if it did not maintain the depot, the land should revert to the original owners. It might elect to maintain the depot and retain the land, but it was not bound to do so. The only liability which it incurred for failure to observe the condition was that the land should revert. It is entirely clear, therefore, that the plaintiffs cannot maintain an action to compel the defendant to maintain the depot, for there is no agreement upon which to base such an action. Neither can it maintain an action for damages for its failure to maintain the depot, for the same reason. Its only remedy is that which it now seeks. On this point see the following cases: *Jackson* v. *Florence,* 16 Johns. (N. Y.) 47; *Palmer* v. *Plank Road Co.,* 11 N. Y. 387; *Livingston* v. *Stickles,* 8 Paige (N. Y.) 398; *Blanchard* v. *Railroad Co.,* 31 Mich. 43, 18 Am. Rep. 142; *Close et al.* v. *B. C. R. & N. Ry. Co.,* 64 Iowa 149, 19 N. W. 886; *Clark* v. *Inhabitants, etc.,* 81 Mo. 503, 51 Am. Rep. 243. In *Palmer* v. *Plank Road Co., supra,* the court said: "It is clear that there may be a condition without a covenant, and that, where the language imports a condition merely, and there are no words importing an agreement, it cannot be enforced as a covenant, but the only remedy is through a forfeiture of the estate. * * * It by no means follows, because a grantee consents to take an estate, sub-

ject to a certain condition, that he also consents to obligate himself personally for the performance of the condition. Many cases might be imagined in which one would be willing to risk the forfeiture of the estate, while he would be altogether unwilling to incur the hazard of a personal responsibility in addition." The right to maintain an action for trespass affords a remedy only for the interference with the plaintiffs' possession, and is not a substitute for the remedy to recover the possession itself. In short, the present action is the only one to which the plaintiffs can resort to vindicate their property rights. In this state a landowner may be compelled to submit to a loss of his land through condemnation proceedings under the power of eminent domain. The right to exercise that power was open to the defendant. It not only has declined to exercise it, but it insists upon using plaintiffs' lands without legal right, and also demands that plaintiffs be denied the only remedy they have to vindicate their property rights; and this upon the ground that public policy demands that it be afforded this protection. The plaintiffs' property rights are protected both by the Constitution and by the statute. In the absence of a transfer by deed or contract, or its loss by consent or acquiescence, the title and right of possession of the land can be obtained by defendant only by an exercise of the power of eminent domain. A similar question was before us in the case of *Donovan* v. *Allert*, 11 N. D. 289, 91 N. W. 441, 58 L. R. A. 775, which was an action to enjoin a telephone company from maintaining its poles upon a street abutting plaintiff's property. It was urged in that case that the plaintiff had an adequate remedy in an action to recover damages, and that the remedy afforded by injunction for protecting his property rights would seriously interfere with public interests, and should not, therefore, be accorded. Both contentions were overruled, and for reasons which are controlling in this case. The court said: "The defendants are proceeding to damage the plaintiff's property without first complying with a mandatory provision of the Constitution. That provision of the Constitution is peremptory that property taken or damaged for public use shall first be paid for, and the legislature has also enacted that payment must precede the taking or damage, and has provided adequate means for establishing the amount of such damages. The taking or damaging of private property for public use without the owner's consent is deemed so serious that payment therefor is a prerequisite to attempting to do so. The defendants

have the ultimate right, under their franchise, to use the street for telephone purposes; but payment of damages, actual or consequential, to plaintiff's property, must be first attended to. This does not mean that it may first be appropriated, and paid for at the end of a suit for damages, but means that payment must precede the taking or damaging"—citing *McElroy* v. *Kansas City* (C. C.) 21 Fed. 261; *Searle* v. *City of Lead* (S. D.) 73 N. W. 913, and numerous other cases. We held in that case that the occupancy of the plaintiff's property was a violation of rights which were protected both by the Constitution and by statute, for the prevention of which a preliminary injunction should have been granted. We know of no doctrine of public policy which authorizes the courts to deprive an individual who is without fault of the possession of his real estate by withholding remedies adapted to vindicate his right of possession. The cases are numerous wherein the remedy by ejectment has been invoked and sustained on facts substantially like those which exist in this case. The *Indianapolis P. & C. Ry. Co.* v. *Hood et al.*, 66 Ind. 580; *Horner* v. *C. M. & St. P. Ry. Co.*, 38 Wis. 165; *Avery* v. *Kansas City & S. Ry.*, 113 Mo. 561, 21 S. W. 90. See, also, *Cowell* v. *Colorado Springs Co.*, 100 U. S. 55, 25 L. Ed. 547; *Ritchie* v. *Kansas, N. & D. Co.*, 55 Kan. 36 39 Pac. 718.

It is not an uncommon practice, in view of the hardship attending the ejectment of a railroad company from its right of way, for a court of equity to enjoin the proceedings to oust it from land upon which it has in good faith constructed its road until it shall have an opportunity to acquire title by condemnation proceedings. *Allegheny Valley R. Co.* v. *Colwell* (Pa.) 15 Atl. 927; *Pittsburgh & Lake Erie Ry.* v. *Bruce*, 102 Pa. 23; *Harrington* v. *St. Paul, etc., Co.*, 17 Minn. 215 (Gil. 188); *South & N. Ala. R. Co.* v. *Alabama, etc., Co.*, 102 Ala. 236, 14 South. 747; *New York, etc., Co.* v. *Stanley's Heirs*, 35 N. Y. Eq. 283; *Justice* v. *Nesquehoning Valley Railroad Co.*, 87 Pa. 28; 3 Elliott on Railroads, section 944. In this case that power was exercised by the court in staying the execution of the judgment for a period of six months for the purpose of enabling the defendant to prosecute its condemnation proceedings. This course was proper, in our opinion.

Finding no error in the record, the judgment will be affirmed. All concur.

(97 N. W. Rep. 538.)

WILLIAM H. BROWN *v.* THEODORE SKOTLAND, ADMINISTRATOR OF THE ESTATE OF THOMAS HALVERSON, DECEASED, A. B. GUPTILL AS RECEIVER OF MORTGAGE BANK & INVESTMENT CO., A CORPORATION, F. H. WELHASEN, GEORGE M. KENYON AND GEORGE STANBERRY.

Opinion filed November 18, 1903.

Usury.

1. A finding by the trial court that a certain assumed agreement for a loan was usurious, examined, and found correct.

Power, Not Coupled With an Interest, Terminates by Death of Its Author.

2. One H made written application for a loan from M, and in such application appointed M's agent his attorney in fact to execute a note and mortgage in case H failed to do so. Thereafter H died, before the loan was advanced or the application accepted by M. *Held*, that such power of attorney was terminated by the death of H, it not being a power coupled with an interest.

Costs, Proper Exercise of Discretion.

3. The trial court ordered judgment in favor of the defendant for costs. *Held*, that the awarding of costs was discretionary, and that such discretion was properly exercised.

Cancellation of Note and Mortgage.

4. Judgment was ordered canceling the note and mortgage which were executed by M's agent, assuming to act under such power of attorney. *Held*, not error.

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

Action by William H. Brown against Theodore Skotland and others to foreclose a certain mortgage upon real property. From a judgment in favor of defendant Skotland, plaintiff appeals.

Affirmed.

M. H. Brennan and Burke & Middaugh, for appellant.

The power of attorney was a power coupled with an interest. It was for the benefit of the Mortgage Bank & Investment Company; and being for the benefit of another than the author it was coupled with an interest, and survived its author. Rev. Codes 1899, section 3403.

The application and agreement are to be construed together. They authorized the expenditure to clear title, and the subsequent power

was given for the benefit of the Mortgage Bank & Investment Company, to which it was made, and for whose benefit it was executed. *Grandin* v. *Emmons,* 10 N. D. 223, 86 N. W. Rep. 723, 54 L. R. A. 610, 88 Am. St. Rep. 684; *Relly* v. *Phillips,* 57 N. W. Rep. 780 (S. D.); *Knapp* v. *Alford,* 40 Am. Dec. 241, 10 Paige 205.

When a power is a part of contract and is security for money, it is irrevocable. *Hunt* v. *Rousmanier's Admrs.,* 21 U. S. 174, 5 L. Ed. 589. Such power cannot be revoked by the author without satisfaction of the contract. *Stewart* v. *Hilton,* 7 Fed. 562, 19 Blatchford 290; *Marzin* v. *Pioche,* 8 Cal. 522; *Barr* v. *Schroeder,* 32 Cal. 609; *Norton* v. *Whitehead,* 24 Pac. 154. That the holder of the power is other than the beneficiary does not affect the matter; power is still irrevocable. *American Loan & Trust Co.* v. *Billings,* 59 N. W. Rep. 998; *Blackstone* v. *Buttermore,* 53 Pa. 266; *Merry* v. *Lynch,* 68 Me. 94; *Morgan* v. *Gibson,* 42 Mo. App. 234; *Hennessee* v. *Johnston,* 36 S. W. Rep. 774.

If mortgage is declared invalid, plaintiff is entitled to $230 paid on proof and $175 paid to administrator.

Albert Besancon and *B. G. Skulason,* for respondent, Skotland.

The mortgage and note were usurious. Out of an ostensible loan of $632.50, the borrower gets $175 only. The expenditure of $230 to perfect title is merely a cover, as the expenditures for that object—final proof—are merely nominal. Under any view, the borrower was to get but $405, and no more. It is practically conceded by appellant; and argument and authority are not needed.

Mears was not the attorney in fact of the deceased and had no authority to execute the mortgage and note; and the estate is not bound thereby. The power was not coupled with an interest and expired with the death of Halverson. Neither the Mortgage Bank & Investment Company nor Mears had any interest in the land to be mortgaged. The company's interest, if any, was only in the proceeds of the loan, to be made through the execution of the power itself. The author of the power owed neither the company nor Mears, so it was not in the nature of a security. The existence or nonexistence of an interest in the thing itself on which the power is to operate, is the universally accepted test; in this case, Halverson's land, on which the mortgage was given. 1 Am. & Eng. Enc. of Law 1217; Bishop on Cont. 1051; Clark on Cont. 749, 751;

Bonney v. *Smith,* 17 Ill. 531; *Mansfield* v. *Mansfield,* 16 Am. Dec. 76; *Alworth* v. *Seymour,* 44 N. W. Rep. 1030; *Barr* v. *Schroeder,* 32 Cal. 609; *Chambers* v. *Seay,* 73 Ala. 372; 1 Parsons on Cont. (8th Ed.) 71, note y; *Oregon, etc., Bank* v. *Am. Mortgage Co.,* 35 Fed. 22; *State of Missouri ex rel. Walker* v. *Walker,* 125 U. S. 339, 31 L. Ed. 769; *Johnson, etc., Co.* v. *Union, etc., Co.,* 59 Fed. 20; *Hartley and Minor's Appeal,* 91 Am. Dec. 207; *Darrow* v. *St. George,* 9 Pac. 791; *Wainright* v. *Massenburg,* 39 S. E. Rep. 725; *Cassiday* v. *McKenzie,* 39 Am. Dec. 76 and note; *Farmers Loan & Trust Co.* v. *Wilson,* 34 N. E. Rep. 784; *Smith* v. *Dare,* 42 Atl. Rep. 909.

The interest in the thing itself must be such that the agent can deal with it in his own name, and, in the event of the principal's death, exercise the authority in his own name. 1 Am. & Eng. Enc. of Law, *supra.*

The power to lend money on commission is not coupled with an interest. *Oregon, etc., Bank* v. *Am. Mortgage Co., supra.*

A power of attorney to sell and convey lands is revoked by the principal's death, although in terms irrevocable. *Harpers* v. *Little,* 11 Am. Dec. 25; *McClasky* v. *Barr,* 56 Fed. 712; *Funk* v. *Roe,* 7 Pac. 481; *Hanrick* v. *Patrick,* 119 U. S. 156, 7 Sup. Ct. Rep. 147, 30 L. Ed. 396.

Respondent Skotland is entitled to costs. Costs are discretionary with the court. Rev. Codes, section 5580; 5 Enc. Pl. & Pr. 184-189.

FISK, District Judge. This is an action commenced for the purpose of foreclosing a certain mortgage upon real property, which mortgage was dated the 22d day of May, 1889, and given for the purpose of securing a note dated on said day for the sum of $632.50. The facts as found by the trial court must be accepted as true, as no statement of the case was settled, and we are therefore called upon only to determine whether or not the conclusions of law made by the trial court are warranted by the facts as found. The facts, briefly stated, are as follows: On December 24, 1888, one Thomas Halverson made a written application, through one E. Ashley Mears, to the Mortgage Bank & Investment Company, for a loan of $550, to be secured by a mortgage upon the real property described in the complaint; such loan to bear interest at the rate of 9 per cent per annum. Such application contained a stipulation that the sum of $230 should be paid for the necessary papers to complete title

to the lands described in the complaint, and the sum of $175 to be paid to the said Halverson. That by such application Halverson agreed that, in case the application should be accepted, he would execute his promissory note for the sum of $550, bearing interest at the rate of 9 per cent per annum, and also execute a mortgage securing the same upon the land in question. Such application also contains the following stipulation: "In the event of my failure to execute the same I hereby appoint E. Ashley Mears my attorney in fact, irrevocably, to make, execute, deliver and record them, hereby agreeing to ratify and confirm all my said attorney may do in the matter." During the month of March, 1889, Thomas Halverson died, and thereafter the defendant Skotland was appointed administrator of his estate, and duly qualified as such. Thereafter, and on May 22, 1889, the said Mears, assuming to exercise the authority given by Halverson in such application for loan, executed to said corporation, in the name of said Halverson, a promissory note for the sum of $632.50, bearing interest at the rate of 6 per cent per annum, evidence by certain coupon notes, and also executed to said corporation, in the name of said Halverson, a mortgage upon the land described in the complaint, to secure said note; said mortgage containing the usual covenants, and also a stipulation for $200 attorney's fee in case of foreclosure. That after the death of said Halverson the Mortgage Bank & Investment Company paid $230 for the purpose of completing title to the premises, and paid to the defendant Skotland, as administrator, the sum of $175; these sums being the only consideration for the said note and mortgage. That the note and mortgage were, for value, transferred to the plaintiff, William H. Brown, prior to the commencement of the action. From these facts the trial court found as conclusions of law, (1) that the assumed agreement evidenced by the note and mortgage was usurious; (2) that E. Ashley Mears, at the time of the execution of the note and mortgage, was not the attorney in fact of said Halverson, and had no authority to execute said note and mortgage, and that the estate of said Halverson is in no way bound by the stipulation in said note and mortgage, and that, as against such administrator, the note and mortgage are void, except as to the sum of $175; (3) that defendant is entitled to his costs and disbursements of this action; (4) that he is entitled to have said note and mortgage delivered up and canceled upon the payment of the sum of $175; and (5) that the defendant A. B. Guptill,

as receiver of said Mortgage Bank & Investment Company, and certain other defendants mentioned, have no estate, lien, or interest in the premises described in the complaint. The appellant urges that the trial court erred, first, in holding said note usurious; second, in holding that said Mears was not the attorney in fact of Thomas Halverson, deceased, and had no authority to execute the note and mortgage; third, in holding that the defendant was entitled to costs; fourth, in holding that defendant is entitled to have the note and mortgage delivered up and canceled; and, fifth, in ordering judgment against plaintiff for such cancellation and for costs.

The first assignment of error is wholly without merit. Under the agreement for the loan, Halverson was to receive only the sum of $175, and the sum of only $230 was to be advanced for the purpose of perfecting title to the property. Therefore the utmost that can be claimed is that Halverson was to receive through said loan, the sum of $405 only, and was to execute his note for $550, and the note which was actually executed by Mears was for $632.50, which latter sum, we presume, was arrived at by computing interest in advance on the sum of $550. There was therefore a bonus of at least $145 agreed upon. It is therefore apparent that the finding of the trial court that the transaction was usurious was correct.

The second assignment of error is equally untenable. The power of attorney included in the application for loan, which authorized Mears to execute the note and mortgage, was revoked by the death of Halverson. It was not a power coupled with an interest. Therefore, under the rule universally established, such power ceased at the death of the author thereof. Prior to the date of Halverson's death nothing had been done under the application by the investment company. The application for the loan is not set out at length in the record, but, from what appears in the findings, it did not constitute a contract at all, but was a mere proposition on the part of Halverson to make the loan; and, until the same was accepted by the Mortgage Bank & Investment Company, Halverson was at liberty to revoke the same, and, so far as the record discloses, no such acceptance ever took place—at least, not until after notice of the death of Halverson, which, of course, would be too late. If Halverson had a right to revoke the same during his lifetime, and before acceptance of the same by the investment company, as he unquestionably had, then it follows that his death would operate to revoke

the same. But assuming that the application was accepted by the investment company prior to Halverson's death, and that the contract was not usurious, still we are clearly of the opinion that the power of attorney given to Mears did not survive the death of Halverson. If the investment company thereafter advanced the money, it did so at its peril. This power was not coupled with an interest in the subject of the agency, and hence was terminated by the death of Halverson. Rev. Codes 1899, section 4350. Neither Mears, the alleged agent, nor the Mortgage Bank & Investment Company, the alleged principal, had any interest in the land to be mortgaged. The company was interested only in the profits to be derived from the loan, which could be realized only through the execution of the power. Mears had no interest whatever. The leading case in this country defining the phrase "coupled with an interest" is *Hunt* v. *Rousmanier,* 8 Wheat. 174, 5. L. Ed. 589. The opinion in this case was written by Chief Justice Marshall in 1823, and has been generally followed and approved by the courts of the country ever since. We quote from the opinion as follows: "We think it well settled that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death. * * * This general rule that a power ceases with the life of the person giving it admits of one exception. If a power be coupled with an interest, it survives the person giving it, and may be executed after his death. As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire what is meant by the expression 'a power coupled with an interest.' Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is to be produced by the exercise of the power? We hold it to be clear that the interest which can protect the power after the death of a person who creates it must be an interest in the thing itself. In other words, the power must be ingrafted on the estate in the thing. The words themselves would seem to import this meaning. 'A power coupled with an interest' is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said

to be 'coupled' with it." The existence or nonexistence of an interest in the thing itself on which the power is to operate is the universally accepted test. There are a multitude of authorities holding this doctrine, but we deem it useless to cite them. We refer simply to 1 Am. & Eng. Enc. of Law, p. 1217, where a great many of the cases are collected. Counsel for appellant have cited numerous cases in their brief, all of which we have examined, and find none in point. It would serve no useful purpose to analyze them, but we cite them below, and an examination thereof will disclose that they are not in point. The following are the authorities cited by appellant: *Grandin* v. *Emmons* (N. D.) 86 N. W. 723, 54 L. R. A. 610, 88 Am. St. Rep. 684; *Reilly* v. *Phillips* (S. D.) 57 N. W. 780; *Knapp* v. *Alvord,* 40 Am. Dec. 241; *Stewart* v. *Hilton,* 7 Fed. 562; *Norton* v. *Whitehead* (Cal.) 24 Pac. 154; *Hennessee* v. *Johnson* (Tex. Civ. App.) 36 S. W. 774; *Am. Loan & Trust Co.* v. *Billings* (Minn.) 59 N. W. 998; *Barr* v. *Schroeder,* 32 Cal. 609; *Blackstone* v. *Buttermore,* 53 Pa. 266. This disposes of appellant's second assignment of error.

It is next urged that the court below erred in allowing costs to respondent. Costs were wholly discretionary (section 5580, Rev. Codes 1899), and we cannot hold that there was an abuse of discretion. On the contrary, we are of the opinion that the trial court very properly allowed such costs. The plaintiff wholly failed to show himself entitled to the relief prayed for, while, on the other hand, defendant recovered affirmative relief.

This brings us to the last two assignments of error, which are, that the court erred in holding that the defendant is entitled to have the note and mortgage delivered up and canceled of record, and in ordering judgment accordingly. These assignments of error are predicated, no doubt, upon the theory that, although the note and mortgage are void, still plaintiff is entitled to recover the moneys actually paid out by the investment company, and to enforce the note and mortgage to this extent. We are unable to give our assent to this theory. As to the sum of $175, which was paid to defendant Skotland, no question is raised, as defendant, in his answer, prays that plaintiff be allowed to recover said sum, and the trial court ordered such payment as a condition to the cancellation of the note and mortgage. As to the $230, which was paid for the purpose of making final proof and perfecting title, no recovery can be had in this action. This payment was made after the death of

Halverson, and, as we have already said, the power of attorney was terminated, and the contract for loan, if any valid contract or any contract ever existed, was wholly extinguished, at the death of Halverson. Nor was this money paid to or for the benefit of defendant Skotland, as such administrator, and, as we view it, the same was a mere voluntary payment, and resulted to the benefit only of the heirs at law of the deceased. Under these facts, we are of the opinion that the trial court very properly held adversely to appellant, and that these assignments of error are also without merit.

The judgment of the district court is in all things affirmed. All concur.

MORGAN, J., having tried the case in the court below, took no part in the decision; HON. C. J. FISK, judge of the First judicial district, sitting in his place by request.

(97 N. W. Rep. 543.)

THOMAS WADGE *v.* ANNOND KITTLESON.

Opinion filed November 30, 1903.

Estoppel to Claim Ownership of Land.

1. Defendant entered into a contract in writing for the purchase of land from the Grand Forks Security Improvement Company on the crop-payment plan. Later defendant assigned said contract to M. & D. by a written assignment indorsed thereon, absolute in form, but as security only. Subsequently defendant and plaintiff orally entered into a contract by which defendant sold the land to plaintiff for a consideration agreed upon—that plaintiff should pay certain debts of defendant, including that of M. & D. Defendant told M. & D. in plaintiff's presence that he had sold the land to plaintiff and that plaintiff would pay them, and that they should transfer the contract to plaintiff. Plaintiff paid M. &. D., and they assigned the contract to plaintiff. Plaintiff presented the contract, duly assigned, to the Grand Forks Security Improvement Company, pursuant to the contract with defendant, paid the unpaid purchase money, and received a deed for the land, and placed it on record. Plaintiff for two years thereafter leased the land to defendant in writing, and in such lease plaintiff was described as the owner of the land. Under these facts, and others stated in the opinion, it is *held* that defendant is estopped to claim ownership of the land.

Specific Performance, Verbal Assignment of Contract of Sale.

2. Under an answer claiming relief in the nature of specific performance, a court of equity will not grant such relief in cases where the party claiming the relief has abandoned such contract, or directed it by parol authority to be by another assigned, and the assignment is executed in writing by such other person, and his assignee has paid out money in reliance on such assignment, and taken possession of the land with the assignor's knowledge and consent.

Written Contract of Sale May Be Annulled or Extinguished by Parol.

3. A party to a written contract for the sale of land may waive his rights thereunder by parol, and the contract may be annulled and abandoned and extinguished by parol.

A Trespasser on Lands Acquires No Title to Crops Sown Without Owner's Consent.

4. A trespasser on lands of another, going thereon and seeding the same against the protest of the owner, who thereafter brings an action for the possession of such land and secures an injunction restraining the trespasser from harvesting the crop, is not entitled to a share of such crop.

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

Action by Thomas Wadge against Annond Kittleson. Judgment for plaintiff. Defendant appeals.

Modified.

Spencer & Sinkler, for appellant.

The assignment of the contract of the land in question by the defendant to McEwen & Dougherty was for security only; for the indebtedness due from him to them, and the subsequent assignment of said contract by McEwen & Dougherty to Wadge, simply transferred the security interest of McEwen & Dougherty to Wadge and created no other estate in him; and the defendant having never transferred his interest in said contract or the land described therein to Wadge in writing, nor authorized any agent in writing to do so, the taking of the deed by Wadge from the vendor in the contract, in his own name, makes him only a mortgagee, and the deed so received is only a mortgage for securing the indebtedness due Wadge from Kittleson. *O'Toole* v. *Omlie et al.,* 79 N. W. Rep. 849; *O'Dell* v. *Montrams,* 68 N. Y. 499; *Yankton B. & L. Ass'n.* v. *Dowling,* 74 N. W. Rep. 436; *Feltz* v. *Peterson,* 28 So. 829; *Murry* v. *Walker,* 31 N. Y. Ct. Ap. 401; *Brayton* v. *Jones,* 5 Wis. 117; *Niggeler* v. *Maurin,* 24 N. W. Rep. 369.

H. A. Libby, for respondent.

A parol agreement for the sale of lands which has been executed between the parties, is not within the statute of frauds. *Baxter* v. *Gay,* 14 Conn. 119; *McKenna* v. *Bolger,* 49 Hun. 259, 22 N. E. Rep. 1132; *Martin* v. *McCord,* 30 Am. Dec. 342; *Pope* v. *Chaffee,* 14 Rich. Eq. 69; *Larsen* v. *Johnson,* 47 N. W. Rep. 615; *Lucus* v. *Mitchell,* 10 Ky. 244; *Pooyle* v. *Sheehy,* 57 N. Y. 637; *Andrews* v. *Jones,* 10 Ala. 400; *Slatter* v. *Meak,* 35 Ala. 528; *LeFevre* v. *LeFevre,* 8 Am. Dec. 696; *Whitson* v. *Smith,* 15 Tex. 33; *Robb* v. *San Antonia St. R. R. Co.,* 18 S. W. Rep. 707; *Reedy* v. *Smith,* 42 Cal. 245; *Doherty* v. *Doe,* 33 Pac. Rep. 165; *Swenzey* v. *Moore,* 74 Am. Dec. 134; *Wheeler* v. *Frankinfall,* 78 Ill. 124; *Anderson School Tp.* v. *Milroy Lodge of Masons,* 29 N. E. Rep. 411; *Pomeroy* v. *Winship,* 7 Am. Dec. 91; *Stone* v. *Dennison,* 23 Am. Dec. 654; *Nutting* v. *McCutcheon,* 5 Minn. 382; *Bird* v. *Jacobus,* 84 N. W. Rep. 1062; *Fideler* v. *Norton,* 30 N. W. Rep. 128; *DeHierapolis* v. *Wright,* 60 N. Y. St. 417; *Cameron* v. *Austin,* 27 N. W. Rep. 622.

Where a person who holds a contract of purchase of land stands by and sees another purchase the same land from his vendor, and fails to object, he will be estopped from claiming that the second purchaser bought for his benefit. *Baehr* v. *Wolf,* 59 Ill. 470.

In this case Kittleson not only stood by when Wadge bought the land, and secured a transfer of the contract from McEwen & Dougherty, but he bargained with Wadge to do this, and the whole transaction was upon his instance and request, and under his personal supervision and direction, and every act done by Wadge was in direct pursuance of the agreement with Kittleson. After the contract had been fully performed, Kittleson worked the land as Wadge's tenant for two years without objection. See also *Mellor* v. *Valentine,* 3 Colo. 255; *Doan* v. *Mayzey,* 33 Ill. 227; *Martin* v. *Me. Cen. R. R. Co.,* 83 Me. 105, 21 Atl. Rep. 740; *Stores* v. *Barker,* 10 Am. Dec. 316.

Kittleson has no interest in the crop. He was a trespasser on the land, and did his work in putting the crop in with full knowledge of all the facts, after he had been forbidden to do so, and against the express commands of the owner. Crops sown on land by a stranger to the title without authority or consent of the owner, belong to the owner of the soil. *Freeman* v. *McLenon,* 26 Kan. 151; *Simpkins* v. *Rodgers,* 15 Ill. 397; *Crotty* v. *Collins,* 13 Ill. 567;

Thomas v. *Moody,* 11 Me. 139; *Lindsay* v. *Winona R. R. Co.,* 43 Am. Rep. 228; *Brothers* v. *Hurdle,* 10 N. C. 490; *Murphy* v. *Sioux City R. R. Co.,* 55 Iowa 473, 8 N. W. Rep. 320; *Straubble* v. *Trustees,* 78 Ky. 481.

MORGAN, J. The controversy in this case arises over the ownership and the right to the use and possession of the southwest quarter of section 24, township 157, range 58, in Walsh county, N. D. The plaintiff claims in his complaint to be the absolute owner thereof, and asks to have the title quieted in himself, and defendant's interference with his possession permanently enjoined. Defendant claims, in his answer, to be the equitable owner of said lands, and claims that he has been in the continuous possession thereof since 1897; that he purchased said land from the Security Improvement Company, of Grand Forks, in 1897, and received from said company a contract of sale, under which he was to secure full title to said land upon payment to it of $850 from the crops raised on the land; that in January, 1898, he was indebted to McEwen & Dougherty, of Park River, and assigned said contract of sale to said firm as security for the payment of said indebtedness; that defendant was indebted to plaintiff and his partner in November, 1899, in the sum of about $300, and plaintiff about said time requested that defendant authorize McEwen & Dougherty to assign said contract of sale to plaintiff, and that plaintiff would thereupon pay said McEwen & Dougherty's debt, and hold said contract as security for the payment of plaintiff's debt, as well as the amount paid to McEwen & Dougherty to secure the assignment of the contract to plaintiff; that plaintiff paid McEwen & Dougherty what was their due, and received from them the assignment of the contract of sale; that plaintiff thereafter wrongfully presented said assignment to the Security Improvement Company, at Grand Forks, N. D., paid the amount due on said contract, and demanded that a deed be executed and delivered to him, by said company; that said company issued such deed to him, which was duly recorded in the office of the register of deeds of Walsh county; that plaintiff procured said deed without authority or right to do so, and without defendant's authority or knowledge. The relief demanded by defendant is for an accounting; that plaintiff be adjudged to have received such deed in trust for defendant, and as security for the amounts owed by defendant to plaintiff; that, "upon payment to plaintiff by defendant of the amount found due to plaintiff, that plaintiff be compelled to deed the land in dispute

in this action, by a special warranty deed, * * * to this defendant." The trial resulted in findings and a decree in favor of the plaintiff, so far as the ownership of the land was concerned. Defendant appeals, and requests a review of the entire case, under section 5630, Rev. Codes 1899.

Unless an accounting must be made between the parties, the issues are: (1) Was the transaction of November 1, 1899, between plaintiff and defendant, whereby the contract of sale was assigned by McEwen & Dougherty to plaintiff, a security, or an absolute assignment? (2) If not a security assignment, has the defendant parted with, conveyed, or abandoned his interest in the contract of sale?

Upon the first question, it is not difficult to reach a conclusion, based on evidence that preponderates in plaintiff's favor, and is thoroughly convincing, that defendant's version of the affair is not the true one. The facts out of which the differences between the parties arose are as follows: On the 3d day of June, 1897, the defendant entered into a contract for the purchase of the land in suit from the Grand Forks Security Improvement Company, on the crop-payment plan of purchase. Possession of the premises was given him by said contract, and he went into what is deemed in law actual possession thereof, and in 1898 broke forty-three acres, and cropped this and the eighty acres of land already broken thereon when he purchased it. He also cultivated this land and cropped it in 1899. There were no buildings on the land. In January, 1898, the defendant was in debt, and owed the firm of McEwen & Dougherty $741. He owed the plaintiff and his partner about $300. He also owed the Security Improvement Company $752.25, the unpaid balance on the purchase price of the land; being $850. He owed other debts, also. At this time defendant assigned to McEwen & Dougherty the land contract received from the Security Improvement Company, by an assignment absolute in form, indorsed on said contract. At the same time McEwen & Dougherty gave defendant a memorandum acknowledging that such assignment was for security purposes only. Later, and in the spring or summer of 1899, the plaintiff met the defendant to settle a seed-lien transaction, and to get a lien on the crop; and, during a conversation then had, defendant proposed that the plaintiff buy the land in question from him. The plaintiff, after they had talked over the price, said that he would see about it later. The defendant also

requested him later in the summer to buy it, and again in the fall. At the conversation had in the fall about selling the farm, the plaintiff made him an offer to buy the farm. He offered to buy it on the following terms: Defendant was to turn over to plaintiff 200 bushels of wheat; plaintiff was to pay the McEwen & Dougherty indebtedness; the indebtedness due plaintiff and Wadge & Johnson was to be satisfied; plaintiff was to pay the Security Improvement Company the unpaid purchase money; and defendant was to transfer to plaintiff all his right, title, and interest in the farm. Defendant accepted the offer. Plaintiff and defendant then immediately went into the office of Wadge & Johnson, and their claim was found to be about $300. They then went to the office of McEwen & Dougherty to find out the amount of their claim. Upon arriving there, the defendant said: "McEwen, I sold my farm to Mr. Wadge, and he will take up your indebtedness, and you will transfer the contract to him." Then they went to the elevator to find out about the amount of wheat that the defendant had stored there. It was found to be 200 bushels, and the defendant then and there ordered the elevator agent to turn over such wheat to plaintiff, and it was then turned over to plaintiff. During these negotiations the defendant had told the plaintiff that his contract for the purchase of the land from the Security Improvement Company had been assigned to McEwen & Dougherty, and that plaintiff should take the contract, pay the indebtedness, and get a deed for the land. Immediately thereafter plaintiff paid McEwen & Dougherty, received the notes from them, and marked them "Paid," as requested by defendant, and left them in the safe in the office of Wadge & Johnson, and informed defendant that the notes were paid, and marked "Paid," and that he could get them by calling at the office of Wadge & Johnson. Plaintiff paid his partner, Johnson, his share of the defendant's indebtedness to the firm. McEwen & Dougherty assigned to plaintiff all their right, title, and interest to the contract on November 1, 1899. Plaintiff immediately sent the same to the Security Improvement Company at Grand Forks, N. D., and that company conveyed the land by deed to plaintiff on November 8th. The deed was recorded at once in the register of deed's office at Grafton, N. D. The plaintiff thereafter informed defendant that the deed was recorded, and that the notes were at Wadge & Johnson's office, marked "Paid." Later defendant leased the land from

the plaintiff, and cropped it for him in the year 1900. In 1901 a written lease was entered into between these parties for the farming of the land in 1901 by the defendant. In this lease, signed by defendant, the plaintiff was therein expressly acknowledged and described as the owner of the land. The crop of 1900 was divided between the parties in accordance with the terms of the lease, without anything being said that defendant claimed the land. The first time that defendant intimated to plaintiff that he still claimed to own the land was at the time that the crop of 1901 was being divided. Defendant then said that he had changed his mind, and claimed to own the land. This is the plaintiff's testimony, which defendant denies, and says that this was the first time that plaintiff made claims to the land. But we are convinced that defendant is mistaken as to this conversation, and that this was the first intimation given by defendant to plaintiff that he intended to claim ownership of the land. The manner of the dealings between them shows to us that up to this time nothing had transpired to indicate that defendant had any intention of repudiating the transaction of November 1, 1899. For over two years defendant and plaintiff dealt in reference to this land on the basis of absolute ownership in the plaintiff. On several occasions defendant had admitted in direct and indirect statements that he had sold the land to the plaintiff. He so admitted in a subsequent conversation with McEwen. The written lease of February 21, 1901, admits plaintiff's ownership in express words. Defendant's explanation of making the leases of 1900 and 1901 is not satisfactory. If believed, it shows that he entered into the transaction upon—to say the least—unworthy motives; that is, to conceal this property from creditors. The circumstances under which they were given indicate to us an express recognition of plaintiff's absolute ownership of the land. The circumstances show a motive for an absolute sale. Defendant was being threatened with proceedings to enforce payment of the McEwen & Dougherty notes, secured by the contract. He was indebted to others. The land was not valued at more than $1,500. He received what was equivalent to $1,800 for it. Land values have since rapidly increased, so that it is now worth much more. If plaintiff took the land as security, he was paying out nearly $1,700, including taxes, to secure himself, personally, payment of about $150. Another strong circumstance showing that a sale ab-

solute was intended is that defendant nowhere during the negotiations stated that it was to be as security only. When he assigned the contract to McEwen & Dougherty he protected himself from all question as to the character of the assignment by taking another writing from the assignees, admitting it to be security only. It is not explained why equal precautions should not have been taken as to this assignment.

The rule is well settled that, to show a deed or other instrument absolute on its face to have been intended only as security, the evidence must be clear, convincing, and satisfactory. *Jasper* v. *Hazen*, 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58; *McGuin* v. *Lee*, 10 N. D. 160, 86 N. W. 714; *Sargent* v. *Cooley*, 12 N. D. 1, 94 N. W. 576; *Forester* v. *Van Auken*, 12 N. D. —, 96 N. W. 301. Under the rule stated and the cases above cited, we have no hesitation in saying that the transaction was intended as an absolute sale, and not as a security transaction.

Defendant's main contention, however, is that he has never parted with the title to the contract in question, nor with equitable ownership of the land conveyed thereby. His position is that the assignment to McEwen & Dougherty was admittedly as security only, although in form absolute, and that the assignment from McEwen & Dougherty to plaintiff could convey no greater interest in the contract or to the land than they had—a mortgage or security interest. In other words, his contention is that he never transferred his interest in the contract or land absolutely, but only to secure a debt of his, and that the transfer by him was oral, and invalid, under section 3887, Rev. Codes 1899; that, if McEwen & Dougherty be considered as defendant's agents to assign the contract, their authority must be in writing, under the statute. As shown heretofore, the intention of the parties at the time that defendant requested McEwen & Dougherty to assign the contract to plaintiff was that such assignment should be made, as evidencing the sale to plaintiff. The assignment to McEwen & Dougherty indorsed on the contract, was absolute in form, and purported to assign the contract without conditions. The defendant made no claim at the time that he told McEwen & Dougherty to assign the contract that it was as security only. For two years thereafter he made no claim to own the land. Plaintiff paid out large sums of money on the understanding that he was getting an absolute title to the

land. All these things were done in reliance on defendant's agreement to sell the land to plaintiff, and directing that the assignment of the contract be made to plaintiff by those having possession of it under an assignment positive in its terms. The plaintiff now asks that a court of equity relieve him from the effect of his express direction, and that he be allowed to specifically perform the contract by paying the amount paid by plaintiff. This would not be equitable, so far as the plaintiff is concerned, and would be making a new contract for the parties. Their contract was a sale. Plaintiff paid his money out for a conveyance of the title absolutely and did not make a loan. Defendant's indebtedness was canceled and paid by plaintiff on the strength of receiving a conveyance without conditions. In *Baehr* v. *Wolf et al.*, 59 Ill. 470, it was said: "So far as the evidence discloses, Wolf had abandoned his contract, and Carpenter could lawfully sell the land to appellant or anyone else. Wolf stood by and saw the appellant making the contract with Carpenter in his own name and for his own use, and paying out his own money therefor; and he cannot now be heard to say that the appellant was purchasing it as his trustee, and, after the lapse of years, come into a court of equity and say that he will take unto himself the profits of the transaction. When Wolf saw the appellant purchasing the land of Carpenter with his own money and to his own use, he ought then to have asserted his rights, if he had any; but, having remained silent, for so many years, he will now be estopped to deny that the purchase was rightfully made by the appellant to his own use." See, also, *Storrs* v. *Barker,* 10 Am. Dec. 316; *Martin* v. *Maine Central Ry. Co.*, 83 Me. 105, 21 Atl. 740; *Mellor* v. *Valentine,* 3 Colo. 255; 11 Enc. of Law (2d Ed.) p. 429, and cases cited.

However, we need not rest the decision on principles of estoppel. The relief asked in the answer is that plaintiff be compelled to specifically perform the contract of sale, and convey to defendant the title which he acquired from the vendor in the contract, the Grand Forks Security Improvement Company. Whatever defendant's rights are, they must be based upon that contract. Under the contract, he became the equitable owner of the land. The legal title remained in the vendor, as security for the purchase price. *Nearing* v. *Coop*, 6 N. D. 345, 70 N. W. 1044. This court has recently held that, under a contract such as the one in suit, the

parties may waive its terms by parol, or annul or extinguish its provisions, without writing. In *Mahon* v. *Leech,* 11 N. D. 181, 90 N. W. 807, it was said: "The fact that the relinquishment was not in writing is not important. That the mutual rights and obligations of the parties to a written contract for the purchase and sale of real estate may be waived, and the contract annulled and extinguished by parol, is well settled. It is also well settled that where a party has been grossly negligent of his rights, or has abandoned his contract, a court of equity will not extend to him the extraordinary relief afforded by specific performance." The authorities are collected in that case, and liberally quoted from; and we need say no more than that that case is parallel with this, and decisive of it. In fact, this case presents stronger reasons for the enforcement of equitable principles than the Mahon case. In that case the vendees, who abandoned the contract, received no benefits by virtue of such abandonment. In this case defendant made a most advantageous surrender of the contract. By surrendering the contract to plaintiff, he realized a large profit on his purchase, not counting his possession of the place for two years. What is said in *Mahon* v. *Leech, supra,* is peculiarly pertinent to this case, as referring to the rise in the value of the land: "Time has rendered that valuable which the creditors deemed valueless, and which they voluntarily abandoned. Will a court of equity, because of this fortuitous circumstance, and under the circumstances of this case, wrest the land from the defendants and give it to the plaintiff? Certainly not. Courts of equity look with small favor upon those who seek their aid in actions prosecuted under a change of mind induced by motives such as are here manifest."

The trial court awarded to the defendant two-thirds of the net proceeds of the crop of 1902, and the balance to the plaintiff. Plaintiff had been in the possession and control of the land since 1899. Defendant's relation to the land during that time was solely what he derived as tenant of the plaintiff, whom defendant acknowledged as owner. In the spring of 1902 defendant took possession and control of the land, and, without warrant, put in the crop. Plaintiff seasonably and promptly notified the defendant of what he before knew—that he had no right to the possession of the land. Defendant seeded the land with great haste, and against plaintiff's protest. He showed a disposition to resort to force to thwart plaintiff's attempt to control the cropping of the land. He had no rights.

there. He was nothing more or less than a willful trespasser. We see nothing in the record to show that he was acting in good faith. Such a lawless attempt to control another's rightful possession should not be rewarded by giving one the fruits of a trespass made in bad faith. Defendant amicably allowed plaintiff his share of the crop of 1900. The plaintiff had the same right to the land in 1902 as he had in 1900 and in 1901. Because the defendant, without license and by threatened force, cropped the land in 1902, does not give him any legal right to the crop. He acted without right or authority and at his peril, and must suffer the consequences. The crops belong to the owner of the land, unless some right thereto is given to a tenant or cropper by authority or assent of the owner. In this case plaintiff forbade defendant to crop the land, and thereafter brought this action, and, in connection with it, secured an injunction against the defendant's harvesting the crop; alleging defendant's insolvency, among other grounds for asking equitable relief. As bearing upon the right of the plaintiff to the crop under such circumstances, see *McLean* v. *Bovee,* 24 Wis. 295, 1 Am. Rep. 185; *Rowell* v. *Klein,* 44 Ind. 290, 15 Am. Rep. 235; *McGinnis* v. *Fernandez* (Ill.) 26 N. E. 109, 25 Am. St. Rep. 348; *Carlisle* v. *Killebrew,* 89 Ala. 329, 6 South. 756, 6 L. R. A. 617; *Crotty* v. *Collins,* 13 Ill. 567; *Freeman* v. *McLennan,* 26 Kan. 151.

The district court is directed to modify its judgment so far as the defendant is therein given judgment for the sum of $575.23, and to award the whole of the crop of 1902 to plaintiff. Plaintiff will recover costs in district court and in this court. In all other respects, the judgment is affirmed. All concur.

(97 N. W. Rep. 856.)

EDWARD STEVENS AND MARGARET POLLY STEVENS, MINORS, BY DAVID W. SHIELDS, THEIR GUARDIAN *v.* CONTINENTAL CASUALTY COMPANY.

Opinion filed November 30, 1903.

Burden of Proof Where Death Is Intentionally Inflicted.

1. In an action to recover upon an accident policy insuring against injuries incurred through external, violent, and purely accidental causes, but providing that in loss of life from injury intentionally inflicted upon the insured by himself or another person the limit of the company's liability should be one-tenth the amount which would otherwise be payable under the policy, where the defendant alleged in its answer that the death of the insured was from an injury intentionally inflicted by a person other than the deceased, the burden was on it to prove that the injury of the deceased was intentionally and not accidentally inflicted.

No Presumption that Death from Gunshot Was Intentional.

2. Upon proof of death from a gunshot wound, in the absence of evidence as to how the wound was inflicted, it will be presumed that the wound was accidental, and not that it was illegally inflicted.

Statements of Guardian, in Preliminary Proofs of Death, Not Binding Upon His Wards.

3. While primary proofs of death are ordinarily admissible on the trial as *prima facie* evidence of the facts stated therein against the insured and on behalf of the insurer, where the preliminary proofs were made by a guardian of the infant beneficiaries under the policy, and the statements made by him as to the cause of death were based entirely upon hearsay, such statements could not be considered as competent evidence of matters therein recited, as against the infant plaintiffs, so as to relieve defendant from the necessity of proving such facts. Such statements are admissions of the guardian alone, and not of the infants, and the guardian has no authority to make admissions against the interests of his wards.

Infliction of Injury Raises No Presumption of Intent—It Is a Matter of Proof.

4. Where defendant sought to reduce its liability under an accident policy by bringing the case within a proviso therein limiting its liability to one-tenth of the face of the policy in case death resulted from an injury intentionally inflicted by insured or another person, the intent to injure or kill, on the part of the person inflicting the injury, becomes an essential part of the proof, and the infliction of the injury does not raise a presumption that it was done intentionally.

Intention a Question of Fact—Court Cannot Direct a Finding Where the Proof May Justify Different Conclusions.

5. Intention is a question of fact to be inferred from the act itself and the surrounding circumstances. So, where the burden of proof is upon a party to show that a shooting was done with intent to kill or injure, the court cannot require the jury to find that the act was intentionally done if the facts and circumstances proved can be reconciled with an accidental or nonintentional injury.

Case Properly Submitted to Jury.

6. The evidence in this case is consistent with an intentional shooting of the insured by a third person, but is not inconsistent with and does not negative an accidental or nonintentional shooting. The case, therefore, was properly submitted to the jury to determine whether the injury resulting in the death of insured was intentionally inflicted.

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

Action by Edward and Polly Stevens, by their guardian, against the Continental Casualty Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Ball, Watson & Maclay, for appellant.

The statements contained in the proofs of death, standing without explanation or denial, conclusively establish that the insured died as the result of a pistol-shot wound inflicted upon him by a person whom he had ejected from his train. *Mutual Benefit Ins. Co.* v. *Newton*, 89 U. S. 32, 22 L. Ed. 793; *Lodge* v. *Beck*, 181 U. S. 49, 56; *Hassencamp* v. *Insurance Co.*, 120 Fed. 475; *Spruill* v. *Insurance Co.*, 27 N. E. Rep. 39; *Hart* v. *Lodge*, 84 N. W. Rep. 85; *Walther* v. *Mutual Ins. Co.*, 4 Pac. Rep. 413; *Hanna* v. *Conn. Mut. Life Ins. Co.*, 44 N. E. Rep. 1099.

The law presumes that a man intends the natural and probable consequences of his acts. There is also a presumption that men's acts are intentional. *Northwestern Benev. Society of Duluth* v. *Dudley*, 61 N. E. Rep. 207; *People* v. *Langton*, 67 Cal. 427, 7 Pac. Rep. 643.

Even in a trial for murder, from the proof of killing with a deadly weapon, the law implies an intent to kill. *Conway* v. *Reed*, 66 Mo. 354; *People* v. *Newcomer*, 50 Pac. Rep. 405; *State* v. *Silk*, 44 S. W. Rep. 76.

Acts and conduct of parties are the best indices as to intent or purpose of mind. *Insurance Co.* v. *Smith*, 71 S. W. Rep. 391.

There is no fact or circumstance in evidence upon which a guess could be based. At the utmost all that can be said is, that there is a possibility that the man who shot Stevens discharged his pistol accidentally, or for the purpose of frightening him. But it cannot be said that the evidence tends to prove any such theory or would justify such a conclusion on the part of the jury. *Butero* v. *Travelers Acc. Ins. Co. of Hartford, Conn.,* 71 N. W. Rep. 811; *Orr* v. *Insurance Co.,* 24 So. 997; *Insurance Co.* v. *Hayward,* 34 S. W. Rep. 801; *Insurance Co.* v. *Smith,* 71 S. W. Rep. 391; *Johnson* v. *Insurance Co.,* 39 S. W. Rep. 972.

There is not even a scintilla of evidence upon which the verdict can rest. But even if the possibility that the shooting was really accidental, can be considered evidence at all, it is too slight and inconclusive in its nature to go to the jury. *Bowman* v. *Eppinger,* 1 N. D. 21, 44 N. W. Rep. 1000.

Morrill & Engerud, for respondents.

The proviso under which appellant contends that it is relieved from full liability, is an exception to the general policy, and the burden is upon the defendant to establish the fact, that the insured came to his death from an injury intentionally inflicted by another person. *Home Benefit Association* v. *Sargent,* 142 U. S. 691, 12 Sup. Ct. Rep. 332, 35 L. Ed. 1160; *Jones* v. *U. S. Mut. Acc. Ass'n,* 61 N. W. Rep. 485; *Railway Official and Employes Acc. Ass'n.* v. *Drummond,* 76 N. W. Rep. 562; *Anthony* v. *Mercantile Mut. Acc. Ass'n,* 38 N. E. Rep. 973; *Goldschmidt* v. *Mut. Life Ins. Co. of New York,* 102 N. Y. 486, 7 N. E. Rep. 408.

This is the rule in the courts of the United States and different states, and some go so far as to hold that such defense must be proved beyond a reasonable doubt. *Decker* v. *Somerest Mut. Fire Co.,* 66 Me. 406; *Lexington F. M. & L. Ins. Co.* v. *Paver,* 16 Ohio 324; *McConnell* v. *Delaware Mut. Ins. Co.,* 18 Ill. 228.

In case of suicide the presumption is against it. *Mallory* v. *Travelers Ins. Co.,* 47 N. Y. 52; *Keels* v. *Mut. Reserve F. L. Ass'n,* 29 Fed. 198.

It cannot be presumed that the person shooting did so with intent to injure the insured; so in doubtful cases the presumption should be against such intent. *Jones* v. *U. S. Mut. Acc. Ass'n, supra.*

An accident within the meaning of contracts of this kind includes any event which takes place without the foresight or expectation of the person affected thereby. *Railway Employes Ass'n, etc.,* v. *Drummond, supra; Button* v. *American Mut. Acc. Ass'n,* 65 N. W. Rep. 861; *Richard* v. *Ins. Co.,* 20 N. E. Rep. 347; *McGlinchey* v. *Casualty Co.,* 14 Atl. Rep. 13; *Lovelace* v. *Travelers Pro. Ass'n,* 28 S. W. Rep. 877; *Fidelity and Casualty Co.* v. *Johnson,* 17 So. Rep. 2; Anderson's Law Dictionary; Bouvier's Law Dictionary.

The statements made by the guardian, Mr. Shields, were made without any personal knowledge of the facts, as he fully explains in his testimony. These proofs are not to be taken as conclusive, and are subject to explanation. *The Home Benefit Ass'n* v. *Sargent, supra; Utter* v. *Travelers Ins. Co.,* 32 N. W. Rep. 812; *Coburn* v. *Travelers Ins. Co.,* 13 N. E. Rep. 604; *Freeman* v. *Travelers Ins. Co.,* 12 N. E. Rep. 372; *Keene* v. *New England Mutual Acc. Ass'n,* 36 N. E. Rep. 891; *Cornwell* v. *Fraternal Acc. Ass'n of America,* 6 N. D. Rep. 201, 69 N. W. Rep. 191.

COCHRANE, J. Edward and Polly Stevens, minor children of Fred W. Stevens, deceased, by their guardian, sued to recover the amount of an accident policy issued by the Continental Casualty Company. This policy was for $2,000, and stipulated to indemnify the beneficiaries therein named in case of the death of the insured through external, violent, and purely accidental causes, unless such death should result from an injury "intentionally inflicted upon the insured by himself or another person," in which event the beneficiaries were to receive one-tenth of the face of the policy, or $200. No question is raised as to the sufficiency of the proofs of death, and it is conceded that they were made in proper time. Plaintiffs, in their complaint, alleged that the insured died from personal injury received solely from accidental causes. The answer denied this averment of the complaint, and defendant alleged "that on or about the 12th day of August, 1902, near Bismarck, in the state of North Dakota, while the said Stevens was engaged in some disagreement, altercation, or fight with some person or persons whom he had expelled or was endeavoring to expel from the passenger train upon which he (the said Stevens) was then employed as a passenger brakeman, one of the said persons (the name of such person being unknown to the defendant) discharged a revolver or a gun loaded with powder and bullet at said Stevens, intentionally, and with the intent of injuring or killing said

Stevens, and that said Stevens was thereby so wounded and injured that soon thereafter, on or about the 18th day of August, 1902, he died therefrom, and on account of the wound and injury so received by him as aforesaid." Defendant offered to allow judgment to be taken against it for $200, with interest and costs. Upon the trial, plaintiffs rested their case on proof of the policy of insurance, and the evidence of C. F. Watkins, a surgeon employed at the Brainerd hospital, to the effect that the insured was brought to the hospital on the 13th day of August, 1902, suffering from a wound inflicted by a bullet from some firearm, the calibre of which he was unable to state. The wound was in the upper part of the thigh, and produced a double comminuted fracture of the femur or thigh bone. That insured died at the hospital on August 18, 1902, from the direct result of the gunshot wound just described. Defendant introduced in evidence the proofs of death and loss furnished the company. In these proofs was the affidavit of David W. Shields, guardian of the infant plaintiffs, setting forth that "Stevens was at the time of his death a passenger brakeman on the Northern Pacific Railway, that at the time of the injury he was performing his duties as passenger brakeman; that he had shortly before ejected a negro from the train, who, soon after being so put off the train, shot the brakeman, Stevens." Further on in the same affidavit was the following statement: "In the performance of his duties, it became necessary for Brakeman Stevens to eject a colored passenger who refused to pay his fare. After being put off the train, he shot Stevens with a 45 Colt's army revolver. He fell at once, and was unable to move without assistance. He had to be carried to the baggage car. He died at the Brainerd hospital of the Northern Pacific Railway Company at Brainerd, Minnesota." Accompanying these proofs, and a part thereof, was the affidavit of Isaac D. Worden to the effect that he was present when Stevens was shot, and was a witness to the shooting; "that the decedent was injured in the upper part of the left thigh by a bullet from a 45 Colt's army revolver, shot by another person; that Stevens fell at once, and was unable to move or help himself; that the visible mark of the injury was a hole in the back part of the thigh large enough to put one's thumb into." Defendant had R. M. Poindexter sworn as a witness, who testified that he was a clerk in the United States mail service, and was on the train the night Stevens was shot. "I remember the occasion of

the attempt to expel or eject certain persons from the train at or near Bismarck, North Dakota, on August 12, 1902. At that time I was alone in the mail car, and had charge of receiving and distributing letters in the car without any assistance. I heard some one passing along on top of the car over my head. Before that the train was pulled down inside the yards—pulled out a ways from Bismarck. I stepped to the door to see what was up, and saw somebody passing on the north side of the train, and also heard somebody coming up on the south side, and somebody on the roof. As I went to the door on the north side, and stood there a short time, I heard a pistol shot; and, as I heard it, I could not see who fired it. It was right in front of the engine. Then I started to go to the south side of the car to look out of that door; and just as I got to the door I heard another shot, and I looked out, and saw some person stop, wheel around, and kind of step forward, and saw a flash, and heard Stevens say 'Stop'; he was shot. I remember his language—what he said. He said: 'Flag her down, boys. I am shot.' I heard the report of the pistol. Q. Did you hear Stevens say anything just prior to the shot, to the people that he was chasing or ejecting from the train? A. Only as he came up to the side of the car he helloed, 'Get off from there.'" D. W. Shields testified in rebuttal that he was the guardian of the minor plaintiffs; that the proofs of death and loss were prepared by plaintiffs' attorneys on blanks furnished by the company, and that he signed them at the attorneys' request. At the time the proofs were mailed and forwarded, he had no knowledge whatever of the matters therein stated. All knowledge he then had was what had been told him by others. At the close of the testimony defendant's counsel moved the court to direct a verdict for plaintiff for $200 and interest, only. The motion was denied, and the case submitted to the jury, which returned a verdict for plaintiffs for the full amount claimed. Defendant moved that notwithstanding the verdict, plaintiffs have judgment for $200 and interest and costs, and no more, which motion was denied. This appeal is from the judgment entered on the verdict.

The assignments of error present a single question for our determination. Was there sufficient evidence to justify the submission of this case to the jury, or should the court have directed a verdict, on defendant's motion, for the sum of $200 only? In the condition of the pleadings, plaintiffs made a *prima facie* case by proof of the contract of insurance, and the fact that the insured died

from the effect of the gunshot wound. The presumption of the law is that the wound was accidentally, and not illegally, inflicted. *Lampkin* v. *Ins. Co.* (Colo. App.) 52 Pac. 1040; *Jones* v. *Accident Ass'n* (Iowa) 61 N. W. 485; *Accident Ins. Co.* v. *Bennett* (Tenn. Sup.) 16 S. W. 723, 25 Am. St. Rep. 685; *Travelers' Ins. Co.* v. *McConkey,* 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308; *Peck* v. *Accident Ass'n* (Sup.) 5 N. Y. Supp. 215; 1 Cyc. 289. The burden was then upon the defendant to show that its liability was avoided because the injury resulting in the death of the assured was intentionally inflicted by another person, as alleged in its answer. *Lampkin* v. *Ins. Co.,* 52 Pac. 1040, 11 Colo. App. 249; *Travelers' Ins. Co.* v. *Wyness* (Ga.) 34 S. E. 113; *Coburn* v. *Ins. Co.,* 145 Mass. 226, 13 N. E. 604; *Guldenkirch* v. *Accident Ass'n* (City Ct. N. Y.) 5 N. Y. Supp. 428; *Home Benefit Ass'n* v. *Sargent,* 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160; *Jones* v. *Accident Ass'n* (Iowa) 61 N. W. 485; *Goldschmidt* v. *Ins. Co.,* 102 N. Y. 486, 7 N. E. 408; *Cronkhite* v. *Ins. Co.,* 75 Wis. 116, 43 N. W. 731, 17 Am. St. Rep. 184; 1 Cyc. 290, and cases cited.

The clause in the policy sued upon excusing defendant from full liability in case death resulted from injuries intentionally inflicted is inserted by way of proviso. The rule of pleading is that stipulations added to the principal contract, which are intended to avoid the defendant's promise by way of defeasance or excuse, must be pleaded in defense; and, where the defendant intends to rest its defense upon a fact which is not included in the allegations necessary to the support of the plaintiff's case, it must set it out in precise terms in the answer. *Coburn* v. *Ins. Co.,* 145 Mass. 226, 13 N. E. 604.

Plaintiff's complaint stated a cause of action without averments negativing the proviso upon which defendant relies to escape liability, and, as said by the Massachusetts court, "In the case at bar the policy is general, and insures against death or injury by external, violent, and accidental means. It is made subject to certain agreements and conditions annexed thereto. The occurrence of these conditions is to operate to defeat the policy, and this should be shown by the party relying upon them." Defendant has followed this rule of pleading, and expressly alleged in its answer that the death of Mr. Stevens was produced through the intentional act of another, and it has therefore imposed upon itself the burden of proving the substantive fact which it was required to, and did, aver

in its pleading. *Freeman* v. *Ins. Co.*, 144 Mass. 572, 12 N. E. 372; *Guldenkirch* v. *Accident Ass'n* (City Ct. N. Y.) 5 N. Y. Supp. 428; *Slocovich* v. *Ins. Co.*, 108 N. Y. 56, 14 N. E. 802; *Anthony* v. *Accident Ass'n*, 162 Mass. 354, 38 N. E. 973, 26 L. R. A. 406, 44 Am. St. Rep. 367; 2 Enc. of Evidence, 794. With the burden of proof upon the defendant to show that the insured died from injury intentionally inflicted, ought the judge to have instructed the jury that the burden was sustained, as a matter of law? "It is not often, where a party has the burden of proving a fact by the testimony of witnesses, that the jury can be required by the court to say that the fact is proved. They may disbelieve the witnesses. If the conclusion is to be reached by drawing inferences of fact from other facts agreed, ordinarily the jury alone can draw these inferences. It is only when no inferences are possible, except those which lead to one conclusion, that the jury can be required to find a proposition affirmatively established." *Anthony* v. *Accident Ass'n*, 162 Mass. 354, 38 N. E. 973, 26 L. R. A. 406, 44 Am. St. Rep. 367. That the person who shot the insured in this case intended to do so must not only be an inference arising from the facts proven, but any other inference must be excluded by the proofs. The city court of Brooklyn had before it for consideration this same question, under facts and pleadings closely analogous. Concerning it, they said: "If a man does an injury, it does not follow as a matter of law that such injury is intentional; and, in civil and criminal cases, intention is a question of fact, to be inferred from the act itself and surrounding circumstances. In this case, where the burden of proof was on the defendant, it would not have been right for the court to draw inferences from the testimony as to what took place in the hall when Guldenkirch was shot. The question was one peculiarly within the province of the jury, whose duty it is to weigh testimony and draw conclusions therefrom." *Guldenkirch* v. *Accident Ass'n* (City Ct. N. Y.) 5 N. Y. Supp. 428. The proofs in the case at bar are consistent with the theory that the shooting of Brakeman Stevens was the intentional act of a third person, but they are not inconsistent with a nonintentional injury. A question, therefore, was presented for the jury's consideration; and the court, under the rules above stated, could not say, as a matter of law, that the injury was intentionally inflicted. The witness Poindexter heard some one on the top of the mail car, heard Stevens' hello, "Get off from there," and heard a shot fired in

front of the engine. From the form of narrative, it would appear that the person on top of the car, toward whom Stevens directed his remark, was still on the car when the shot in front of the engine was fired. This shot, it is fair to presume, was fired by some one for some unexplained purpose—possibly to frighten the person on top of the mail car. There is no evidence whether the person on the mail car got down onto the ground before the shooting of Stevens, or that it was this person who shot the second time. Whether it was a tramp, a trainman, or a passenger, who "stopped, wheeled around and kind of stepped forward" before the shot was fired, the proofs do not disclose; nor do they disclose that it was the person whose actions are thus described who fired the shot. No reason or necessity for the shooting is known. If it was intentionally done, what was the motive? It may have been an accidental shot. It, like the first one, may have been fired to frighten some one, and without intention to injure. Were both shots fired by the same person? At the time the last shot was fired, where was Stevens standing with reference to the shooter, and what was his attitude? Who else was present? Did the shooter have any reason for protecting himself against an impending assault, either from Stevens or from any other member of the train crew? Had he any grievance against any person standing near Stevens? Did this shooting take place after dark or in the daytime? The court could not presume that, because Brakeman Stevens ordered some one to "get off from there," that person intentionally shot Stevens. Neither can it be said that because Stevens was walking along the side of a train on which was supposed to be a tramp or tramps, a tramp shot him. The proof is devoid of circumstances tending to show an intentional shooting, unless it is to be inferred from the fact of shooting alone. The fact that there is no evidence in this case as to who did the shooting, or of any motive in the party to especially single out Brakeman Stevens for a target; that Stevens was not in the act of making any hostile demonstration toward the individual who fired the shot, and there is no evidence of any language or conduct on his part having a natural tendency to provoke an assault or excite a spirit of anger or revenge; and that the circumstances are reconcilable with an accidental shooting—we think, brings the case fairly within the principle upon which the following cases turned: *Association* v. *Drummond* (Neb.) 76 N. W. 562; *Richards* v. *Travelers' Ins. Co.* (Cal.) 26 Pac. 762, 23

Am. St. Rep. 455; *Utter* v. *Ins. Co.* (Mich.) 32 N. W. 812, 8 Am. St. Rep. 913; *Keene* v. *Accident Ass'n,* 161 Mass. 149, 36 N. E. 891. That the injury was intentionally inflicted will not be presumed from the mere proof of the shooting. See Lawson's Presumptive Evidence, 331; *People* v. *Plath,* 100 N. Y. 590, 3 N. E. 790, 53 Am. Rep. 236; *People* v. *Landman* (Cal.) 37 Pac. 518; *State* v. *Debolt* (Iowa) 73 N. W. 500; *Patterson* v. *State,* (Ga.) 11 S. E. 620, 21 Am. St. Rep. 152. In this last case it is said: "The particular intent charged must be proved to the satisfaction of the jury, and no intent of law, or mere legal presumption differing from the intent in fact, can be allowed to supply the place of the latter."

It is urged in this case that the proofs of death which were offered in evidence by defendant established the fact *prima facie* that the insured was injured by the act of a negro whom he had ejected from the train. Appellant relies largely upon the evidential value of these preliminary proofs as establishing an intentional shooting. They were made by the guardian of the plaintiffs entirely upon hearsay. The statements were made to convey to the indemnitors the information that an event had happened which entitled the beneficiaries, under the insurance contract, to indemnity, because the insured had lost his life through external, violent, and accidental causes. Their purpose was effected, both as to the insurer and the insured, when the company was advised of the fact of the accident, and the circumstances surrounding it. Recitals in preliminary proofs of death, based upon hearsay, and conveying mere conclusions, which, in their nature, must have been, and were understood as, based upon hearsay, so far as the party making them was concerned, cannot ordinarily be considered as admissions or estoppels, so as to prevent a showing of the true facts upon the trial. *Home Benefit Ass'n* v. *Sargent,* 142 U. S. 691, 12 Sup. Ct. 332, 36 L. Ed. 1160; *Ins. Co.* v. *Schmidt,* 40 Ohio St. 112; *Bentz* v. *Ass'n,* 40 Minn. 202, 41 N. W. 1037, 2 L. R. A. 784; 2 Bacon's Ben. Soc., section 472. But here the recital in the proof of death that deceased was shot by a negro whom he had ejected from the train is not *prima facie* evidence, or any evidence at all, in favor of the defendant company, that the insured was shot by a negro, or that he had ejected a negro from the train and was shot by him; and it could not be relied upon by defendant as proof of such matters even in the absence of any evidence from the plaintiff tending to contradict the statement. Such statements are received to

prove matters therein recited, upon the theory that they are in the nature of admissions against one's interest. 2 Bacon, Ben. Soc. section 471, and cases cited.

A guardian cannot make admissions against the interests of his wards. This action is being prosecuted by and in the name of the minor children of the deceased, and they are represented in the action by a guardian to protect their interests, and not to make admissions against their interests, whereby their interests may be jeopardized. If the insured did not in fact eject a negro from the train, and was not in fact shot by the negro so ejected; the guardian of the minors (beneficiaries under the policy) could not make an admission that such were the facts, and bind his wards by an admission contrary to the truth; while, on the other hand, if their parent was shot by a negro he had ejected from the train, this was a link in the chain of circumstantial evidence tending to show an intentional injury, which defendant assumed the burden of proving by competent evidence, and it could not be proven by an admission of the guardian, based alone on hearsay, made in another proceeding, and without consideration of the possible issues here presented. In *Wright* v. *Miller,* 7 N. Y. Ch. 256, 262, the court said: "The answer of an infant, by his guardian, is in truth the answer of the guardian and not of the infant; hence the infant is not bound by his answer, it cannot be read against him, and no decree can be made on the admission of facts which it contained. Where there are infant defendants, and it is necessary, in order to entitle the complainant to the relief he prays, that certain facts should be before the court, such facts, although they might be the subject of admission on the part of the adults, must be proved against the infants." *Seaton* v. *Tohill* (Colo. App.) 53 Pac. 170; *Phillips* v. *Dusenberry,* 8 Hun. 348; *Sherman* v. *Wright,* 49 N. Y. 227. In *Laidley* v. *Kline,* 8 W. Va. 218, it is said that infants are deemed and taken to be incapable of making contracts or admissions in civil transactions, ordinarily, that are binding upon them. In *Seaton* v. *Tohill* (Colo. App.) 53 Pac. 170, it is said: "The rule is well settled that an infant cannot be bound by the admissions of his guardian, unless they are for his benefit, nor by his errors or omissions in his answer and pleadings. The court will suffer no advantage to be taken of those acting in the infant's behalf, to the detriment of the infant." *Lloyd* v. *Kirkwood,* 112 Ill. 338; *Hutchinson* v. *McLaughlin* (Colo. Sup.) 25 Pac. 317, 11 L. R. A. 287;

Daingerfield v. *Smith,* 83 Va. 91, 1 S. E. 599; *Rarick* v. *Vandevier* (Colo. App.) 52 Pac. 743; *Cooper* v. *Mayhew,* 40 Mich. 529; 1 Enc. of Evidence, 460, 568, and note; 1 Am. & Eng. Enc. L. 678, and cases cited.

Upon the entire evidence, we think the case was properly submitted to the jury. The judgment appealed from is affirmed. All concur.

(97 N. W. Rep. 862.)

THE STATE OF NORTH DAKOTA EX REL. ADAMS *v.* C. E. LARSON, SHERIFF OF LAMOURE COUNTY.

Opinion filed December 3, 1903.

The Words "Not Admitted to Bail" Mean that Accused Is Under Commitment for Want of Bail.

1. The words "not admitted to bail," as used in section 8679, Rev. Codes 1899, mean that the accused has not been discharged on bail, but is in custody under commitment because unable or unwilling to furnish the bail required.

Prisoner Not Under Bail Will Not Be Discharged, Under Section 8679, When the Delay Is on His Application.

2. One committed for trial on a criminal charge, not admitted to bail, and not brought to trial at or before the second term of court subsequent to his commitment, will not be released on habeas corpus under section 8679, Rev. Codes 1899, when the delay of trial was upon the application of the prisoner.

When Court Offers to Summon Jury, and Prisoner Declines the Offer, Delay Is Upon His Application.

3. The relator was committed for trial upon a criminal charge, and at the second term of the district court thereafter, interposed a plea of not guilty to the information filed against him, whereupon the presiding judge offered to order and have a jury immediately summoned for the trial of his case, no jury being in attendance at this term. Relator's counsel declined the offer. *Held,* that the delay of his trial over the second term of court after his commitment was upon relator's application, and that he was not entitled to discharge, under section 8679, Rev. Codes 1899.

Application by the state on the relation of William W. Adams for writ of habeas corpus to C. E. Larson, sheriff of LaMoure county.

Writ denied.

T. A. Curtis, for petitioner.

The petitioner, not having been tried at or before the second term of court after his commitment for want of bail, should be discharged. *Cummins* v. *People,* 34 Pac. Rep. 734; *re Frederick Bergerow,* 133 Cal. 513, 56 L. R. A. 513.

C. N. Frich, Attorney General, *E. M. Warren,* State's Attorney, and *Nels Larsen,* for the state.

Admission to bail is the order of a competent court or magistrate that the defendant be discharged from actual custody upon an undertaking for his appearance. Rev. Codes, 8443.

Issues of fact in criminal actions must be tried at a regular term of the court in the county in which the case is brought, or to which it has been removed. Rev. Codes, section 7755.

The phrase, "regular term," has reference to a term at which jurors have been summoned. *State ex rel. Baker* v. *Boucher,* 8 N. D. 277, 78 N. W. Rep. 988.

Unless good cause to the contrary is shown, prosecution must be dismissed when a person has been held to answer for a public offense if information is not filed, or indictment found, against him at the next regular term. Rev. Codes, section 8497.

An order refusing to discharge a prisoner because three terms of court have passed without his being tried as provided by section 221, Criminal Code of Kansas, is properly made when the defendant has made no effort to be tried. *In re Edwards,* 35 Kan. 99, 10 Pac. Rep. 539.

Defendant must appear and demand trial. *Gallagher* v. *People,* 88 Ill. 335; *Stewart* v. *State,* 13 Ark. 720; *Watson* v. *People,* 27 Ill. App. 493; *Roebuck* v. *State,* 57 Ga. 154.

The May term was the first term of court at which an indictment could have been found or information filed against the defendant. The May term should be excluded. *Gillespie* v. *People,* 176 Ill. 238; 52 N. E. Rep. 250; *Ochs* v. *People,* 124 Ill. 399, 16 N. E. Rep. 662.

The trial court at the September term having offered to summon a jury for the trial of the defendant's case, which offer was declined, brings the action within the exception found in section 8679, Rev. Codes, in the words "unless the delay shall happen on the application of the prisoner."

COCHRANE, J. Two terms of the district court of LaMoure county have been held since petitioner was bound over to answer on a charge of rape. These terms were held at the times fixed by law for the holding of court in this county, but at neither term was a jury ordered or summoned to attend. An information was filed against the petitioner by the state's attorney at the second term after his commitment. He was arraigned upon this information, and entered a plea of not guilty thereto. He made no demand for a trial at this term. He has been held in jail by the respondent, the sheriff of LaMoure county, since commitment, in default of $5,000 bail fixed by the examining magistrate, and which he was unable to give. After the adjournment of the second term of the district court, following his commitment, he sued out a writ of habeas corpus from the district court, to which respondent made due return. The petition and return in all respects complied with the requirements of sections, 8650, 8656, Rev. Codes 1899. On October 16, 1903, a full hearing was had, both sides being represented by counsel. After such hearing, the writ was discharged, and the petitioner remanded to the custody of the sheriff. The district judge made the following findings, upon which said order was based: "That there has been no regular term of court within and for LaMoure county since the commitment of said Adams. At the May and September terms of said court no jury was drawn and in attendance. At the September term an information was filed against said defendant, whereupon he pleaded 'Not guilty.' The judge of said district court thereupon suggested and offered forthwith to summon a jury for the trial of said cause, which offer was declined by the defendant's counsel, T. A. Curtis. For several years past, it has been customary practice to summon a jury for LaMoure county at the winter terms only, and, since all eligible jurors in said county are farmers, it has been inconvenient and impracticable to secure the attendance of jurors during the farming season." Thereafter a petition for a writ was presented to this court. A written stipulation was entered into by counsel that said matter be heard on the application for the writ, upon the petition therefor, and a stipulation as to the facts shown in the return of the writ in the district court, and that a copy of the order of the district court remanding petitioner and discharging the writ, and of the findings upon which such order was based, should, for the purposes of this application, be considered as a part of the respondent's return and answer to

said petition. The statute upon which relator relies reads as follows: "If any person shall be committed for a criminal or supposed criminal matter and not admitted to bail, and shall not be tried on or before the second term of the court having jurisdiction of the offense, the prisoner shall be set at liberty by the court, unless the delay shall happen on the application of the prisoner; if such court at the second term shall be satisfied that due exertions have been made to procure the evidence for and on behalf of the state, and that there are reasonable grounds to believe that such evidence may be procured at the third term, it shall have power to continue such case till the third term. If any such prisoner shall have been admitted to bail for a crime other than a capital offense, the court may continue the trial of said cause to a third term, if it shall appear by oath or affirmation that the witnesses for the state are absent, such witnesses being mentioned by name, and the court shown wherein their testimony is material." Section 8679, Rev. Codes 1899.

It is first suggested that, petitioner's bail having been fixed at $5,000, he is not within the terms of this statute; that only persons who have not been admitted to bail are entitled to invoke the protection of the first clause of the section. The words "not admitted to bail," as used in section 8679, Rev. Codes 1899, mean that the accused has not been discharged on bail, but is in custody under commitment because unable or unwilling to furnish the bail required. Admission to bail is defined as the "order of a competent court or magistrate that the defendant be discharged from actual custody upon an undertaking with sufficient sureties for his appearance." Section 8443, Rev. Codes 1899. The order of discharge cannot be made until the bail has been furnished and accepted. This is the sense in which the expression is used in the statute. Sections 8444, 8450, 7966, 7968, Rev. Codes 1899. This is the sense in which the words are understood by the courts of Illinois and Colorado, where they have dealt with a statute of identical phraseology. *Brooks* v. *People,* 88 Ill. 327; *VanBuren* v. *People* (Colo. App.) 42 Pac. 599. Relator was not admitted to bail, within the meaning of this statute.

The relator does not bring himself within the terms of the statute entitling him to a discharge in this proceeding. This statute puts a legislative construction upon section 13 of the constitution, by which accused persons are guaranteed a speedy trial. It de-

clares what is a reasonable time within which the prosecuting officers shall bring the accused person to trial. While its object is to secure persons accused against long and oppressive delays in obtaining a trial, it is not its purpose to enable them to escape trial altogether; and persons imprisoned cannot complain when the delay in trial is not due to acts of the court, or of its officers having the prosecution in charge, but is with the consent or upon the application of the accused. See cases cited in note, 56 L. R. A. 513-545. The relator would have been tried at the second term of court after his commitment, had he not declined the offer of the trial judge to forthwith order summoned a jury for the trial of his case. This was a waiver by petitioner of his right to a trial at such term, and was, in effect, a delay upon his application, within the meaning of the statute. *Healey* v. *People* (Ill.) 52 N. E. 426; *People* v. *Matson* (Ill.) 22 N. E. 456; *People* v. *Cline,* 74 Cal. 575, 16 Pac. 391; *People* v. *Benc* (Cal.) 62 Pac. 404; *Steward* v. *State,* 13 Ark. 720; *Ex parte* Walton, 2 Whart. 501.

The writ prayed for is denied. All concur.

(97 N. W. Rep. 537.)

THE CHAFFEE-MILLER LAND COMPANY *v.* EDWARD W. BARBER AND LOTTIE E. BARBER.

Opinion filed December 16, 1903.

Under Section 5630, Refusal to Find Upon All Issues, Not Error—Remedy Is Trial De Novo.

1. In action tried by the court, without a jury, under section 5630, Rev. Codes 1899, the refusal or failure of the trial court to make findings upon all of the issues does not constitute ground for granting a new trial or reversing the judgment. The remedy of a party aggrieved by such refusal or failure is an appeal from the judgment, and a trial *de novo* upon the evidence in this court.

Finding Title in Plaintiff, and Not in Defendant, Supports Judgment Confirming Plaintiff's Title.

2. In an action to determine adverse claims to real estate, findings that the plaintiff is the owner and entitled to possession, and that defendant has no claim or right of possession, are findings of the ultimate facts in issue, and support a judgment confirming plaintiff's title, and awarding him possession.

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

Action by the Chaffee-Miller Land Company against Edward W. Barber and another. Judgment for plaintiff. Defendant Edward W. Barber appeals.

Affirmed.

H. F. Miller and *Morrill & Engerud,* for appellant.

A judgment entered without findings disposing of all material issues of fact, is erroneous. *Loto* v. *Irvine,* 60 Cal. 436; *People* v. *Forbes,* 51 Cal. 628; *Phipps* v. *Harlow,* 53 Cal. 87; *Shaw* v. *Wanderforde,* 53 Cal. 300; *Taylor* v. *Reynolds,* 53 Cal. 686; *Cassidy* v. *Cassidy,* 63 Cal. 352; *Campbell* v. *Buckman,* 49 Cal. 362; *Byrnes* v. *Claffey,* 54 Cal. 155; *Everson* v. *Mayhew,* 57 Cal. 144.

The findings do not dispose of the allegations putting in issue plaintiff's title and asserting title in defendant, and are therefore insufficient. *Watson* v. *Cornell et al,* 52 Cal. 91; *Ball* v. *Kehl,* 30 Pac. Rep. 780.

Under our statute, an action in forcible entry and detainer may be converted into one to try title. A title once put in issue and tried, in a court having jurisdiction of the controversy, the judgment is as conclusive as any other. It follows that a judgment of a competent court, having jurisdiction of parties and subject matter, is conclusive of all questions that could and ought to have been litigated in the former action. *Cromwell* v. *County of Sac.,* 94 U. S. 351, 24 L. Ed. 195; *The City of Aurora* v. *West,* 7 Wall. 82, 19 L. Ed. 42; *Caperton* v. *Schmidt,* 26 Cal. 479; *Miles* v. *Caldwell,* 2 Wall. 35, 17 L. Ed. 755; 3 Smith's Leading Cases (9th Ed.) 2094; *South Minn. Ry. Co.* v. *St. Paul, etc., Ry.,* 55 Fed. 696; *David Bradley Plow Co.* v. *Eagle Mfg. Co.,* 57 Fed. 989.

The action in which the judgment was rendered that is here pleaded in bar, originated in a justice court, as one for unlawful detainer. It came to the district court not by appeal, but was certified thereto, under section 6671, Rev. Codes. It was thus changed from one concerning possession to one concerning title, and was in effect an action of ejectment. *Ferguson* v. *Kumler,* 25 Minn. 183.

Changing an action of unlawful detainer to a suit to try title, is a practice prevalent in Arkansas, Maine, Massachusetts, Utah, Alabama and Indiana.

The judgment in the former action was a bar to a recovery of possession of the part as to which plaintiff was defeated in a former action. *Gradley* v. *West,* 68 Mo. 69.

The question is not what was litigated in the earlier proceeding, but, what could or ought to have been litigated in that trial. *Cromwell* v. *County of Sac., supra; City of Aurora* v. *West, supra.*

S. B. Bartlett and *Ball, Watson & Maclay,* for respondents.

Upon an appeal from a judgment, no statement of the case being settled, defendant's proposed findings are no part of the judgment roll, and will not be considered. *Mooney* v. *Donovan,* 9 N. D. 93, 81 N. W. Rep. 50.

The only question before the Court is the sufficiency of the complaint, and whether the judgment is supported by the findings actually made. If they cover the ultimate fact at issue, and are not inconsistent with the judgment, they are sufficient. *Daly* v. *Sorocco et al.,* 22 Pac. Rep. 211; *Smith* v. *Cushing,* 41 Cal. 97.

The finding that plaintiff was the owner, and defendant was not the owner, disposed of every issue in the case, including that of *res adjudicata. Brynjolfson* v. *Thingvalla,* 8 N. D. 106, 77 N. W. Rep. 284.

That the court did not pass upon the issue is not available to the appellant as the point is not saved in the statement of the case, and it does not appear that any evidence was introduced touching it. *Rogers* v. *Duff et al.,* 31 Pac. Rep. 836; *Himmelman* v. *Henry et al.,* 23 Pac. Rep. 1098; *Winslow* v. *Gohransen,* 26 Pac. 504; *Wise et al* v. *Burton et al.,* 14 Pac. Rep. 683; *Heroy* v. *Kerr,* 21 How. Pr. 409, 423; *Williams* v. *Schembri,* 46 N. W. Rep. 403; *Baker* v. *Byerly,* 42 N. W. Rep. 395; *Princeton Mining Co.* v. *First National Bank of Butte et al.,* 19 Pac. Rep. 210; *Spencer* v. *James,* 31 S. W. Rep. 540; *May* v. *Cavender et al.,* 7 S. E. Rep. 489; *Noland* v. *Bull,* 33 Pac. Rep. 983; *Eakin* v. *McCraith,* 3 Pac. Rep. 838; *Gaar, Scott & Co.* v. *Spaulding,* 2 N. D. 414; 51 N. W Rep. 867.

Neither the title nor right of possession were litigated in the detainer action. The lands there mentioned were the cultivated portion of the section only. But if there is any doubt, the former judgment is no bar, as there is no certainty as to the estoppel. *Russell* v. *Place,* 94 U. S. 606, 24 L. Ed. 214.

An estoppel must be to every intent. *Fahey* v. *Esterly Harvesting Machine Co.,* 3 N. D. 220, 55 N. W. Rep. 580. To work an estoppel

the former judgment must itself show that the title was involved and decided, or it must appear by extrinsic evidence. *Auger* v. *Ryan,* 65 N. W. Rep. 640; *Neilson* v. *Pennsylvania Coal & Oil Co., et al,* 80 N. W. Rep. 859; *Morse* v. *Marshall,* 97 Mass. 522; *Hargus* v. *Goodman,* 12 Ind. 629.

The former judgment was in forcible entry and detainer for possession of the land only. The transfer of the action to the district court did not change its nature. In such an action, for possession only, plaintiffs cannot be compelled to litigate their title against their consent. *McNamara* v. *Culver,* 22 Kan. 661: *Williams* v. *Wait,* 49 N. W. Rep. 209 (S. D.); *Shelby* v. *Houston,* 38 Cal. 410; *Dennis* v. *Wood,* 48 Cal. 361; *Brown* v. *Hartshorn,* 69 Pac. Rep. 1049; *McClain* v. *Jones,* 57 Pac. Rep. 500; *Armour* v. *Howe,* 64 Pac. Rep. 42; *McDonald* v. *Stiles,* 54 Pac. Rep. 487.

Under the above decisions from Kansas and Oklahoma, it is a question whether the district court obtained jurisdiction in the detainer suit, and whether the judgment rendered therein was not absolutely void. If the title to the land was involved, then under section 6670, Rev. Codes 1895, the justice had no power to transfer the case to the district court, and should have dismissed it. *Wideman* v. *Taylor,* 65 Pac. Rep. 664; *Babby et al* v. *Musser,* 89 N. W. Rep. 742; *Brown* v. *Hartshorn,* 69 Pac. Rep. 1049.

If by the transfer the detainer action was transmuted into an action of ejectment, the after acquired title could not be adjudicated therein. Such title must be vested at the beginning of the action. *Smith* v. *Colvin,* 17 Barb. 157, and cases cited; *Valentine* v. *Mahoney,* 37 Cal. 389, 396.

A subsequently acquired title cannot be set up by a supplemental complaint. *Sacramento Savings Bank* v. *Hynes,* 50 Cal. 195; *McLane* v. *Bovee et al,* 35 Wis. 27.

The cases holding that a judgment in an action of forcible entry and detainer cannot constitute a bar in an action to try title, are numberless. 30 Century Digest, 1644; *Riverside Co. of Shawneetown, Ill.,* v. *Townsend et al,* 9 N. E. Rep. 65.

YOUNG, C. J. This is an action to determine adverse claims to 640 acres of agricultural land situated in Cass county, and for the possession of eight acres thereof, with the buildings situated thereon, which plaintiff alleges are wrongfully occupied and withheld by the defendants. The complaint is in the form prescribed by section 5907, Rev. Codes, as amended by chapter 5, p. 9, Laws 1901,

and alleges that the plaintiff has an estate in the land, towit, that it is the owner in fee of the entire tract; that the defendants claim certain estates therein adverse to plaintiff, and that defendants are in the wrongful occupancy and possession of a certain eight-acre tract, which is described by metes and bounds, including the house, barn, and other structures situated thereon; and concludes with the statutory prayer for judgment, "that defendants be required to set forth their claims," etc. The defendant Lottie E. Barber made default. Edward W. Barber, the other defendant, served and filed an answer in which he denied plaintiff's ownership of the land; admitted that he is in possession of the eight-acre tract and buildings, and that he claims an estate and interest in the land adverse to the plaintiff; and set forth the source of his alleged title. The answer further alleged by way of estoppel, that the plaintiff's grantor instituted an action of unlawful detainer against him in justice court to recover the possession of the entire tract; that the defendant answered in the case, placing title in issue; that the action was thereupon certified to the district court and tried, and judgment entered against the defendant for the recovery of only a part of the premises, and not including the eight-acre tract and buildings. By order of court the plaintiff filed a reply to the foregoing answer, in which it set forth copies of the complaint, answer, and judgment in the forcible detainer action, and, among other things, alleged that there was no evidence or testimony of any kind whatsoever introduced by either side upon the trial of said action in any wise affecting or bearing upon, or having to do with, the matter of the title of said premises, or any part thereof; that the only issue upon which any evidence whatever was introduced, and the only issue which was tried or determined in said action, was the question of the right of the plaintiff therein to the possession of those portions of said land which were under cultivation; and that the matter of the title to said land, or any part or portion thereof, was not in any manner whatsoever drawn in question or litigated in said action; that the defendant E. W. Barber introduced no evidence or testimony whatsoever upon the trial of said action. The judgment in the forcible detainer action was for "the possession of all those portions * * * under cultivation," and for costs.

Upon the evidence introduced upon the issues thus framed, the trial court found the following facts: (1) That the plaintiff is the owner in fee simple of the entire 640 acres; (2) that the defendant

Edward W. Barber has heretofore claimed some estate or interest in said land adverse to the plaintiff, and that he is now in possession of the eight-acre tract, and unlawfully withholds the occupancy and possession thereof, together with the house, barn, and other structures situated thereon; (3) that the defendant Barber has no claim to, interest in, or lien or incumbrance upon, said land, or any part thereof, or right of possession thereto; (4) that plaintiff is entitled to recover the possession of that portion now occupied by the defendant. As conclusions of law, the court found that the plaintiff is entitled to a decree quieting title in it as against the defendant Barber, and for possession and costs. From the judgment entered in accordance therewith, the defendant appeals.

The case was tried under section 5630, Rev. Codes, but it is not here for review under that section. Error is assigned upon the judgment roll proper. The errors assigned as grounds for reversal are that, "(1) the court erred in refusing to find on the points presented by defendant's proposed findings; (2) the findings of fact do not cover all the facts involved in the issues as presented by the pleadings; (3) the findings of facts are insufficient to support any judgment; (4) the findings of fact, conclusions of law, and judgment are contrary to, and not warranted by the pleadings, in so far as they award the eight acres of uncultivated land, and structures thereon, to the plaintiff, in this: That the pleadings conclusively show that plaintiff is estopped to claim title to, and right to possession of, that part of the land. We are of opinion that none of the assignments of error is well founded. The judgment must therefore be affirmed.

The first and second assignments are based upon the assumption that the alleged refusal and failure of the trial court to make findings of fact upon all of the issues raised by the pleadings in an action tried under section 5630, Rev. Codes 1899, constitutes reversible error. This is a mistake. This section, among other things, expressly provides that, "in actions tried under the provisions of this section, failure of the court to make findings upon all the issues in the case shall not constitute a ground for granting a new trial or reversing the judgment." Findings of fact are not abolished by this section, but it declares that the failure of the court to make findings upon all the issues shall not constitute reversible error. The chief purpose of the practice created by section 5630 is to secure a speedy and final determination of cases. To accomplish

that purpose, a party who is aggrieved because of the failure of the trial court to find upon any issue is deprived of the power of securing a reversal upon appeal or a new trial in the district court, and is compelled to avail himself of the right given by this section to bring up the evidence on his appeal, and have the error corrected in this court, where a new and final judgment may be ordered without the delay incident to a new trial in the district court.

Neither do we agree with appellant's contention that the findings of fact are insufficient to sustain the judgment. The provisions of our statute governing the making and filing of findings of fact (sections 5450-5453, Rev. Codes) are substantially the same as the provisions in the California Code (sections 632-635, Deering's Code of Civil Procedure). This court, in passing upon the sufficiency of findings of fact, has adopted the liberal rule of the California courts. It was held by this court in *Brynjolfson* v. *Thingvalla Township,* 8 N. D. 106, 77 N. W. 284, that a finding "that all the allegations in the complaint are true" was sufficient, although the practice was not commended. See Hayne on New Trial, pp. 723, 724. In this case the trial court found that the plaintiff is the owner in fee simple of the premises; that the defendant has no claim or interest to any portion of it, or right of possession. This disposes of all the issues in favor of plaintiff and against the defendant. The criticism made by counsel for the appellant is that the findings are not sufficiently specific. The issues in this case were ownership and right of possession. Both were found for plaintiff and against defendant. They are findings of the ultimate facts, and therefore sufficient. In *Daly* v. *Sorocco,* 80 Cal. 367, 22 Pac. 211, it was held, in an action to quiet title, that, "where the plaintiff alleges ownership of real estate in an action to quiet title, a finding upon the issue of ownership is a finding of fact, and the evidence going to prove such ownership need not and should not be pleaded or found." In that case the trial court found that the plaintiff was not the owner of the property, and was not entitled to possession. It was contended that the finding that the plaintiff was not the owner of the property was a conclusion, and that the facts showing that he was not the owner, should have been found. The court said: "If so, then the plaintiff's complaint is bad also. It alleged the ownership as a fact, and the finding is as broad and specific as the allegation of the appellant's pleading. But the finding was sufficient. Where a party alleges his ownership of real estate in an action of this kind, a finding that he

was or was not such owner is a finding of a fact, the fact in issue, and the evidence going to prove such ownership need not and should not be pleaded or found. *Payne* v. *Treadwell,* 16 Cal. 247; *Smith* v. *Acker,* 52 Cal. 217; *Frazier* v. *Crowell,* 52 Cal. 399; *Murphy* v. *Bennett,* 68 Cal. 528 (9 Pac. 738)." The same court also held in the case of *Smith* v. *Cushing,* 41 Cal. 97, that "where there are findings of facts the presumption is that the court has found all the facts in issue in favor of the party in whose favor the judgment is rendered, unless the contrary appears from the findings themselves." And further, "Whether there are findings of fact, or not, and, if there are findings, whether they cover all the issues, or not, the appellate court will not disturb the judgment unless the appellant can show that the facts found, or some of them, are inconsistent with the judgment." It is also held that, "when the ultimate fact is found, no finding of probative facts which may tend to establish that the ultimate fact was found against the evidence can overcome the principal finding." *Smith* v. *Acker,* 52 Cal. 217; *Perry* v. *Quackenbush,* 105 Cal. 299, 38 Pac. 740. In the case last cited it was said that "findings of probative facts will not, in general, control, limit, or modify the finding of ultimate fact. The province of the trial court is to find the ultimate facts, and not probative facts. If, from a consideration of the probative facts, this court should determine that they did not justify the finding of the ultimate fact, it would determine that the evidence was insufficient to justify the decision. This, it has been repeatedly held, cannot be done in this mode." See, also, *Gill* v. *Driver,* 90 Cal. 72, 27 Pac. 64; *Pico* v. *Cuyas,* 47 Cal. 174; *Barrante* v. *Garratt,* 50 Cal. 112; *Jones* v. *Clark,* 42 Cal. 180; *Mathews* v. *Kinsell,* 41 Cal. 512; *Downing* v. *Graves,* 55 Cal. 544.

Likewise, the fourth assignment of error furnishes no ground for reversing the judgment, and for reasons already stated. The contention under this assignment is that the pleadings show that the plaintiff is estopped by a former adjudication from asserting title or right of possession in the eight-acre tract. The question as to whether or not the forcible detainer action, when certified to the district court, became one in which title could or should have been litigated, and whether it was in fact in issue in that action, is discussed by counsel for both parties at length. Upon this question we need not express an opinion. The ultimate facts in issue, towit, title and right of possession, were expressly found against the defendant

in favor of the plaintiff. The facts alleged as an estoppel are merely probative facts, and, even if they had been expressly found, as we have seen, they would not have controlled the finding upon the ultimate facts, which are adverse to the claim of an estoppel. The judgment rests upon the findings, and they are sufficient to sustain it. The findings rest upon the evidence. They may or may not be supported by the evidence. The findings are conclusive, if not attacked in the mode prescribed by the statute. Hayne on New Trial & App. section 244. In this state, under our present practice, where a party is aggrieved by findings of fact which sustain the judgment, or by a failure to find upon material issues, his remedy under section 5630, Rev. Codes, is by an appeal from the judgment, and a retrial upon the evidence in this court.

Judgment affirmed. All concur.

(97 N. W. Rep. 850.)

O. A. BRASETH AND LINDORUS PRATT, COPARTNERS AS O. A. BRASETH & CO., *v.* THE STATE BANK OF EDINBURG, N. D., A CORPORATION.

Opinion filed January 7, 1904.

Contract—Action for Breach—Substantial Performance.

1. Before a contractor is entitled to recover on his contract, not fully complied with as to the work done or materials used, on the principle of substantial performance, he must show not only that he endeavored in good faith to comply with the contract, but has complied with it except as to unimportant matters susceptible of remedy without material injury to the other parts of the building. Failure to perform the contract, or omissions or deviations from it, must be through mistake or inadvertence, and not intentional, and not such as to result in giving the owner a building different from the one contracted for in substantial matters. *Anderson* v. *Todd*, 77 N. W. 599, 8 N. D. 158, followed.

Same.

2. Where defects or omissions or deviations from the contract pervade the work on the whole building, the contractor cannot recover on the theory of substantial performance.

Evidence.

3. Evidence examined, and *held* not to warrant a recovery on the contract as substantially performed.

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

Action by O. A. Braseth and Lindorus Pratt against the State Bank of Edinburg, N. D. Judgment for defendant, and plaintiffs appeal.

Affirmed.

B. G. Skulason, for appellants.

H. A. Libby, for respondent.

MORGAN, J. This is an action to foreclose a mechanic's lien filed by the plaintiffs against defendant's bank building in Edinburg, N. D. The plaintiffs erected the bank building under a contract embodying in it the plans and specifications. The amount claimed to be due on the contract price, $2,918, is the sum of $1,097.95. Extra work was done on the foundation and building in the sum of $221.69, which has also been paid for. The answer alleges that the contract was not performed in substantial compliance therewith, that it was deviated from intentionally, and that the building was erected in such an improper and defective manner and with such inferior materials that such defects cannot be remedied without material injury to the building in other ways. The defendant also pleads a counterclaim for damages on account of such defects in the building in the sum of $1,200. The trial court dismissed plaintiff's action, disallowed the counterclaim, and gave defendant its costs and disbursements. The appeal is from such judgment. Plaintiffs request a review of the entire case, under section 5630, Rev. Codes 1899.

Defects in the construction of the building are not denied by plaintiffs. There is no claim made by them that the contract was performed in all respects strictly according to its terms. They do claim, however, that the contract was substantially complied with, and that the deviations from the plans and specifications were unintentional, excusable, and capable of remedy, and that by allowing defendant damages for making some changes to make the building strictly conform to the plans the contract will be substantially performed, and defendant receive a building in every way as substantial as though the contract had been performed according to its letter. The defendant has pleaded many particulars in which the building does not conform to the specifications. In all, twelve variations are the subject of discussion in the arguments and are covered by the testimony. Some of these—in fact most

of them—will not be more than mentioned, as one of them will be decisive of the case in its present form. The contract provided that the plaintiff should have the use of the brick that were on the lot, out of which the former bank building on the lot had been built. The former building was burned, and these brick had gone through the fire. The contract provision as to this is: "The contractor receives all salvage of the burned building and may work in as much of the old brick as will be consistent with the brick work specifications of the original building. All the outer brick walls must be taken down and rebuilt," etc. The specifications for the former building provided that: "Brick work shall start from bottom of first floor joists as shown per section and shall be laid of well-burned, sound brick, laid in lime mortar having trowel-struck joints. * * * The best brick to be selected for all face work." It is admitted that the side walls are not trowel-struck, and it is a matter of conflicting testimony as to the extent of the use of "brick bats" in the outer and inner layers of the side walls. The plaintiffs attempt to justify the failure to trowel-strike the brickwork of the side walls in view of the following facts: The fire which destroyed the former bank building also destroyed the buildings adjacent thereto on each side. When the contract was entered into in this case, it was not known to the parties that these adjacent buildings were to be rebuilt. Subsequent to letting this contract, and before the brickwork on the bank building had been begun, these adjacent buildings were put up. They were frame buildings, and were speedily erected. The space between this bank building and the adjacent buildings was small. The space was not accurately measured, but the evidence shows that "it was four or five inches." On the part of the plaintiffs it is claimed that it is impossible to trowel-strike brickwork in so small a space. The defendant claims that it is easily done. The excuse urged by plaintiffs is that it could not be done, and therefore was not done. There is very convincing testimony that the walls could have been finished according to the specifications in this regard, without extra care in any great degree. An expert witness for the plaintiffs testified as follows on cross-examination: "Don't you think it is possible and quite easily done, to trowel-strike these brick, layer by layer? A. Not in a place like that. Q. Couldn't it be done? A. Why, not hardly, I don't believe. I am going to try it the first chance I get. Q. And can't you reach

down there and trowel-strike that without seeing it. A. Not very well. You have got to see it to know that you are hitting the joint. Q. I am not asking you as to how well you could do it. I am asking you if you could do it. A. Yes, sir. You could strike it." A witness for the defendant, testifying as an expert, said: "It could have been struck course by course, as they were laid up, very easily. Q. How close, or in how narrow a space, can you make a struck joint, with your trowel, by taking the work layer by layer? A.. Anywhere from one inch to two." This witness was thoroughly cross-examined on this subject, and his testimony remained unshaken that trowel-struck work could have been done on the side walls without much difficulty. The testimony of this witness is corroborated by that of two others. The court found that this brickwork could have been trowel-struck "by exercising a great degree of patience and taking much more time." We will dismiss this phase of the case by saying that the evidence convinces us that this work could have been done according to the contract, and that the failure to do so was intentional and inexcusable.

The evidence is undisputed that the appearance of the building is injured by the failure to finish these walls properly, and is conflicting as to whether it affects the durability of the wall or its use so far as keeping out wind, rain, or snow, and in resisting fire is concerned. It is claimed that, so far as appearances are concerned, it is immaterial, as the adjacent buildings conceal the defects from casual observation. In considering whether the walls are affected so far as durability and usefulness or protection from the elements is concerned, the evidence as to the character of the brick used therein and the manner of laying them must be considered with the evidence as to failure to trowel-strike the work. The witnesses all agree that brick bats were used to some extent in the outer walls, and that the walls had holes in them. Some say many and some say few. Owing to the adjacent buildings preventing, the examination was impossible except from the tops of the adjacent buildings, and then it could only be made at most about two feet below the roofs of the adjacent buildings. But it is amply proven by a convincing preponderance of the evidence that the holes in the wall were quite numerous so far as the examination extended. We see no reason for holding that an examination of the whole walls would show an absence of holes in the unexamined part.

The failure to properly finish was intentional, and done for a purpose, and the purpose undoubtedly existed and was carried out as to the whole wall. It needs no evidence to convince any one that a wall with numerous holes in it is not substantially built, or that it is inadequate for the purposes for which built. One of the plaintiffs (Mr. Braseth) testifies that there were some holes in the walls, but a few only of much depth. He also testifies that some brick bats were used in the outer walls. Not one witness claims that there were no holes in the side walls. There is no conflict on this point. The conflict in the evidence relates to the question as to the number, and whether their presence is detrimental or affects the durability or the usefulness of the wall as protection. The evidence shows that the side walls, so far as they could be examined, contained many holes extending well into the wall. These were caused by the falling out of the mortar, caused by the improper setting of the brick in the mortar, and the failure to trowel-strike the mortar between the brick. Trowel-striking is described as drawing the trowel over the mortar after the brick is placed therein, resulting in cutting it off and smoothing and spreading it, so that the holes are closed up. The use of brick bats of all sizes in the side walls was general. Practically all the brick bats from the burned building were utilized. On reading the whole evidence, the conclusion is forced upon us that they were used to such an extent that the walls are not such walls in strength, durability, or protection purposes as they would have been if the specifications had been complied with. The contract limited the use of broken pieces of brick so that their use must be consistent with building a good wall. This provision was violated. It is claimed that the use of brick bats in the walls to a greater extent than permitted by the contract is not pleaded. The contract specified what kind of bricks should be used. The answer alleges that the plaintiffs used an inferior quality of brick in the walls. The evidence was received without objection.

It is claimed that the wall was not laid according to specifications by reason of the fact that the brick in the outside walls were not properly laid; that they were not laid evenly; that they were not in line; that the wall was, in consequence, wavy. The testimony is uncontradicted that the wall was not laid true to a line. The variation is given variously by different witnesses, the greatest variation being one inch. One witness testifies that the appearance of the

wall indicated that the brick was laid in a haphazard way, and are irregular so far as being in a line is concerned. Another describes them as "roughly laid, crooked to some extent, and not laid straight or to a line." Taking into consideration the holes in the outer walls, the lack of trowel-finishing work, the use of brick bats in the inner and outer tiers of the walls, the evidence convinces us that the walls up to the roofs of the adjacent buildings were not built in substantial compliance with the contract and specifications, and, in consequence thereof, the wall is not as good a wall in appearance, strength, or use as if built in accordance therewith. It cannot be made to accord with the specifications except by tearing it down and rebuilding. Hence the defect cannot be remedied as a matter of fact or as a matter of law. The trial court made this finding in respect to these walls: "By said contract it was stipulated and agreed that plaintiffs should have and own as their property all the debris left on said premises and resulting from the destruction of the former bank building, and that they had the right to use all of said debris which might be suitable and fit to go into a building in the construction of said building; that in making use of that portion of such debris known as 'brick bats,' the plaintiffs had a right to make use of all such in size down to half bricks only, but that as a matter of fact the plaintiffs used all of the old brick bats in the construction of the brick walls and rear end of said building, using brick bats in size three inches square; and that in the construction of said walls of the new building the plaintiffs used all of this class of material left over from the old building except the mortar; that the side walls and rear end of said building were not erected to the line; that the surface of the walls is very uneven, the brick being laid crooked, and large quantities of brick bats smaller in size than halves used in the construction of the side walls and rear end, and that the walls themselves are crooked and wavy, being out of plumb from one-quarter to one inch; the outside surface of the side walls was never trowel-struck finished, but that the mortar was thrown on to the brick and the brick set therein, * * * and the mortar pressed out and left hanging upon the outer surface of said walls; that said side walls for about fourteen feet down are full of holes." The evidence is conflicting as to whether the walls are good walls, so far as durability and use are concerned. The conflict is sharp and irreconcilable. The reasons given to support the conclusions of defendant's wit-

nesses seem to us much more cogent. The plaintiffs' witnesses were on the defensive to some degree during the cross-examinations. One witness makes this admission: "Of course, it (the wall) would not be as good as if it was filled, but I don't imagine that the heat could go through or harm the wall." We think it amply shown that these walls were not as good, in point of substance, as though they had been laid in strict accordance with the specifications. Hence the contract was not substantially performed. If not substantially performed, evidence that the building is a good one and as suitable for the purposes for which constructed is inadmissible. Such evidence is admissible only in cases of minor, unimportant matters susceptible of remedy. *Anderson* v. *Todd*, 77 N. W. 599, 8 N. D. 158. In that case the principle was established in this state that the contract can be relied on as a basis for recovery only in cases "where it appears that he (the contractor) has endeavored to perform it in good faith and according to its terms, and has done so, except as to unimportant omissions or deviations, which are the result of inadvertence, and were not intentional, and which are susceptible of remedy, so that the other party will get substantially the building he has contracted for. * * * But the doctrine does not go to the extent of compelling a person to pay the contract price for a building differing in important particulars from that for which he has contracted. The defendant had a right to use his own judgment as to the kind of materials to be used in this structure, and his own taste to fix the style of its architecture. All the details were set out fully in the written specifications and contract. The contract governs their rights. Upon its performance the defendant had agreed to pay the contract price, and by a performance of its obligations, as a condition precedent, the plaintiffs are enabled to compel payment of the contract price and in that way only." The same rule is also well stated in volume 20, Am. & Eng. Enc. of Law (2d Ed.) p. 367, as follows: "Substantial performance permits only such omissions or deviations from the contract as are inadvertent and unintentional, are not due to bad faith, do not impair the structure as a whole, are remediable without doing material damage to other parts of the building in tearing down and reconstructing, and may without injustice be paid for by deductions from the contract price."

There are other defects complained of, which we will notice briefly, although we might, with propriety, rest the decision here.

The contract provided for finishing the front walls in what is known as "beaded finish." Such work is made by the use of a special instrument used for that purpose. It is considered superior and more artistic as a finish than trowel-struck work. It is admitted that no beaded work was done on the building. It is shown that, so far as the strength, durability, and utility of the wall is concerned, beaded work adds nothing to the value of the building. It affects the appearance only, and gives the front a better appearance. The only way that the beaded finish could now be given to the front would be to dig out the mortar and replace it by the beaded finish. The cost of this change would be from $50 to $60. Had it been done when the front was built, it would have cost but a trifle more in money or labor. It is a question of serious conflict whether the change could now be made without detriment to the wall as a protection from the elements. The specifications call for the use of "second common surfaced boards" for the second floor. It is admitted that No. 3 flooring was used. The cost of the kind used was less than what was called for by the specifications. To remedy the deviation would require a tearing up of the floor. The roof leaked in several places soon after it was placed on the building. A conflict exists as to whether the roof put on was such as was contracted to be used. The trial court found a deviation from the specifications in this respect, which could be remedied by an outlay of $100. We adopt this finding as sustained by the evidence, without any discussion of the evidence, except as to the cost of replacing, which is not required to be passed on by us in view of what has been hitherto said on the failure by plaintiffs to substantially comply with the contract. An iron ladder was specified to be built from rear stair steps between the rear windows, so as not to interfere with the opening of iron shutters. This was improperly done, in consequence of which the iron shutters struck against it, removing brick and injuring the shutters. This could be easily remedied. The window sills were not constructed according to plans and specifications. Split brick were used to finish out the front wall towards the top, contrary to the contract. The door and window frames were not made with No. 1 selected lumber, but of some inferior grade; the lumber used on the outside of the door frames being wet, green, and not seasoned. The difference of cost between what was used and what should have been used was about $2 per thousand. The plaintiffs do not deny that this deviation

from the specifications was made. They claim that the deficiency should be recompensed by allowing a deduction. There are other admitted deviations from the specifications in matters susceptible of easy remedy, without much expense, and others claimed to exist concerning which the evidence conflicts, and found not to exist by the trial court. We have specified these several deviations, mostly admitted, for the purpose of showing a basis for the application of another legal principle.

From the statement of deviations last mentioned, and outside of the construction of the walls improperly, to the extent that recovery under the contract is not permissible, it is apparent that poor work pervaded the entire building. Noncompliance with the specifications was general, and compliance a rare exception. To hold that these deviations and omissions were not intentional would be a perverse disregard of the probative force of admitted facts. In some instances protests were made as to the class of work done and materials used. It is not an excusable omission to follow the specifications to say that the contractor did not know that they so provided. What is said in *Anderson* v. *Petereit,* 86 Hun. 600, 33 N. Y. Supp. 741, has peculiar application to this case: "The testimony introduced by the defendant showed defects which ran through the whole work. Foundations were of less size than specified, and constructed of inferior material. Timbers in the frame of the building and in the partitions were smaller than called for by the specifications. The chimneys were out of plumb, floors and ceilings out of level, walls uneven, and corners not square. Doors, windows, and blinds were defective and of poor material, and generally defective work was the rule, and not compliance with the contract. And in one important particular the plans and specifications were departed from to such an extent as to preclude the conclusion of performance." In *Glacius* v. *Black,* 50 N. Y. 145, 10 Am. Rep. 449, it was expressed: "On the other hand, if these defects and omissions are so numerous and pervading as to show that the whole job was done in a slovenly and improper manner, not conforming substantially with the plans and specifications, and there has been no waiver, there is no rule of law or morality which entitles the claimant to compensation." See, also, *Wollreich* v. *Fettretch* (Sup.) 4 N. Y. Supp. 326. The conclusion is plain from the whole evidence that the building as completed was not such as was contracted for. Two of plaintiff's expert witnesses

are forced to admit that the building was not in compliance with the specifications, and would not have been unconditionally accepted by them. An attempt is made to distinguish the facts of *Anderson* v. *Todd, supra,* from this case, but we think the principles laid down in that case control this, although the facts are not identical. That the counterclaim should have been allowed is not urged in this court. It was not seriously urged at the trial.

The judgment will therefore be affirmed. All concur.

(98 N. W. Rep. 79.)

STATE OF NORTH DAKOTA *v.* WILLIAM H. HOWSER AND LIZZIE ANTHONY.

Opinion filed February 15, 1904.

Criminal Law—New Trial—Appeal.

1. An order granting a new trial in a criminal case for insufficiency of the evidence to sustain the verdict rests in the sound legal discretion of the trial court, and will not be disturbed on appeal, save in a clear case of abuse.

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

William H. Howser and Lizzie Anthony were convicted of a conspiracy. From an order granting a new trial, the state appeals. Affirmed.

George D. Kelly, State's Attorney, and *C. N. Frich,* Attorney General, for the state.

Townsend & Denoyer, for respondents.

COCHRANE, J. Defendants were convicted of a criminal conspiracy. They moved for a new trial. It was granted, and the state appeals from the order granting a new trial. It is claimed that the verdict is sustained by the evidence, and that the court abused its discretion in setting it aside as against the evidence.

The rule in civil cases in this state is that an order granting a new trial for insufficiency of the evidence will not be disturbed unless there was an abuse of discretion in making it, and the reviewing court will consider and weigh the evidence only so far as may be necessary to determine the question whether the trial court acted within its discretion. *Pengilly* v. *Machine Co.,* 11 N. D. 249, 91 N. W. 63; *Dinnie* v. *Johnson,* 8 N. D. 153, 77 N. W. 612; *Gull River*

Lumber Co. v. *Elev. Co.*, 6 N. D. 276, 69 N. W. 691. A less liberal rule should not be applied in criminal trials where human liberty, and sometimes life, is at stake. *People* v. *Chew Wing Gow*, 120 Cal. 298, 52 Pac. 657; *People* v. *Knutte*, 111 Cal. 453, 44 Pac. 166; *People* v. *Tapia*, 131 Cal. 647, 63 Pac. 1001; *State* v. *Webb*, 41 Tex. 67; *Mullins* v. *State*, 37 Tex. 337; *Owens* v. *State*, 35 Tex. 361; Spelling, New Trials, section 239; 14 Enc. Pl. & Pr. 841. The conspiracy charged was to falsely accuse and procure one Frederick A. Grant to be complained of and arrested upon a charge of bastardy, in pursuance of which conspiracy defendants caused Zelda H. Hyde to make complaint and procure the arrest of said Grant upon the charge of being the father of her unborn bastard child. The evidence upon which the state chiefly relied to prove the fact of the conspiracy was that of Zelda Hyde and her mother, Mary Hyde. If there was a conspiracy in fact, these witnesses were parties to it and accomplices. These witnesses admitted upon the stand facts showing themselves guilty of perjury and subornation of perjury, respectively. Their statements upon the stand were contradictory, unreliable, and unsatisfactory. Frederick Grant, also a witness for the state, was contradicted as to relevant matters by six witnesses, who testified to declarations and admissions of his, contrary to the evidence given by him upon the trial. No motive in the defendants was shown for causing a false charge to be made against Grant. The acts proven against them are entirely consistent with their innocence. The trial court cannot be said to have abused its discretion in setting aside a verdict when, as in this case, the facts and circumstances proven can be as reasonably explained upon the hypothesis of defendants' innocence as upon that of their guilt. 1 Spelling, New Trials, section 239; *Bell* v. *State*, 93 Ga. 557, 19 S. E. 244; *Orr* v. *State*, (Ga.) 40 S. E. 697; *Shay* v. *State*, (Ga.) 37 S. E. 884; *State* v. *Goodson* (N. C.) 12 S. E. 329; *State* v. *Nesbit* (Idaho) 43 Pac. 66; *Territory* v. *Rehberg*, 6 Mont. 467, 13 Pac. 132. Nor where the verdict rests in essential particulars upon the uncorroborated evidence of discredited witnesses. *State* v. *Prendible* (Mo.) 65 S. W. 559; *State* v. *Huff* (Mo.) 61 S. W. 900, 908, 1104; *People* v. *Baker*, 39 Cal. 686; *Gibbons* v. *People*, 23 Ill. 518; *People* v. *Lyons*, 51 Mich. 215, 16 N. W. 380; *Owens* v. *State*, 35 Tex. 361.

The order appealed from is affirmed. All concur.

(98 N. W. Rep. 352.)

THE BANK OF PARK RIVER *v.* THE TOWN OF NORTON.

Opinion filed November 30, 1903.

Where Both Parties Ask for a Directed Verdict, Trial by Court and Discharge of Jury Deemed Assented to.

1. In a money demand action testimony was taken before a jury. At the close of the testimony defendant moved for a directed verdict, which was denied. Plaintiff then moved for a directed verdict. The court then asked each attorney, individually, "Do you stand on your motion?" Each responded affirmatively. The court then discharged the jury, and made findings of fact and conclusions of law in favor of plaintiff, without objection by either party. *Held,* that the attorneys will be deemed to have consented to a trial by the court and to the discharge of the jury.

Motion for New Trial Not Entertained, Under Section 5630 Rev. Codes.

2. The defendant's attorney in the case stated moved for a new trial, alleging errors of law as grounds therefor. *Held,* that such motion is not provided for in cases tried under section 5630, Rev. Codes 1899, and that an appeal from such order will not be entertained.

Under Section 5630, Errors of Law Reviewed Only in Connection With the Facts on the Merits.

3. On appeals in cases tried under section 5630, Rev. Codes 1899, errors of law occurring at the trial will not be reviewed for the correction thereof, but only in connection with a review of the facts on the merits.

Appeal from District Court, Walsh county; *Lauder,* J., sitting by request.

Action by Bank of Park River against the town of Norton. Judgment for plaintiff. Defendant appeals.

Dismissed.

E. R. Sinkler, for appellant.

Township order not drawn on the fund out of which it is payable, is void. I Dil. Mun. Corp. 505; *Argenti* v. *City of San Francisco,* 16 Cal. 255; *Martin* v. *City and County of San Francisco,* 16 Cal. 285; *Wilson* v. *City of Aberdeen,* 52 Pac. Rep. 524; *Minor* v. *Legging,* 37 S. W. Rep. 1086, 15 Am. & Eng. Enc. of L. (1st Ed.) 1214; *People ex rel. J. G. Cooke* v. *Lewis Wood,* 71 N. Y. 371; *Baker* v. *City of Seattle,* 27 Pac. Rep. 462; *Hoffleman* v. *Pennington County,* 52 N. W. Rep. 851.

Township warrants are not negotiable so as to protect a bona fide purchaser for value without notice. *Gilman* v. *Township of Gilby*, 8 N. D. 627, 80 N. W. Rep. 889, 73 Am. St. Rep. 791; *Goose River Bank* v. *Willow Lake Township*, 1 N. D. 26, 44 N. W. Rep. 1002, 26 Am. St. Rep. 605, 1 Dil. Mun. Corp., sections 503, 504, 487; *Miner* v. *Vedder*, 33 N. W. Rep. 47; *Hubbell* v. *Town of Custer City*, 87 N. W. Rep. 520; *Story* v. *Murphy*, 9 N. D. 115, 81 N. W. Rep. 23.

It was error to receive evidence over the objection, of what was done at the meeting of the township board. *San Joaquin L. & W. Co.* v. *Beecher*, 35 Pa. 349; *Gould* v. *Norfold Co.*, 57 Am. Dec. 50; *Hunneman* v. *Jamaica Fire Dept.*, 37 Vt. 40.

The mode of contracting constitutes the measure of the power of the officers of a municipal corporation. Rev. Codes, section 2538; 1 Dil. Mun. Corp. 447; *Zottman* v. *The City and County of San Francisco*, 20 Cal. 97; *Crawford* v. *Ice Company*, 60 Pac. Rep. 14.

Township warrants do not draw interest until they have been presented and marked "not paid for lack of funds." Rev. Codes, 2614. *Freeman* v. *City of Huron*, 73 N. W. Rep. 260.

At close of the trial both parties moved for a directed verdict. The court did not direct a verdict for either party. This was error. It would render an appeal impossible, for an appeal from a case tried to the court would be abortive where all the evidence offered is not in the record. The parties did not waive a jury trial and all the concomitants and advantages of such a trial, such a motion for a new trial, and the right to appeal which go with a jury trial. 6 Enc. Pl. & Pr. 704; *Thompson* v. *Brennan*, 80 N. W. Rep. 947.

H. A. Libby, for respondent.

The legislature intended to provide two distinct methods by which road machines might be purchased by townships. First—The township board may of its own accord, without any petition or further authority than is vested by this section, purchase road machines for the use of the township, and such purchase constitutes a good and valid obligation against the township. Rev. Codes, section 1115a. Second—The chairman of the township board upon the petition of the majority of the freeholders of the township, could contract for the purchase of these machines. Rev. Codes, section 1115b. If all the freeholders of the township desired such machines

purchased and the town refused, they could have resort under section 1115b.

Where, at the close of the evidence on a jury trial, both parties ask for the direction of a verdict, it will be presumed that they intend to waive the right of submission to the jury and let the court decide the questions involved, both of law and fact, unless some request is made. 6 Enc. Pl. & Pr. 703; *Haganan* v. *Burr,* 41 N. Y. Super. Ct. 423; *Thompson* v. *Liverpool Steam Co.,* 44 N. Y. 407; *Benjamin* v. *Welsh,* 73 Hun. (N. Y.) 371; *Ropes* v. *Arnold,* 81 Hun. (N. Y.) 476; *Schran* v. *Werner,* 81 Hun. (N. Y.) 561; *Fogarty* v. *Hook,* 84 Hun. (N. Y.) 165; *Farham* v. *Davidson,* 3 Cush. 232; *Kelly* v. *McGhee,* 137 Pa. St. 443; *Potts* v. *Wallace,* 146 U. S. 689, 13 Sup. Ct. Rep. 196.

It was a mere technical error in the court to discharge the defendant instead of directing the jury to find him not guilty. *Noise* v. *Hewitt,* 18 Wend. 141.

Where plaintiff is entitled to directed verdict, it is not a substantial error for the court to order judgment on plaintiff's motion instead of directing a verdict. *Duluth Chamber of Com.* v. *Knowlton,* 44 N. W. Rep. 2; *Engrer* v. *Ohio & M. Ry. Co.,* 42 N. W. Rep. 217.

The court having the power in a proper case to direct a verdict certainly has the power in a more direct manner to reach substantially the same result by finding the facts itself and rendering judgment accordingly. *Gammon* v. *Abrams,* 53 Wis. 323, 10 N. W. Rep. 479; *Cahil* v. *Chicago Ry. Co.,* 74 Fed. Rep. 285; *Erickson et al.* v. *Citizens' Nat. Bank.,* 9 N. D. 81, 81 N. W. Rep. 46.

Defendant's notice of motion and the motion itself are insufficient in that they do not specifically point out the irregularities of the court and jury, or the misconduct of the jury, or the insufficiency of the evidence, or the errors of law occurring at the trial. *Henry* v. *Maher,* 6 N. D. 413, 71 N. W. Rep. 127; *Thompson* v. *Cunningham,* 6 N. D. 426, 71 N. W. Rep. 128.

When party requests the withdrawal from the jury issues properly triable by them, cannot complain of the court's actions in granting his demand. *Stepp* v. *National Loan Ass'n,* 37 S. C. 417.

Where statute provides that, when a jury is waived the cause shall be heard and determined by the court and judgment entered, the court shall render a judgment and not a verdict. *Bearce* v. *Bowker,* 115 Mass. 129.

The effect of the waiver is to submit to the court the question involved and make it the trial of the facts. 12 Enc. Pl. & Pr. 269; *Grigsby* v. *Western Union Telegraph Co.,* 59 N. W. Rep. 743; *Lazare* v. *Allen,* 47 N. Y. 340; *Cling* v. *Irving Nat'l Bank,* 47 N. Y. 528.

Section 2596 Rev. Codes, provides that meetings of township boards "may adjourn from time to time, and in cases of emergency may hold special meetings on call of the clerk on three days' notice." This is not a notice to the public, only notice to the board. *Lewick et al.* v. *Glazier et al.,* 74 N. W. Rep. 717; *Shaw* v. *Jones,* 7 Ohio Dec. 453.

Each supervisor had actual notice of the meeting and all were present and participated therein and acted in making the contract for the purchase of the grader. This is sufficient. *Lord* v. *City of Anoka,* 30 N. W. Rep. 550; *Township of Beaver Creek* v. *Hastings,* 18 N. W. Rep. 250; *States* v. *Borough of Washington,* 2 Am. & Eng. Corp. Cas. 39, 15 Am. & Eng. Enc. of L. (1st Ed.) 1034.

MORGAN, J. The complaint states a cause of action against the defendant, based on a township order issued by it in favor of the Fleming Manufacturing Company for the sum of $100. The answer alleges that defendant is not liable on said order, for the reason that the township board had no authority to issue the same on account of its failure to comply with the statutory requirements made and provided in such cases; that such order was issued in payment of a road grader purchased by said board; and that such order is void by reason of the fact that it was issued without a petition to said board to purchase said grader from a majority of the freeholders of said town. The answer also alleges that said order is void for other specified grounds, based upon a failure to comply with the provisions of section 1115b, Rev. Codes 1899, relating to the purchase of graders by township boards. At the close of taking the testimony defendant moved the court to direct a verdict in its favor. This motion was denied, and an exception taken by defendant to such ruling. Thereupon plaintiff moved for a directed verdict in its favor. The court thereupon asked plaintiff's counsel and defendant's counsel individually if he wished to stand upon his motion. Having received an affirmative response from each, the court discharged the jury without ruling on plaintiff's motion, and without any further remarks or explanations, except that the

case would be taken under advisement. Later the court made findings of fact and conclusions of law in favor of the plaintiff. These findings of fact and conclusions of law were made on January 20, 1902. On March 3d following defendant served notice of intention to move for a new trial, to be based on errors of law occurring at the trial and the insufficiency of the evidence to justify the decision of the court. A statement of the case was settled, and the motion for a new trial made. This motion was based on alleged errors of law occurring at the trial, viz: (1) Errors in receiving evidence duly objected to; (2) refusing to grant defendant's motion for a directed verdict; (3) withdrawing the issues from the consideration of the jury and disposing of the case as a court case; (4) ordering judgment to be entered based on findings of fact in place of submitting the case to the jury for a verdict. The trial court denied the motion for a new trial. Defendant has appealed from the order denying the motion for a new trial.

The errors alleged and relied on for a reversal of the order refer to matters occurring at the trial, and are the same as those enumerated above, as contained in the statement of the case as settled. We are first called on to dispose of a question of practice before considering the merits. Respondent contends that this court cannot entertain the appeal on the merits, for two reasons: (1) It cannot be considered as an appeal from a decision of the case by the court, for the reason that no demand for a trial *de novo* is made, and that the appeal in this case is not from a judgment, but from an order refusing a new trial; (2) the case not having been tried by a jury, but by the court, no provision is made for granting new trials in such cases in the district court, nor can errors be reviewed in such case in this court. Appellant insists that the court should have granted one of the motions for a directed verdict, and that to discharge the jury without having done so was prejudicial error. That may be true in some cases and under some circumstances, but such a case is not here presented. The jury was discharged because each party consented that the case be decided by the court. Both parties made motions for a directed verdict, and thereafter each stated that he desired to stand upon such motion, which meant no more or less than that the case was, by both parties, deemed one for the court without a jury. That such was meant is emphasized by the fact that neither party objected to the discharge of the jury, or excepted thereto, nor asked that the jury be allowed to pass upon

all the evidence or upon any particular fact. That such was the attorneys' and the court's understanding at the time is borne out by the recitals in the order for judgment, as follows: "Whereupon the defendant and the plaintiff * * * made independent motions to the court for a directed verdict in favor of their respective parties, * * * and, both parties electing and stipulating in open court to stand upon the record, * * * the court thereupon dismissed and discharged the jury and took complete control of the case." This recital shows that the trial court understood that the case was, by consent of parties, submitted to him for decision on questions of fact and questions of law, and his findings of fact and conclusions of law show that the case was tried by him as a court case. Nothing in appellant's conduct, or any objections or motions during the trial, or after the trial when copies of the findings were served on him, indicate anything different than that he consented that the case be tried as a court case. His first intimation of anything to the contrary is shown in the notice of his intention to move for a new trial. We therefore hold that his objections to the decision of the case as a court case came too late, as a trial by jury was waived. The case is similar in this respect to *Hagen* v. *Gilbertson,* 10 N. D. 546, 88 N. W. 455. In that case the stipulation to waive a jury and make the case a court case was expressly made in open court. In this case nothing different can be gathered from what counsel did, and from what was said between counsel and the court, and from what followed after the jury was discharged, the acts and silence of counsel considered, than that the case was to be disposed of as a court case. Appellant, however, insists that he should not be held to have waived not only a jury trial, but also the right to move for a new trial, as in jury cases in which verdicts are rendered. The same question was present in *Hagen* v. *Gilbertson, supra,* and in that case the court said: "That this case was tried to the court there can be no doubt. In waiving a jury is involved the necessary implication that the parties consented to a trial of all the issues before the court without a jury, and this makes the case a court case under section 5630. Being a court case, it can be tried in this court only upon the terms set out in the statute." In that case a judgment was appealed from. In this case no judgment is shown to have been entered. There is no demand for a retrial in this case. It therefore cannot be entertained under section 5630, *supra.* Having consented to a trial

by the court, the procedure laid down by that section should have been thereafter followed in reference to an appeal, as well as everything else. In the case last cited, and in *Erickson* v. *Citizens' National Bank,* 9 N. D. 81, 81 N. W. 46, this court refused to retry the case under section 5630 for the reason that evidence objected to has been excluded from the record. In this case no such obstacle to a review or retrial here could be urged. In this case every objection to evidence made was overruled, and all the evidence offered was received. The cases cited are also authority for holding that this court cannot review a record on appeals from cases tried under section 5630 for the purpose of correcting errors. In cases tried under said section no appeals are provided for, save appeals from the judgment. No motion for a new trial is provided for in the trial court, nor in this court, so far as granted on errors assigned. The specifications and assignments of error are therefore improperly in the record, and cannot be considered. *Erickson* v. *Citizens' National Bank, supra; Hagen* v. *Gilbertson, supra; Nichols & Shepard* v. *Stangler,* 7 N. D. 102, 72 N. W. 1089. In the Erickson case this court said: "Nor can we pass upon the assignment of error based on the request of defendant's counsel for a directed verdict. The questions of fact which the jury was called to try were by consent of counsel sent to another tribunal for determination; *i. e.,* to the court. This, in our judgment, must operate as a constructive waiver by the parties of any and all right to a verdict, whether based upon evidence or returned in obedience to the mandate of the court. After consenting that the court should try the case, neither party should be heard to complain on the ground that he was entitled to the verdict of a jury in the same case. It is true that the record does not affirmatively show that counsel consented to a discharge of the jury, but it does appear that the discharge was made in open court, and hence, presumptively, in the presence of counsel." In this case the discharge of the jury is assigned as error. The assignment is disposed of on the same ground, and so are each of the other assignments. The case was tried as a court case by consent, and errors cannot be reviewed on appeals in cases tried under section 5630.

As the statutory motion for a new trial is not authorized under section 5630, it follows that the order appealed from cannot be reviewed on appeal, and the appeal is dismissed. All concur.

(97 N. W. Rep. 860.)

RICHARD SYKES *v.* M. C. ALLEN.

Opinion filed July 3, 1903.

Appeal from District Court, Stutsman county; *S. L. Glaspell*, J.

Action by Richard Sykes against M. C. Allen. Judgment for plaintiff. Defendant appeals.

Reversed.

Marion Conklin and *Ball, Watson & Maclay*, for appellant.

J. E. Robinson and *S. E. Ellsworth*, for respondent.

PER CURIAM. The questions involved in this case are the same as those considered and determined in the case of *Sykes* v. *Beck*, 96 N. W. Rep. 844, in which the opinion has just been handed down. The same attorneys appear in both cases. No briefs were filed in this case, and it was agreed by counsel in open court that the disposition of this case should be governed by the decision in the Beck case. Following the order made in that case, the district court is accordingly directed to reverse its judgment and enter judgment dismissing the action.

(98 N. W. Rep. 1134.)

GEORGE S. MONTGOMERY *v.* GEORGE A. TUCKER.

Opinion filed August 7, 1903.

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

Action by George S. Montgomery, as receiver, against George A. Tucker. From a judgment for plaintiff, defendant appeals.

Reversed.

Lee Combs, for appellants.

Purcell & Bradley and *Charles E. Wolfe*, for respondents.

PER CURIAM. This case is not distinguished in any way upon its facts from the case of *Montgomery* v. *Whitbeck* (12 N. D. —), 96 N. W. Rep. 327. The case was tried in the district court on the same day, by the same counsel, and before the same judge as was the Whitbeck case. The purpose of the action is the same. The pleadings and proofs are alike in essential particulars, and the case is in all respects controlled by the decision of that

controversy. The judgment of the district court is reversed. That court is directed to reverse its judgment and to dismiss the action. Appellants will recover costs of all courts.

(96 N. W. Rep. 1134.)

JAMES HUNTER *v.* ALFRED N. COE AND JOHN MCDEVITT.

Opinion filed November 30, 1903.

Purchaser With Knowledge of Outstanding Title, Takes Subject to It—Payment to Purchaser From Vendor.

1. One who purchases real estate with notice of an outstanding contract of sale takes it subject to such contract, and may be compelled, in an action of specific performance, to convey the same upon the performance of the conditions of the contract. The decree in such a case should require the purchaser to pay to the vendee, from the unpaid purchase price, a sufficient amount to reimburse the latter for payments made to his vendor.

Decree of Specific Performance Discretionary.

2. The granting or refusal of a decree of specific performance rests in the sound discretion of the court. It may grant or refuse the decree, or grant it only upon conditions, in view of the equities peculiar to each case.

The Seeker of Equitable Relief Must Pay for Improvements Made in Good Faith, Before Action, With His Knowledge.

3. The holder of a contract for the purchase of real estate, who has knowledge that the owner has conveyed to another, and that the latter, although chargeable with constructive notice of his contract, honestly believes that he has perfect title, and, induced by such belief, is making valuable improvements thereon, and yet makes no protest or objection thereto prior to the institution of an action for specific performance of the contract, is not entitled to a decree as against the vendee except upon a condition that he reimburse the latter for such permanent improvements as have been placed upon the premises prior to the commencement of the action.

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

Action by James Hunter against John McDevitt and others. Judgment for plaintiff. Defendant McDevitt appeals.

Reversed.

Townsend & Denoyer, for appellant.

McDevitt was a bona fide purchaser for value with neither actual nor constructive notice of Hunter's rights. Section 3594, Rev. Codes 1899.

For definition of good faith see Rev. Codes 1899, section 5114.

Constructive notice is defined in section 5118, Rev. Codes 1899.

The English rule, viz.: "If a purchaser had not actual knowledge that the property was in some way affected, it must appear that for the purpose of avoiding knowledge, he knowingly and designedly abstained from making inquiry," is adopted in Alabama, Delaware, Georgia, Illinois, Iowa, Kentucky, Massachusetts, Ohio, Oregon, Virginia, and the U. S. Circuit Court of Appeals. 23 Am. & Eng. Enc. of L. (2d Ed.) 497, and note on page 498; *Williamson* v. *Brown,* 15 N. Y. 354; *Jackson* v. *Given,* 8 Johns 137; *McMechan* v. *Griffling,* 3 Pick. 149.

Information, to be sufficient to cast upon a subsequent purchaser the duty to inquire, must be credible in its character and source, and communicated under such circumstances as to excite belief in the minds of reasonably prudent men. 16 Am. & Eng. Enc. of L. (1st Ed.) 796, 797.

Rumors and statements by strangers are insufficient to charge a person with constructive notice. 21 Am. & Eng. Enc of L. (2d Ed.) 586; 11 Am. & Eng. Enc. of L. (1st Ed.) 797; *Maul* v. *Rider,* 59 Pa. St. 172; 23 Am. & Eng. Enc. of L. (2d Ed.) 497; *Wilson* v. *McCullough,* 23 Pa. St. 440.

A party purchases land subject to the rights of persons in possession. Such possession must be actual, open and visible, not equivocal, occasional, or for a special or temporary purpose. 16 Am. & Eng. Enc. of L. (1st Ed.) 802; *Betts* v. *Latcher,* 46 N. W. Rep. 193.

If Hunter's title be declared superior to that of McDevitt, the decree must be modified to the effect that the purchase price be paid to McDevitt, who bought from Coe, the owner, subject to the contract held by Hunter. *Winslow et al* v. *Crowell et al,* 32 Wis. 639; *Smith* v. *Doak,* 3 Tex. 215; *Boise* v. *Satterthwait,* 180 Pa. St. 542; *McPherson* v. *Parker,* 30 Cal. 455; *Bailey* v. *Myrick,* 36 Me. 50; *Vanderveer* v. *Holcomb,* 17 N. J. Eq. 87, 547; *Blackwood* v. *Jones,* 57 N. C. 54; *Ingram* v. *Smith,* 38 Tenn. 411; *Oliver* v. *Piatt,* 44 U. S 333, 11 L. Ed. 622.

In adjusting the rights and equities of different claimants in or to the same piece of land, the court will require compensation from

the party benefited to a person who has, under color of title and in good faith, believing such title to be valid, and relying thereupon, placed permanent improvements upon the land. *Walden* v. *Bodley*, 39 U. S. 156, 10 L. Ed. 398, 20 Enc of Pl. & Pr. 500; *Benson* v. *Cutler*, 53 Wis. 107; Waterman on Spec. Perf. 521.

McClory, Barnett & Adamson, for respondent.

When the pleadings disclose that the contents of a document in the possession of an adverse party will necessarily have to be proved in order to establish a link in the proof of the other party's cause of action or defense, a notice to produce such document at the trial is not necessary in order to permit the introduction of secondary evidence of its contents. *Nichols & Shepard* v. *George Carlebois*, 10 N. D. 446, 88 N. W. Rep. 80.

If Coe enters into a contract to sell land to Hunter and afterwards refuses to perform his contract, and sells the land to McDevitt, for valuable consideration, Hunter can compel McDevitt to convey to him, provided he is chargeable with notice at the time of his purchase of Hunter's equitable title under his agreement. *Lord MacClesfield Atsherley* v. *Vernon*, 10 Mod. 518; *Wigned* v. *Lefbury*, 2 Eq. cases Abr. p. 32 Pl. 43, and other cases.

The notice given to McDevitt of the agreement to sell was sufficient to put him upon inquiry. Hunter took possession of the land, although but for a short time, partly prepared it for crop, and afterwards rented it to Olson and put him in possession. Olson informed McDevitt of the fact that he had rented the land from Hunter, the plaintiff.

Possession is of itself sufficient notice, *prima facie*, whether it is actually known to the other party or not; but this presumptive notice from possession is subject to rebuttal by proof showing that an inquiry, duly or reasonably made, failed to disclose any legal or equitable title in the occupant. But failure to make such inquiry is regarded as an intentional avoidance of the truth which it would disclose, and voluntary ignorance under such circumstances effectually deprives the subsequent party of the character of a bona fide purchaser. *Betts* v. *Letcher* (S. D.) 46 N. W. 193; *Grimstone* v. *Carter*, 3 Paige 421, 24 Am. Dec. 230; *Flagg* v. *Mann*, 2 Sum. 486, 554; *Thompson* v. *Pioche*, 44 Cal. 508.

McDevitt heard of Hunter's title from his neighbors, who heard it from Hunter, and told McDevitt. That McDevitt thought enough

of these reports in regard to James Hunter having bought the property to cause him to talk it over with different parties shows that he considered them sufficient to put him on inquiry.

Defendant's admissions are to be taken most strongly against him, and he must be considered as having notice of circumstances sufficient to put a prudent man on inquiry, and having omitted to make such inquiry with reasonable diligence, he must be deemed to have constructive notice of the fact itself. *Gress v. Evans et al,* 46 N. W. Rep. 1132; *Frerking* v. *Thomas,* 89 N. W. Rep. 1005; *Hannan* v. *Seidentopf,* 86 N. W. Rep. 44; *Nolan* v. *Grant,* 5 N. W. Rep. 513.

Possession of the tenant is constructive notice of the landlord's title. *Dickey* v. *Lyon,* 19 Ia. 544.

YOUNG, C. J. This is an action to compel the specific performance of the written contract of defendant Coe to sell and convey to the plaintiff a certain eighty-acre tract of land situated in Ramsey county, and to cancel and declare void a deed of conveyance of said land executed and delivered by said Coe to the defendant McDevitt after he had entered into the contract to convey the same to the plaintiff. The plaintiff alleges, in substance, that the land in question was formerly owned by Nettie Coe; that upon her death, which occurred on April 28, 1900, the defendant Alfred N. Coe, her husband, was appointed administrator of her estate, and has since acted as such; that said estate does not exceed in value the sum of $5,000, and no claims have been filed against it; that the said defendant Alfred N. Coe is the sole heir of said deceased, and entitled to a decree from the county court conveying to him all of the property of decedent, including these premises; that the administration of the estate has not been completed, in this: that the final decree of distribution of said estate, formally assigning the above real estate to the defendant Alfred N. Coe, has not been made; that on April 24, 1901, the plaintiff and the defendant Alfred N. Coe, entered into a written contract, through correspondence, wherein the plaintiff agreed to purchase and the defendant Coe agreed to sell to the plaintiff the land in question, and convey the same upon a good and sufficient deed upon said Alfred N. Coe receiving from the plaintiff the sum of $475, and that by the terms of said contract the plaintiff received possession of the premises, and was to have clear title upon the county court issuing its decree vesting title in defendant Alfred N. Coe; that in pursuance of said con-

tract the plaintiff took possession and prepared part of the land for crop, and that he has ever since been in the open possession of the same, and has at all times been ready and willing to pay the said sum of $475 upon the delivery of a good and sufficient deed of conveyance; that thereafter, and with full knowledge of the above contract and of plaintiff's possession thereunder, the defendant John McDevitt purchased said land from said Coe, and received a warranty deed therefor, which said deed the defendant caused to be placed of record; that the said McDevitt claims to own said land, and threatens to take forcible possession thereof. Plaintiff prays that the contract made by defendant Coe may be specifically performed; that the deed of conveyance delivered by Coe to McDevitt be declared null and void, and be canceled of record; and for general equitable relief. The defendant Coe was served, but did not answer. McDevitt, answering for himself, in addition to a general denial, alleges that in May, 1901, relying upon the apparent ownership of Coe of the premises, and on the advice of an attorney that Coe could give a good title, he purchased the same, and received a good and sufficient deed of conveyance, and paid therefor the sum of $525 in cash; that he paid the delinquent taxes upon the premises, and on the 10th day of June, 1901, caused his deed to be recorded, and upon receiving his deed entered into possession, and has ever since been in the sole, open, and complete possession thereof; that he has made valuable, permanent improvements thereon to the value of at least $800, and is still in possession. He further alleges that the plaintiff is not, and never has been, in possession of the premises; that Coe was in possession up to the time of the latter's conveyance to him; and that this defendant, up to the time of receiving his deed, had no notice whatever of any claim on the part of the plaintiff, or that he had or pretended to have any interest or estate in said premises. The trial court found that the facts alleged in the complaint and above set out were true, and, in addition, the court found that the defendant Coe, pursuant to his contract with plaintiff, delivered to the Ramsey county bank a warranty deed, which deed was made out to F. E. Merrick for the purpose of securing the payment by the plaintiff to the said F. E. Merrick of the sum of $475, which the latter had agreed to advance to him to pay for said land, and that, for the reason that the said Coe had not completed the probate of the estate, the said deed, with the knowledge and consent of

defendant Coe, was to remain in the Ramsey County Bank until the final decree was issued by the county court; that the defendant McDevitt, when he purchased said land, had knowledge that the plaintiff had contracted for the purchase of the same, that he was in possession thereof, and had prepared a part of it for crop. The trial court also found that since the date of his purchase the defendant McDevitt has erected improvements thereon, consisting of a house, barn, granary, and well, of the value of about $1,400; that they were made after the plaintiff's contract of purchase, and with knowledge on the part of the defendant McDevitt that plaintiff had purchased said land, and was in possession thereof. As conclusions of law the trial court found that plaintiff is entitled to judgment declaring that he is the owner and entitled to the possession of the premises; that the deed from Coe to McDevitt be adjudged void, and canceled of record; further, that the plaintiff be required to deposit in the Ramsey County Bank the sum of $475, payable to the order of Alfred N. Coe, less the sum of $54.30, costs and disbursements heretofore taxed, and that upon said deposit being made the plaintiff is entitled to receive and record the deed executed by Coe to Merrick for the benefit of the plaintiff; further, that plaintiff is authorized to obtain a decree from the county court vesting title in Coe as the sole heir; that upon the performance of the foregoing conditions the decree shall operate as a transfer of all interests of both defendant Alfred N. Coe and John McDevitt to F. E. Merrick for the benefit of the plaintiff, James Hunter. From the judgment entered in accordance with the foregoing conclusions, the defendant McDevitt has appealed to this court, and demands a review of the entire case, under the provisions of section 5630, Rev. Codes 1899.

Three propositions are urged in this court by counsel for the appellant as grounds for reversing the decree. It is contended (1) that McDevitt was a bona fide purchaser for value, with neither actual nor constructive notice of Hunter's rights; and (2) that, in any event, the decree should provide for the payment of the purchase price by Hunter to this appellant, instead of to Coe; and (3) that the improvements were erected by McDevitt in good faith, and the decree should therefore require Hunter to render compensation therefor to McDevitt. In our opinion, the evidence does not sustain appellant's contention that he purchased without either actual or constructive notice of Hunter's contract. Section 3594,

Rev. Codes 1899, protects a purchaser "in good faith and for a valuable consideration whose conveyance is first duly recorded." It is true defendant is a purchaser for a valuable consideration, and his conveyance was first placed of record, but that is not enough to secure the protection of the statute. He must also be a purchaser in good faith. "Good faith" is defined by section 5114, Rev. Codes 1899, as follows: "Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another even through the forms or technicalities of law together with an absence of all information or belief of facts which would render the transaction unconscientious." Our conclusion that McDevitt is not a purchaser in good faith does not rest on notice from possession. In our opinion, the evidence wholly fails to show any acts of open and visible possession by plaintiff sufficient to constitute notice of his rights. The evidence does show, however, that he had notice of Hunter's contract before he purchased. It may be doubted whether he had actual notice—or, in other words, express information—of the existence of the contract or its terms, but it is entirely clear that he had constructive notice, and that is its equivalent, and defeats his contention that he was a purchaser in good faith. Section 5118, Rev. Codes 1899, defines constructive notice as follows: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself." Upon the facts of this case we must hold that the defendant was under obligations to make inquiry as to Hunter's rights, and must be held to have known what that inquiry would have developed. He was informed by a number of persons that Hunter had bought the land. Among others, one Olson, to whom Hunter attempted to rent it, told him that Hunter had bought it. The defendant himself testified that he had heard a week or ten days before he got his deed that plaintiff claimed an interest in the land. It is well settled that one who takes a deed of land with knowledge of an outstanding contract or title takes it subject to such contract or title. The purchaser with notice merely stands in the place of his vendor, and may be compelled in an action of specific performance to convey upon the terms of the outstanding contract. As was said by Chancellor Kent in *Champion* v. *Brown,* 6 Johns. Ch. 402, 10 Am. Dec. 343: "If A enters into a contract to sell land to B, and afterwards refuses

to perform his contract, and sells the land to C for a valuable consideration, B may by bill compel the purchaser to convey to him, provided he be chargeable with notice at the time of his purchase of B's equitable title under the agreement." It was further said in that case that: "The rule that affects the purchaser is just as plain as that which would entitle the vendee to a specific performance against the vendor. If he be a purchaser with notice, he is liable to the same equity, stands in his place, and is bound to do that which the person he represents would be bound to do by the decree." In Fry on Specific Performance, section 218, p. 102, the rule is laid down that: "Where a contract has been entered into for the sale of property, and that property is afterwards aliened or assigned, or contracted to be aliened or assigned, and the alienee or assign has notice of the original contract, he is liable to its performance at the suit of the purchaser." See cases cited in note 1; also, *McCone* v. *Courser* (N. H.) 15 Atl. 129; *Patten* v. *Moore,* 32 N. H. 382; *Caldwell* v. *Carrington's Heirs,* 9 Pet. 86, 9 L. Ed. 60; *Dickerson* v. *Dickerson* (Neb.) 42 N. W. 9.

The case is one, therefore, in which the remedy by specific performance may properly be invoked. But it does not follow that plaintiff's right to a decree is absolute, for it is well settled that: "The specific performance of a contract of sale rests largely in the sound discretion of the court upon a view of all the circumstances." *Benson, Adm'x,* v. *Cutler,* 53 Wis. 107, 10 N. W. 82; *Williams* v. *Williams,* 50 Wis. 311, 6 N. W. 814; *Taylor* v. *Longworth,* 14 Pet. 172, 10 L. Ed. 405. The court may grant or refuse this remedy, or impose conditions for granting it, in the exercise of a sound discretion, according to the equities peculiar to each case. In our opinion, the facts in this case do not entitle the plaintiff to an unconditional decree, nor sustain the judgment which was entered. In the first place, the judgment provides that the plaintiff shall pay to Coe the unpaid purchase price of $475. This is clearly erroneous. There is nothing due to Coe. He transferred all his title and interest to the defendant McDevitt, and was succeeded by him as the holder of the legal title. Coe cannot transfer the title, because he has none, having parted with it by the delivery of a deed to the defendant McDevitt. Under his contract with the plaintiff Coe was to receive $475 for the land. He has in fact received $525 for the conveyance of the title to the defendant McDevitt. We are not able to understand on what theory Coe should be rewarded for his

duplicity by being paid for the land twice. We certainly know of no principle of equity which will sustain this part of the decree. McDevitt, having obtained the legal title with constructive notice of the plaintiff's contract, is bound by it and may be compelled to convey to the plaintiff. In other words, he is bound to perform the contract which his grantor was bound to perform by reason of the knowledge imputed to him. It is equitable that he should do so, but it is also just that the plaintiff, as a condition to obtaining McDevitt's title, shall perform his part of the obligation by paying to the defendant McDevitt, Coe's successor, the consideration which, under the contract, was to have been paid to Coe. It is clear that the purchase money belongs to the defendant McDevitt, and the decree must so provide. See *Veith* v. *Mc. Murtry* (Neb.) 42 N. W. 6.

We are also of opinion that the judgment is erroneous in not requiring, as a condition for relief, that plaintiff reimburse McDevitt for the permanent improvements placed upon the land by him prior to the service of the summons and complaint in this action. The contract which plaintiff seeks to have enforced called for the land without improvements. Under the decree he gets not only the land which he bargained for, but also permanent improvements made by McDevitt, which the trial court found to be approximately of the value of $1,400, and this upon payment of only $475, and that sum to be paid not to McDevitt, but to Coe, who has already been paid for the land. The theory on which the improvements were awarded to the plaintiff undoubtedly was that they were placed on the premises by the defendant in bad faith. It seems to have been assumed that, if the defendant was not a good-faith purchaser within the meaning of the recording act, he could not have made the improvements in good faith, and therefore would not be entitled to an allowance for them. This by no means follows. One is not a purchaser in good faith, so as to be protected against an outstanding contract, who has constructive notice of such contract; and this because the law itself imputes, in the case of constructive notice, knowledge to him. But one may honestly believe that he has good title when in fact he has not, and, while this belief will not avail him as against an outstanding contract or title of which he has constructive notice, he will nevertheless be entitled to be protected in his permanent improvements, for the test of good faith as to them is his honest belief that he has good

title. See *Parker* v. *Vinson,* 11 S. D. 381, 77 N. W. 1023; *Meadows* v. *Osterkamp,* 13 S. D. 571, 83 N. W. 624; *Green* v. *Dixon,* 9 Wis. 532; *Thompson* v. *Thompson,* 16 Wis. 94; *McLaughlin* v. *Barnum,* 31 Md. 425. What are the facts? It is entirely clear that the defendant honestly believed that by obtaining a deed from Coe and having it recorded he had acquired perfect title. In this he was mistaken, because the law would not permit him to retain the title as against the plaintiff under the circumstances which here exist, but that does not alter the fact that the defendant was honest in his belief. This is made plain by his conduct, which speaks with more convincing effect than any oral testimony. In the first place, he is a man of moderate means. He paid $525 cash for the land. He immediately recorded his deed, paid the delinquent taxes, entered upon the land, dug a well at an expense of $45, erected a barn with a stone foundation at an expense of $225, built a granary at an expense of $275, and a house which cost $850, put in a crop, and fenced the uncultivated land. These were acts of possession and ownership of open and visible character. The plaintiff is a farmer, and resides 160 rods from the land in question. He passed by it frequently, and also saw the defendant at numerous times while the improvements were being made. Plaintiff must have known that defendant believed his title was good, and that he was making these improvements in reliance upon the title which he had acquired by his purchase, and yet they were all made without a single word of objection from the plaintiff. Indeed, the record fully warrants the conclusion that the plaintiff purposely delayed the assertion of his rights under the contract by the institution of this action until these valuable improvements were almost completed. The testimony shows that the improvements were practically all made in the months of June and July. The summons and complaint in this action bear date June 11th. They were not served, however, until July 15th, more than a month after they were drawn. We have held that bad faith will be imputed to the defendant in making his purchase without making inquiry as to plaintiff's contract, and for the same reason we must hold under the facts in this case, that the plaintiff was guilty of actual bad faith in permitting and acquiescing in the making of the improvements by defendant directly under his observation without a single word of protest. Not only was plaintiff at fault in not notifying defendant of his rights under the contract when it be-

came his duty to do so, that is, when the improvements were being made with his knowledge, but he was equally negligent in the performance of his obligation under the contract. It was not until the 17th of June that the plaintiff made a deposit in the Ramsey County Bank, in which the deed from Coe had been left by the latter on the 1st of May preceding. The deposit then made was a conditional one, and the money was advanced by one F. E. Merrick; the condition being that the money might be paid over upon the completion of the administration proceedings by Coe. This was after the summons and complaint in this action were drawn. Had the plaintiff, even at the time of commencing the improvements, made inquiry, he would have found Coe's deed to Merrick lying in the Ramsey County Bank, and no deposit to cover the purchase price. It is not too much to say that, had McDevitt had actual knowledge of all the facts obtainable by inquiry prior to the deposit on June 17th, he might well have honestly doubted the plaintiff's intention to take the land. But, be that as it may, we are entirely clear that the plaintiff should not be permitted, in a court of equity, to profit by his own bad faith in permitting the defendant to make the improvements without protest. The plaintiff is asking the aid of a court of equity to protect him in an equitable right in land as against the holder of the legal title. The rule applicable to the facts as they exist in this case is "that, if the equitable owner of land, who is conusant of his right to it, will stand by and see another occupy and improve the property without asserting his right to it, he shall not in equity enrich himself by the loss of another which it was in his power to have prevented, but must be satisfied to recover the value of the land independent of the improvements. The acquiescence of the owner in the adverse possession of a person whom he found engaged in making valuable improvements on the property is little short of a fraud, and justifies the occupant in the conclusion that the equitable claim which the owner asserts has been abandoned." *Southall* v. *McKeand,* 1 Wash. (Va.) 336; *Green et al* v. *Biddle,* 8 Wheat. 78, 5 L. Ed. 566. In 3 Pom. Equity Juris., section 1241, it is said that: "Where a party innocently and in good faith, though under a mistake as to the true condition of the title, makes improvements or repairs or other expenditures which permanently increase the value of the property, so that the real owner, when he seeks the aid of equity to establish his right to the property itself, or

to enforce some equitable claim upon it, having been substantially benefited, is required upon principles of justice and equity to repay the amount expended." So, also, in *Neeson* v. *Clarkson,* 4 Hare 97, it is said that: "Whenever it is necessary for the true owner himself to proceed in equity, the principle that he who seeks equity must do equity will be applied, and he will only be entitled to the aid of the court upon making compensation for the outlays. In pursuance of this doctrine, when a person in peaceable possession under a claim of lawful title, but really under a defective title, has in good faith made permanent improvements, the true owner, who seeks the aid of equity to establish his own title, will be compelled, as has been held, to reimburse the occupant for his expenditure." *Robinson* v. *Ridley,* 6 Madd. 2; *Atty. Gen.* v. *Baliol Coll.,* 9 Mid. 407, 411; *Bright* v. *Boyd,* 1 Story 478, Fed. Cas. No. 1,875; Id., 2 Story, 605, Fed. Cas. No. 1,876; *Rathburn* v. *Colton* 15 Pick. 471; *Miner* v. *Beekman,* 50 N. Y. 337; *Smith* v. *Drake,* 23 N. J. Eq. 302; *McLaughlin* v. *Barnum,* 31 Md. 425; *Sale* v. *Crutchfield,* 8 Bush, 636; and see *Preston* v. *Brown,* 35 Ohio St. 18. So, also, it is said in 1 Story, Equity Juris. section 388: "If a man, supposing he has an absolute title to an estate, should build upon the land with the knowledge of the real owner, who should stand by and suffer the erections to proceed without giving any notice of his own claim, he would not be permitted to avail himself of such improvements without paying a full compensation therefor; for in conscience he was bound to disclose the defect of title to the builder. Nay, a court of equity might, under circumstances, go further, and oblige the real owner to permit the person making such improvements on the ground to enjoy it quietly and without disturbance." See, also, sections 385, 799a, 799b, 1237, Id. *Putnam* v. *Ritchie,* 6 Paige, 390, a leading case, the doctrine of which has been uniformly approved laid down the rule that: "Where industrial acquisitions have been made to property in good faith by a person who has the legal title to the property, so that the real owner is compelled to resort to a court of chancery to assert his equitable title to such property, this court acts under the civil-law rule of natural equity, and compels the complainant to compensate the adverse party for such industrial acquisitions or improvements as a condition of granting the equitable relief asked for in the suit." As instances in which courts of equity have exacted reimbursement for improvements as a condition of granting equitable relief, the following

cases will be found instructive, and fully sustaining our conclusion: *Leeds* v. *Penrose,* 44 N. J. Eq. 464, 15 Atl. 261; *Miner* v. *Beekman,* 50 N. Y. 337; *Thomas* v. *Evans,* 105 N. Y. 601, 12 N. E. 571, 59 Am. Rep. 519; *Poole* v. *Johnson,* 62 Iowa, 611, 17 N. W. 900; *Gilbert* v. *Peteler,* 38 N. Y. 165, 97 Am. Dec. 785; *Smith* v. *Drake,* 23 N. J. Eq. 302; *Freichnecht* v. *Meyer,* 39 N. J. Eq. 551; *Parsons* v. *Moses,* 16 Iowa, 444; *Wetmore* v. *Roberts,* 10 How. Prac. 51; *Williams* v. *Gibbs,* 20 How. 535, 15 L. Ed. 1013. The basis of all these decisions is the familiar and wholesome maxim that he who seeks equity must do equity. In many cases it is difficult to determine whether the allowance should cover the cost of the improvements or merely the amount they enhance the value of the estate. In this case we have no such embarrassment. The improvements, as we have seen, were made with plaintiff's knowledge, and his silence amounted to acquiescence in the expenditures which were actually made. It is equitable, therefore, that he should be required to reimburse the defendant for the cost of such improvements as were put upon the premises prior to the service of the summons and complaint. Such improvements as were made prior to that date can fairly be said to have been made in good faith, and with plaintiff's implied consent. After the service of the papers, the defendant proceeded at his peril and in bad faith, and is not entitled to consideration at the hands of a court of equity. *McLaughlin* v. *Barnum,* 31 Md. 425. The same equitable considerations which require that the defendant should be reimbursed for his improvements also require that he should pay a reasonable cash rental for the use of the premises during the period of his occupancy.

The condition of the record in this case, including the pleadings and the evidence, will not warrant a final judgment in this court disposing of the case according to its equities. The case must therefore be remanded to the district court for further proceedings, with leave granted to permit such amendments as shall be necessary for a final disposition of the remaining issues. The district court will set aside its judgment and order a new trial for the purpose of determining (1) the cost of the improvements placed upon the premises by the defendant prior to the service of the summons and complaint in this action; and (2) the reasonable cash rental value of the premises during the period of defendant's occupancy. Upon the ascertainment of these facts the district court will enter judgment requiring the defendant, McDevitt, to execute

and deliver to the plaintiff a deed of conveyance sufficient in form and substance to convey to him all the right, title, and interest in and to said land conveyed to him by Coe upon the payment to him by the plaintiff, or deposit in court for his use, of the sum of $475 and the cost of improvements as found by the trial court, less the cash rental value of the premises, and, further, that in default of such payment or deposit by plaintiff within a period to be fixed by the district court, the action will be dismissed. Appellant will recover costs. All concur.

(97 N. W. Rep. 869.)

NEWVILLE ET AL *v.* GREAT NORTHERN RY. CO.

Opinion filed November 3, 1903.

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

Action by Frank Newville and twenty-six others against the Great Northern Railway Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

C. J. Murphy, for appellant.

N. A. Stewart, for respondents.

PER CURIAM. The questions involved in this case are the same as those considered and determined in the case of *Johnson* v. *Great Northern Railway Company,* 97 N. W. 546, in which the opinion has just been handed down. The same attorneys appear in both cases. No briefs were filed in this case, and it was agreed by counsel in open court that the disposition of this case should be governed by the decision in the case of *Johnson* v. *Great Northern Railway Company.* Following the order made in that case, the order of the district court is affirmed.

(97 N. W. Rep. 1119.)

THE MERCHANTS STATE BANK OF FARGO *v.* HARRY D. RUETTELL.

Opinion filed December 14, 1903.

Parol Evidence to Vary Terms of Written Lease.

1. Parol evidence is not admissible to show that the terms of a lease of land, providing for the payment of a specific sum as annual rent, were changed so as to provide for payment of a less sum, as such parol testimony would defeat the operation of the written lease in part.

Executed Contract.

2. A parol agreement for the leasing of real estate for a longer period than one year does not become an executed contract, and therefore valid, when no possession is taken under such agreement, and the rental for one year is assumed to be paid by indorsing the amount of the annual rent upon a past-due note.

Without Possession Given and Partial Performance, Oral Will Not Supersede Written Lease.

3. One Browning, the owner of the land, leased it to the defendant for one year from April, 1899, for $200 as rent, with the privilege of extending the lease for another year if Browning was in possession of the land. Defendant did not expressly avail himself of the privilege of extension for another year under the lease. In October, 1899, the defendant and Browning made an oral and new lease of the land. Possession was not given defendant under the oral lease. An indorsement of $160 was made by defendant on Browning's note for the possession for 1900. The oral lease was to continue until Browning's note of $340 and interest was fully paid—more than two years. In January, 1900, Browning assigned the written lease of April, 1899, to plaintiff, and, by a writing, gave it the right of possession. Plaintiff notified defendant of its right to the possession of the land. Defendant answered that his lease was still in force, and refused possession, and cropped the land for 1900. *Held,* that plaintiff was entitled to the rent as specified in the written lease.

Election.

4. Under such facts the plaintiff had the right to treat the defendant as a trespasser or as a tenant, and, having treated him as a tenant, could recover the rent specified in the written lease.

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

Action by the Merchants' State Bank of Fargo against Harry D. Ruettell. Judgment for plaintiff, and defendant appeals. Affirmed.

S. G. More and *R. M. Pollock,* for appellant.

Defendant should have been permitted to show the true consideration for the use of the land. The consideration is always open to investigation when such investigation and proof attending it do not tend to change in other respects the contract, or destroy it. Jones on Ev., 475; Greenleaf on Ev., section 304; *Hendrick* v. *Crowley,* 31 Cal. 476; *Halpin* v. *Stone,* 78 Wis. 183, 47 N. W. Rep. 177.

Under the clause in the lease giving defendant option of extending the lease one year from its expiration, he should have been permitted to prove, that prior to the assignment of the lease to plaintiff, he paid the assignor $160 in October, 1899, as rent for the year 1900. Defendant's testimony on this point was rejected, as varying the terms of a written instrument. The proof was not susceptible to this objection. Exercising this option he made a new lease for 1900. The landlord being thus paid his rent, his assignee could have no better right than he had. The transaction constituted an executed oral agreement, completed by payment of the rent in full. The assignment by the landlord to plaintiff was subject to all equities between him and the defendant. Rev. Codes, section 5222.

Newman, Spalding and Stambaugh, for respondent.

A written contract cannot be contradicted or altered by parol evidence, and the evidence offered to show a different consideration than that expressed in the lease, was within the rule, and not one of the exceptions. *Diven* v. *Johnston,* 3 L. R. A. 308; *Deering* v. *Russell,* 5 N. D. 319, 65 N. W. Rep. 691; *Hutchinson* v. *Cleary* 3 N. D. 270, 55 N. W. Rep. 729; *National Ger. Amer. Bank* v. *Lang,* 2 N. D. 66, 49 N. W. Rep. 414; *Northwestern Fuel Co.* v. *Bruns,* 1 N D. 137, 45 N. W. Rep. 699.

MORGAN, J. The plaintiff sues to recover $200 as rent for the use and occupation of a farm under a lease from the owner. The complaint sets forth the lease in full, and an assignment of it to the plaintiff. One Browning was the owner of the land, and in April, 1899, leased it in writing to the defendant, Ruettell, for one year, for the sum of $200, to be paid in advance. The lease contained a proviso that defendant had the option to extend the lease for another year from April, 1900. In January, 1900, the owner of the land, Browning, assigned the lease to plaintiff. Upon receiving the assignment, plaintiff notified defendant that it had pos-

session of the Browning land, and that, if defendant desired to lease it for another year, to advise plaintiff of the fact. Plaintiff and defendant had interviews thereafter in reference to the leasing of the land, but failed to come to any agreement, as defendant claimed that he was entitled to the use of the land for 1900 under the special proviso of the lease giving him an option to extend the lease for another year. The answer alleges that the lease set forth in the complaint did not correctly state the agreement of the parties; that the rental of said land was to be $160 per annum, and not $200, as stated in the lease. Defendant further sets forth in his answer that in the fall of 1899 defendant and Browning made a new contract in respect to said land to the effect that defendant was to farm the land for the year 1900, and for the use thereof was to credit the sum of $160 on a note held by defendant against said Browning, and that such credit had been made on said note by defendant pursuant to such agreement, and that defendant had occupied and farmed the land in 1900 under said new agreement, and not under the lease of April 10, 1899. The trial resulted in a directed verdict for the plaintiff for $200 and interest. A motion for a new trial, based on a statement of the case duly settled, was denied, and defendant appeals from the judgment.

The appellant assigns twenty-four errors of law occurring at the trial. Two of them only are argued and these fairly raise everything claimed as error in the additional assignments. These assignments present the following questions: (1) Should the defendant have been permitted to show that the rental for the land in question was $160 per annum, instead of $200, as stipulated in the written lease? (2) Should the defendant have been permitted to show that he occupied the land during the cropping season of 1900 under an oral lease made in October, 1899, under which he was to use the land for 1900? The first question stated is raised by the answer, and apprises the plaintiff that defendant will contend on the trial that the consideration for the use of the land was to be $160, and not $200, as expressly stated in the lease. All of the testimony offered at the trial to show that the rent was other than as stated in the lease was objected to as varying the express terms of a written contract, and sustained on that ground. Defendant contends that such rulings were erroneous, as the evidence offered would vary the terms of a written contract only so far as the consideration for the same is concerned, and that written contracts may be varied

in respect to the consideration by parol proof. A similar question was before this court in *Bank* v. *Prior,* 10 N. D. 146, 86 N. W. 362, involving the admissibility of parol evidence to vary the terms of a mortgage on real estate. In that case it was held that an oral agreement made before or at the time of the execution of the notes and mortgage, to the effect that on payment of two of the four notes secured by the mortgage the mortgage should be released as to the two remaining notes was inadmissible as a defense to the foreclosure of the mortgage as to the two unpaid notes, as such evidence was inconsistent with, and varied the terms of, the mortgage, and defeated its operation in part. In that case the general rule was followed that parol proof is inadmissible to vary the terms of a written contract as to the consideration for the contract if such proof is inconsistent with the terms of the written instrument, or tends to defeat it in whole or in part. The case at bar and that case are alike in principle. The written lease provides for payment of $200 rent, and the oral contract would change its terms so that $160 only are payable. The parol evidence offered is inconsistent with the terms of the written lease, and would destroy and nullify its terms in part. If its terms may be varied to the extent claimed in this case, it could be varied without limit, resulting in showing that a nominal consideration was payable only, or no consideration at all. As bearing on this question, see *Hume Bros.* v. *Taylor,* 63 Ill. 43; *Chapman* v. *McGrew,* 20 Ill. 101; *Loach* v. *Farnum,* 90 Ill. 368; *Collamer* v. *Farrington* (Sup.) 15 N. Y. Supp. 452; *Delamater* v. *Bush,* 63 Barb. (N. Y.) 168. The last case cited was an action for rent, and the court said: "While in deeds and other instruments you may, for certain purposes, prove the consideration to be different from that expressed, it is not admissible to contradict an agreement or covenant to pay a certain sum." In *Williams* v. *Kent* (Md.) 10 Atl. 228, the court said: "It is well settled that, where the lessor and lessee enter into a written agreement for the rent of property for a sum specified, parol evidence will not be received, either for the purpose of increasing or diminishing the sum so agreed upon. The written contract must speak for itself." There was no error in rejecting the testimony offered.

The answer alleges that the defendant is entitled to the possession of the premises during the year 1900 by virtue of a parol contract entered into between himself and Browning in October,

1899, by which Browning leased the premises to him for 1900 at an agreed rental of $160, which he paid to Browning in October, 1899. At the trial the defendant offered proof of such parol contract. On objection by the plaintiff that such proof contravened the provisions of the statute of frauds, as contained in subdivision 5 of section 3887, Rev. Codes 1899, the proof was rejected. Said section and subdivision 5 thereof provide than an agreement for the leasing for a longer period than one year is invalid unless the same, or some note or memorandum thereof, is in writing, and subscribed by the party to be charged, or by his agent, duly authorized in writing. During the trial, and after plaintiff had made a motion for a directed verdict in his favor, the defendant qualified his offer of proof above mentioned as follows: "The defendant now informs the court that the agreement and lease, under which he claims to have cropped the land for the year 1900, was an oral agreement, under and by the terms of which the defendant was to occupy and cultivate the land until such time as the rental therefor at $160 per annum would pay the debt which was due from said Browning to this defendant, and which amounted to something like $340, with accrued interest, the same being in the form of a promissory note; that in pursuance of such oral agreement and arrangement the defendant, Ruettell, then paid, by crediting upon said note the rental for the year 1900, the sum of $160." The defendant now insists that such offer of proof should have been accepted, and that prejudicial error was committed by its rejection. A different conclusion has been reached by us. At the time this oral agreement was entered into, defendant was in possession of the premises under the written lease, which did not expire until April following. The testimony proposed by the offer refers to possession for the cropping season of 1900. The offer states that defendant's possession when the parol agreement was entered into was under the written lease of 1899. Hence, so far as possession is concerned, nothing was done by the defendant or by Browning in reliance on the oral agreement until after January, at which time the plaintiff became the assignee of Browning's rights under the lease, and was entitled to the possession of the premises after defendant's rights had ceased under his written lease. In January, the defendant was advised that plaintiff claimed the possession. On January 19th, plaintiff wrote the defendant: "We have possession of (description of land) which you rented of Jos. P. Browning

last year. If you desire to lease this land for the coming year, kindly let us hear from you." Defendant answered this letter by saying: "We are surprised to know that you have possession of * * * for the reason that our lease covers one year more. * * * We simply leased this property to secure ourselves with J. P. Browning. Still, if there is anything in it, we would be willing to lease it from you." Plaintiff and defendant failed to arrive at a satisfactory agreement in reference to the use of the premises for 1900, and on February 15, 1900, defendant again wrote the plaintiff that he considered his lease still in force. After this letter nothing transpired between the parties, and defendant cropped the land in 1900. Defendant now claims that he was entitled to the possession and use of the land under the parol contract of October, 1899, concerning which he made an offer of proof. He claims that such parol agreement became fully executed and enforceable by virtue of the indorsement of a year's rental of $160 on Browning's past due note, and by virtue of the fact that he cropped the land and was in possession thereof in 1900.

The offer of proof must be considered in connection with the explanation of it given by defendant's attorney after the motion for a directed verdict had been made by plaintiff. From such explanation it appears that the parol agreement was one that could not possibly have been performed within one year. It contemplated a lease of the land for more than two years. Hence it was invalid under section 3887, Rev. Codes 1899, *supra,* unless carried into effect, and its terms executed by the acts of the parties. The rights of parties acting under a contract invalid on account of not being in writing as provided by section 3887, *supra,* is well stated by McAdam on Land. & Ten. (3d Ed.) vol. 1, p. 66, as follows: "Where a lease is void by reason of the provisions of the statute, that does not render the contract an illegal or unlawful one if the parties choose to perform it. If the lease is verbal, and the term is for a longer time than one year, it is void in the limited sense that neither party can compel the other to perform it. The landlord need not, in such a case, give the tenant possession if he chooses not to do so, and no action will lie by the tenant against the landlord in consequence thereof. Nor need the tenant take possession in such a case. No action will lie against him if he does not. The parties may, however, go on and perform the agreement, although they could not be compelled to do so, and in such case, if the tenant

goes into possession of the demised premises, and occupies them, he will then be bound to perform the agreement by paying the rent for such time as he may remain in possession in the same manner as though the lease had been reduced to writing. And if, by reason of the manner of paying rent, as by the year, a yearly tenancy is implied by the law, the tenant may make himself liable for a year's rent." The authorities generally sustain this text, and hold that the parol contract is not enforceable unless its invalidity is waived by acting upon it and executing it. But, until enforced in such a way, neither party can insist upon performance by legal or equitable proceedings. See *Bard* v. *Elston,* 31 Kan. 274, 1 Pac. 565; *Grant* v. *Ramsey,* 7 Ohio St. 157; *Schuyler* v. *Leggett,* 2 Cow. 660; *Reeder* v. *Sayre,* 70 N. Y. 180, 26 Am. Rep. 567; *Rosenblat* v. *Perkins,* 18 Or. 156, 22 Pac. 598, 6 L. R. A. 257; *Walsh* v. *Colclough,* 56 Fed. 779, 6 C. C. A. 114; *Wetherbee* v. *Potter,* 99 Mass. 354. In this case, as we have seen, possession of the premises was not taken by defendant under the parol arrangement until Browning had repudiated it by transferring the lease, and, so far as he could, turning over the possession of the premises to the plaintiff after the written lease would expire in April, 1900. In January defendant was notified by plaintiff that it would claim the possession of the land for the year 1900. At this time nothing had been done by defendant towards executing the verbal lease, so far as work or acts are concerned. He claims that the parol agreement became an executed one by virtue of the fact that $160 was indorsed by defendant on Browning's note, pursuant to such oral agreement. This indorsement alone is not sufficient to take the transaction out of the terms of section 3887, *supra.* That alone does not make the transaction an executed one. Even had the defendant paid $160 in money, that alone would not be deemed such an execution of the oral contract as would be a waiver of the statute. The money could be recovered on a repudiation of the contract by Browning. McAdam on Land. & Ten., vol. 1 (3d Ed.) section 24, p. 67. In *Rosen* v. *Rose* (Super. N. Y.) 34 N. Y. Supp. 467, the court said: "Though the plaintiff has not received possession, he claims that the want of a writing is made up by part performance in that defendant accepted ten dollars on account. The doctrine of part performance applies only where a contract is so far performed that the parties cannot be restored to their original position except by equitable aid, which is sometimes extended to prevent fraud." See,

also, *Nasanowitz* v. *Hanf* (Sup.) 39 N. Y. Supp. 327; *Dunckel* v. *Dunckel,* 141 N. Y. 427, 36 N. E. 405; Frye on Spec. Perf. section 403; *Brockway* v. *Thomas,* 36 Ark. 518. Under these decisions and like ones, the principle seems to be well established that performance, such as will make a parol lease a valid one, so far as performed, must be such that the party performing cannot be placed in his former position if the invalid lease be not carried into effect. In this case the defendant still holds possession of the note. He parted with nothing in making the indorsement upon the note. By reason of Browning's repudiation of the October oral arrangement, the indorsement may be canceled, and is not a credit or payment on the note, as a matter of law, under the circumstances. Hence, nothing is shown by the evidence or in the offer of proof, which, if true, would constitute the parol agreement of October, 1899, an executed transaction, and therefore not invalid under the statute. It follows, therefore, that the defendant cannot make such parol contract the basis of a defense to the plaintiff's cause of action as set forth in the complaint.

On January 19, 1900, defendant was advised of plaintiff's right to the possession of this land. The plaintiff apprised him that, if he wished to lease the land for 1900, he could do so from it. After that he knew that Browning would not comply with the October contract. He also knew that Browning had parted with possession of the land, and that the conditions under which defendant was entitled to hold the land for 1900 under an option provided for in the lease did not exist. Thereafter defendant could not demand a lease of the land for 1900 from Browning under such option, because defendant had the option only in case Browning was in possession. After January 19, 1900, defendant should have looked to the plaintiff bank for rightful occupation of the land for 1900, as he had no rights thereto by virtue of any contract with Browning. The bank was under no legal obligation to renew the tenancy. It could treat him as a trespasser, or permit him to hold over. It could permit him to remain under the written lease, or, at its pleasure, make any other contract for his occupation of the premises. It permitted him to farm the land without any express contract other than the written lease of which it was the assignee. Defendant held over knowing that he had no new contract with the bank. McAdam on Land. and Ten. vol. 1 (3d Ed.) section 32, lays down the rule as follows: "When the tenant remains in pos-

session after the expiration of the original term by permission of the landlord, the implication is that he continues in possession under the conditions of the former demise. If the holding over is without the landlord's permission, the landlord may, at his election, treat the tenant as a trespasser by ejecting him from the premises, or hold him as tenant for a renewed term upon the conditions of the prior lease, so far as applicable." *Hobbs* v. *Batory*, 86 Md. 68, 37 Atl. 713; *Kendall* v. *Moore*, 30 Me. 331. In *Schuyler* v. *Smith*, 51 N. Y. 309, 10 Am. Rep. 609, the court said: "The safe and just rule I believe to be the one established by authority that the tenant holds over the term at his peril; and the owner of the premises may treat him as a trespasser or as a tenant for another year upon the terms of the prior lease, so far as applicable." See, also, note to *Blumenberg* v. *Myres* (Cal.) 91 Am. Dec. 563, and cases cited. The evidence may justify the conclusion that the defendant elected to hold under the written lease, but whether he did or not is immaterial, as the law gives the option to the lessor to treat a lessee holding over under such circumstances as a trespasser or as a tenant under a former lease. In this case the plaintiff treated him as a tenant.

Judgment affirmed. All concur.

(97 N. W. Rep. 853.)

STATE OF NORTH DAKOTA EX REL WESLEY STYLES *v.* BEAVERSTAD.

Opinion filed December 3, 1903.

Jurisdictional Matters Only, Not Irregularities and Errors, Reviewed in Habeas Corpus.

1. On habeas corpus the inquiry is confined to matters which are jurisdictional. Mere irregularities or errors which do not render the proceeding a nullity cannot be considered.

Court Will Examine as to the Existence, Not Weight, of Evidence.

2. Where one is committed upon a criminal charge without reasonable or probable cause, he may secure his release on habeas corpus, but the court issuing the writ will look into the evidence taken upon the preliminary examination only far enough to see that there was competent evidence before the magistrate tending to show the two ultimate facts: First, that an offense was committed, and, second, that there was cause to believe that the accused committed it.

Same.

3. The statute requires a committing magistrate to act upon evidence in making his findings against one under examination upon a charge of having committed a crime. That there was evidence upon which his judgment could rest is a jurisdiction prerequisite to a valid commitment. On habeas corpus the reviewing court will inquire into the evidence so far as to see that this jurisdictional requirement was observed, and no farther.

Same.

4. On habeas corpus to test the legality of the imprisonment of one held to answer on a criminal charge, the court will not weigh conflicting testimony, or measure the credibility of witnesses; neither will it reverse the finding of the magistrate when there was evidence to sustain his finding. The finding of the magistrate, when acting within his jurisdiction, is conclusive against collateral attack by habeas corpus.

Jurisdiction of Person, Matter, and to Make the Particular Finding, Renders Judgment Immune From Attack By Habeas Corpus.

5. In order to render a judgment immune from attack on habeas corpus, the court must have had not only jurisdiction of the subject matter and of the person of the defendant, but also to render the particular judgment in question. All these elements existed in this case, and the commitment, therefore, is impregnable to the attack made upon it.

Wesley Styles, after a preliminary examination before a committing magistrate, was held to answer upon a charge of manslaughter in the first degree, committed upon the person of one Peter J. Selseth. He was committed in default of bail, and petitions for a writ of habeas corpus, alleging that there was not sufficient or probable cause to justify his commitment and detention.

Writ denied.

Asa J. Styles, Tracy R. Bangs and *Guy C. H. Corliss*, for petitioner, cited *ex parte Stevens*, 82 Cal. 245, 23 Pac. Rep. 38.

C. L. Lindstrom, state's attorney, and *John A. Sorley*, for respondent.

COCHRANE, J. Wesley Styles petitioned this court for a writ of habeas corpus. A stipulation was entered into in open court by the counsel for respective parties, whereby the entire matter is to be disposed of upon the petition for the writ. The physical presence of petitioner before the court was waived, and it was agreed that if, upon a hearing, the court should determine that petitioner

was entitled to his release, the writ should forthwith issue; otherwise its denial should be taken as a finale to this proceeding.

Petitioner was arrested and taken before a justice of the peace of Benson county, in this state, upon a complaint accusing him of the crime of murder. After a preliminary examination before such magistrate, in which all the testimony taken was reduced to writing in the form of depositions, pursuant to section 7960, Rev. Codes 1895, said justice found that the offense of manslaughter in the first degree had been committed, and that there was sufficient cause to believe the defendant, Wesley Styles, guilty thereof, and did order that the defendant be held to answer said charge, and that he be allowed to give bail in the sum of $5,000 for his appearance. The defendant was committed to the custody of the sheriff of Benson county in default of bail, and he prays for his release upon habeas corpus.

No question is raised as to the regularity of his examination or commitment, and it is admitted that the examining magistrate literally and fully complied with the statute as to the conduct of such examination and the making and certifying of the proceedings thereon and return thereof. The only particular wherein petitioner claims that his restraint is illegal is in that the evidence not only failed to show that any offense had been committed, but, as he claims, fully and clearly establishes that, if the death of Peter J. Selseth was in any way caused by the act or agency of petitioner, the same evidence discloses the act to have been committed under such circumstances as constitute excusable homicide. Counsel stipulated that the depositions taken upon the preliminary examination, referred to in and made a part of the petition, contain all the evidence of which the prosecuting counsel had any knowledge, and that these depositions should be referred to by this court as containing all the evidence in the case. An application was made to the judge of the district court of the Second judicial district for a writ of habeas corpus, and the writ was granted upon a petition setting forth the same facts as appear in the petition made to this court. A return was made to such writ by the sheriff of Benson county, showing that he held petitioner by virtue of a commitment, a copy of which was attached; that upon a full hearing before said district judge the writ was discharged, and defendant remanded to the custody of respondent.

Counsel for respondent urges as a preliminary consideration that the order of the district court discharging and remanding the petitioner renders the matters inquired into *res adjudicata;* that petitioner's remedy was by appeal. These questions were severally resolved against respondent's present contention in *Carruth* v. *Taylor,* 8 N. D. 166, 77 N. W. 617. A majority of the court, as now constituted, adhere to the ruling that an order discharging the writ and remanding the petitioner, when made by a district judge, is not an appealable order; and all members of the court are agreed that the order of remand was not *res adjudicata,* but that relator is entitled to have his petition for a second writ upon the same facts considered by this court, notwithstanding such order of the district judge. The statute provides that when it appears on the return of a writ of habeas corpus that the party is in custody by virtue of process from any court of this state or judge or officer thereof, such person may be discharged when he has been committed on a criminal charge without reasonable or probable cause. Subdivision 7 of section 8662, Rev. Codes 1899.

Petitioner claims that he is so committed without reasonable or probable cause, and asks this court to examine the proofs against him, and determine whether or not there is probable cause for his detention. This presents for determination the question to what extent the court, on habeas corpus, will go behind the commitment of a magistrate, and examine the evidence to determine whether there was probable cause for holding one accused to answer upon a charge of having committed a crime. The examination of offenders is intrusted to magistrates, whose jurisdiction is defined and limited by the statute. The function exercised by the magistrate in such examination is a judicial one, and the finding and determination made by him, if the statutory bounds and requirements have been observed and followed, is entitled to the same respect and is of the same binding force as against collateral attack by habeas corpus as is the judgment of a court of general jurisdiction. *People* v. *Protectory,* 106 N. Y. 604, 612, 13 N. E. 435. In the conduct of examinations witnesses must be examined in the presence of the defendant. Section 7960, Rev. Codes 1899. After hearing the evidence on behalf of the respective parties, if it appears either that a public offense has not been committed, or that there is no sufficient cause to believe the defendant guilty thereof, he must be discharged. If, however, it appears from the examina-

tion that a public offense has been committed, and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must indorse on the complaint an order signed by him to the effect: "It appearing to me that the offense in the within complaint mentioned (naming it) has been committed, and that there is sufficient cause to believe the within-named guilty thereof, I order that he be held to answer the same." Sections 7964, 7966, Rev. Codes 1899. It is apparent from this statute that the magistrate must act upon evidence, and that it must appear from the evidence taken before him that an offense has been committed, and that there is sufficient cause to believe that the accused committed it. It is plain, therefore, that the order binding one over to answer for crime without the taking and hearing of evidence by the magistrate, unless an examination is waived by the accused, would be a void order, made contrary to the authority of the statute, and, consequently, without jurisdiction. It is equally plain that, when the evidence has been taken and heard, the magistrate is the judicial officer who must pass upon its sufficiency, and decide from the evidence taken before him whether an offense has been committed, and determine whether it shows sufficient cause to believe that the defendant committed it. The determination and order based on such evidence is a judicial determination by a court of competent jurisdiction in this behalf, and the commitment of one accused, based upon such evidence and finding, is lawful, because made upon reasonable and probable cause. Of course, the evidence taken must be legal and competent evidence to prove the facts, and must sustain the findings based thereon; otherwise the findings are without evidence to sustain them. *State* v. *Huegin,* 110 Wis. 240, 85 N. W. 1046, 1058.

Upon habeas corpus the court ordinarily will inquire no further than to ascertain whether the court or officer issuing the process on which the prisoner is detained had jurisdiction of the case, and acted within that jurisdiction in issuing the process. Church on Habeas Corpus, section 233; Cooley's Const. Lim. 430; note to *Koepke* v. *Hill,* 87 Am. St. Rep. 172. Mere errors or irregularities of procedure, not affecting the question of jurisdiction, are never reviewable on habeas corpus; and, where the process is regular and valid upon its face, the inquiry will go only to the question of jurisdiction. Church on Habeas Corpus, section 236. The statutes of this state do not change or enlarge the function of the habeas

corpus remedy. Under it the investigation must be confined to jurisdictional matters. The jurisdictional inquiry, however, will extend to the power of the court or magistrate to make the commitment. Jurisdiction to make the judgment or order is as essential as is jurisdiction of the person and of the subject matter. Church on Habeas Corpus, section 236; *Miskimins* v. *Shaver* (Wyo.) 58 Pac. 411, 49 L. R. A. 831; *Ex parte Degener,* 30 Tex. App. 366, 17 S. W. 1111; *Ex parte Cox* (Idaho) 32 Pac. 197; *Ex parte Kelly,* 65 Cal. 154, 3 Pac. 673; note to *Koepke* v. *Hill,* 87 Am. St. Rep. 173; *Ex parte Nielsen,* 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118; *In re Boyle* (Mont.) 68 Pac. 409; *In re Knowlton,* (Cal.) 68 Pac. 480. In *State* v. *Losby* (Wis.) 90 N. W. 188, it is said: "In reviewing the proceedings of officers exercising *quasi* judicial powers the function of the writ extends to keeping them within their jurisdiction, as well as reviewing matters of original jurisdiction. These principles have been adhered to by the courts when called upon to test the legality of the commitment of one held to answer upon a criminal charge."

It follows from what has been said that the investigation of the evidence can only go to the extent of determining that there was some competent evidence before the magistrate tending to show the commission of the offense named in the commitment, and upon which he could exercise his judgment; because, if there was competent evidence of the commission of the offense, then he had jurisdiction to make the finding, and, no matter how erroneous that finding may be, it being within his power to make, it cannot be inquired into or revised in this proceeding. The following quotations demonstrate the strict adherence of the courts to this rule when called upon to determine by an examination of the evidence taken whether one committed to answer by an examining magistrate has been held on reasonable and probable cause: In *State* v. *Hayden,* 35 Minn. 283, 28 N. W. 659, it is said: "The court or judge is not, in such cases, to sit as a court of review, to determine the sufficiency of the evidence as respects the guilt or innocence of the accused, but to inquire whether the proceedings are without jurisdiction, or the determination of the magistrate unsupported by evidence. His judgment in the premises, upon the evidence, must stand, if there is evidence reasonably tending to support it." In Nevada, where the same provisions of statute are found, it is held that the case provided for in the statute, where

a party has been committed on a criminal charge without reasonable or probable cause, has reference to the proceedings prescribed by the Criminal Practice Code, and applies only to the cases where the evidence given upon the examination was insufficient to warrant the committing magistrate in holding the prisoner to answer. It does not authorize a retrial in this proceeding of the matters then in issue. The prisoner is not entitled to be discharged upon habeas corpus unless his imprisonment was unlawful; and his imprisonment is not unlawful, no matter how innocent he may now be able to prove himself, if the evidence taken on his examination was sufficient to warrant the belief that he was guilty. *Ex parte Allen,* 12 Nev. 87; Church on Habeas Corpus, section 179. In the matter of Henry (Sup.) 35 N. Y. Supp. 210, it is said: "The question is one of jurisdiction in the magistrate. The jurisdiction of magistrates is limited. They may not arbitrarily commit one to answer a charge of crime. If an accused demand an examination, the magistrate may not commit him to answer to a court having cognizance of the crime, unless it appears that a crime has been committed, and that there is sufficient cause to believe the defendant guilty thereof. Cr. Code, section 208. It is not necessary that the evidence be conclusive or sufficient to secure a conviction upon a trial. It may be less than that. In fine, if there be any evidence that the accused committed the crime, it is sufficient. If there be no such evidence, then the magistrate is without jurisdiction to commit him. The present inquiry, therefore, is whether there was any evidence before the magistrate that the accused committed the crime, for that is the test of his jurisdiction." Church on Habeas Corpus, section 236. In *State* v. *Huegin,* 110 Wis. 240, 85 N. W. 1046, the court said: "It is the duty of the court on habeas corpus to examine the evidence, and treat the decision of the examining magistrate as outside of his jurisdiction if no competent evidence is found upon which such magistrate could properly have acted. * * * While it is true that such writ never takes the place of a writ of error, and is confined to jurisdictional defects, when it is resorted to merely for the purpose of liberating a person detained in custody to wait his trial on a charge of being guilty of a criminal offense, the questions of whether there was any evidence for the magistrate to act upon and whether the complaint charges any offense known to the law are jurisdictional matters. The reviewing court, in the exercise of its function, must necessarily

pass upon and affirm the decision of the committing magistrate, if such matters are properly presented for its consideration, according to its determination thereof; and in doing so it does not go beyond the jurisdictional defects. It can examine the evidence only sufficently to discover whether there was any substantial ground for the exercise of judgment by the committing magistrate. It cannot go beyond that, and weigh the evidence. It can say whether the evidence rendered the charge against the prisoner within reasonable probabilities. That is all. When it has discovered that there was competent evidence for the judicial mind of the examining magistrate to act upon in determining the existence of the essential facts, it has reached the limit of its jurisdiction on that point. If the examining magistrate acts without evidence, he exceeds his jurisdiction; but any act, upon evidence worthy of consideration in any respect, is as well within his jurisdiction when he decides wrong as when he decides right." See, also, Church on Habeas Corpus, sections 179, 236; *Ex parte Willoughby,* 14 Nev. 451; *In re Levy* (Idaho) 66 Pac. 806; *Ex parte Becker* (Cal.) 25 Pac. 9; *In re Palmer* (Cal.) 25 Pac. 130; *Ex parte Sternes,* 23 Pac. 40; *State* v. *Losby* (Wis.) 90 N. W. 188; *Ex parte Balcom,* 12 Neb. 316, 11 N. W. 312.

It appears from the evidence taken before the committing magistrate in this case that about 7 o'clock on the evening of June 30, 1903, Wesley Styles went to the post office at Maddock, in Benson county, to get his mail. Peter J. Selseth, a middle-aged man, weighing about 165 or 170 pounds, was in the store in the rear of which was the post office. Selseth was drunk. He approached Styles, and asked some questions about internal revenue taxes. Styles endeavored to get away from him. Selseth took hold of the lapel of Styles' coat, shook his fist in Styles' face, called him names, and threatened to fix him, and rubbed his knuckles in Styles' face. Styles escaped from him, went into the post office, followed closely by Selseth, and asked Mr. Ellingson, the postmaster, who was also a justice of the peace, for a warrant of arrest for Selseth on charge of assault and battery. Selseth renewed his profane threats, and struck Styles, then turned upon Ellingson, and made use of profane, vile, and threatening language toward him. Ellingson ordered Selseth out of the office, and upon his refusal to go seized him by the back of the neck and arm, and put him onto the street by force. Selseth held on to Ellingson's coat sleeve, and

dragged or pulled Ellingson off the sidewalk, and about twenty feet into the street, tearing Ellingson's coat. He refused to let go of Ellingson when requested, whereupon Styles went into the street, asked Selseth to release his hold on Ellingson, and proceeded to loosen Selseth's grip. Selseth turned and kicked Styles on the leg. Styles immediately kicked back, striking Selseth in the abdomen below the navel. Styles retreated backward to the sidewalk, followed by Selseth. Selseth immediately complained of great pain in the abdomen, continued to suffer for five days, and died on July 5th. A post-mortem disclosed that Selseth had been suffering from chronic tuberculosis of the peritoneum, and there was evidence that the kick in the abdomen caused tubercular peritonitis to become acute.

Homicide is manslaughter in the first degree when perpetrated without a design to effect death and in heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon, unless it is committed under such circumstances as constitute excusable or justifiable homicide. Section 7084, Rev. Codes. We cannot say that there was no evidence here upon which the magistrate could find that the immediate cause of Selseth's death was the kick received from Styles, perpetrated in a cruel and unusual manner, and under circumstances not amounting to excusable or justifiable homicide. This being true, the justice acted within his jurisdiction, and his finding is beyond review in this form of proceeding.

The writ prayed for is denied. All concur.

(97 N. W. Rep. 548.)

STATE OF NORTH DAKOTA, EX REL GEORGE M. REGISTER, *v.* ARTHUR E. MCGAHEY, THE NORTHERN PACIFIC RAILWAY CO., THE MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY CO.

Opinion filed January 12, 1904

Criminal Contempt—Knowledge of Process Resisted.

1. Resistance willfully offered by any person to the lawful order of the court is punishable as a criminal contempt, under subdivision 4, section 5932, Rev. Codes 1899. One cannot be convicted under this statute of the willful resistance of a search warrant of which he had no notice or knowledge at the time the resistance was made.

Order Resisted Must Be Lawful.

2. The order or process of the court, resistance of which, when willfully offered, is punishable as a contempt, must be a "lawful order or process." Consequently resistance of an order or warrant for search, void for want of authority in the court to issue it, is not punishable as a contempt.

Affidavit on Information and Belief.

3. In actions for the abatement of liquor nuisances, a search warrant may issue "if an affidavit shall be presented to the court or judge, stating or showing that intoxicating liquor, particularly describing it, is kept for sale, or is sold, bartered or given away on the premises, particularly describing the same, where said nuisance is located." An affidavit made upon information and belief, and not otherwise corroborated, does not "state or show" the facts required, and confers no jurisdiction upon the court to issue a search warrant, under section 7605, Rev. Codes 1899.

Appeal from District Court, Burleigh county; *Winchester, J.* Arthur E. McGahey was convicted of contempt, and appeals. Reversed.

J. G. Hamilton and *A. T. Patterson* (*Tracy R. Bangs*, of counsel), for appellant.

Contempt cannot be charged for resisting void process. The resistance must be predicated and have its foundation upon lawful process. 2 High on Injunctions, 1425.

Disobedience of an order of court not authorized by law is not contempt. *Lester* v. *People,* 150 Ill. 408, 23 N. E. Rep. 387; *In re McCain,* 68 N. W. Rep. 163.

If the writ in whole or in part is beyond the power of the court, or soin excess cmuh as is of jurisdiction, is void, the court has no right to punish for contempt of its requirements. *Ex parte Rowlund et al.,* 104 U. S. 579, 25 L. Ed. 861; *Ex parte in re Lange,* 18 Wall. 165, 21 L. Ed. 872; *Ex parte Parks,* 93 U. S. 22, 23 L. Ed. 787; *Ex parte Seibold,* 100 U. S. 371, 25 L. Ed. 717; *Ex parte Virginia,* 25 L. Ed. 676.

To constitute the offense of resisting an officer, the process must be legal, and the officer authorized in law to serve or execute it. *Brown* v. *People,* 17 Ill. 374; *State* v. *Estis,* 70 Mo. 427; *State* v. *Hooker,* 17 Vt. 658; *People* v. *Nash,* 1 Idaho, 206; *State* v. *Flagg,* 50 N. H. 330; *State* v. *Beason,* 40 N. H. 367; *Bowers* v. *People,* 17 Ill. 373; *State* v. *Hooker, supra; U. S.* v. *Stowell,* 2 Curtis, C. C.

155; *Keenan* v. *People,* 58 Ill. App. 191; *People* v. *O'Neill,* 47 Cal. 109; *Walton* v. *Develing,* 61 Ill. 201; *Lester* v. *People,* 23 N. E. Rep. 387.

Where the court has no jurisdiction, no contempt in disobedience or resistance. *McKinney* v. *Frankfort and State Line Co., et al,* 38 N. E. Rep. 170, 39 N. E. Rep. 500; *Call* v. *Pike,* 66 Me. 360; *St. Louis, K. & S. R. C.* v. *Wear,* 36 S. W. Rep. 357; *Ex parte Gardner,* 22 Nev. 280, 39 Pac. Rep. 570; *Bachelder* v. *Moore,* 42 Cal. 412; *State* v. *Davis,* 2 N. D. 461, 51 N. W. Rep. 942; *Harris* v. *Clark,* 10 How. Pr. 415.

Accusations for contempt must be supported by evidence sufficient to convince the mind of another beyond a reasonable doubt of the actual guilt of the accused. *U. S.* v. *Jose,* 63 Fed. 951; *Potter* v. *Pow,* 16 How. Pr. 549; *Woodruff* v. *North Bloomfield Gravel Min. Co.,* 45 Fed. 793; *Weeks* v. *Smith,* 3 Abb. Pr. 211; *In re Buckley,* 10 Pac. Rep. 69; *In re Taylor,* 10 Pac. Rep. 88; *State* v. *District Court, Fourteenth Judicial District, Minnesota,* 52 N. W. Rep. 831; *People* v. *Brennan,* 45 Barb. 347.

The affidavit served with the papers fails to conform to section 7605 of the Rev. Codes. It does not show that intoxicating liquors were sold, kept for sale, bartered or given away on the premises where a nuisance is alleged on information and belief to have been conducted contrary to law. It does not specifically, particularly and carefully designate the premises to be searched. It does not allege the reasonable cause for search. 3 Woods. 502; *Bly* v. *Tomkins,* 2 Abb. Pr. 468; *Vanatta* v. *State,* 31 Ind. 310.

A search warrant is only granted, after a showing, under oath, that a crime has been committed. *Lippman* v. *People,* 51 N. E. Rep. 872; Cooley on Const. Lim. (6th Ed.) 368.

Affidavit must show probable cause arising from the facts within affiant's knowledge, and must exhibit the facts upon which the belief is based. *U. S.* v. *Turead,* 20 Fed. 621; *Johnson* v. *U. S.,* 30 C. C. A. 612, 87 Fed. Rep. 187.

The warrant is not allowed to obtain evidence of an intended crime, but only after lawful evidence of an offense actually committed. Cooley Const. Lim. Law. 370; *Boyd* v. *U. S.,* 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. Rep. 524; *Commonwealth* v. *Dana,* 2 Met. 329; *Glennon* v. *Britton,* 40 N. E. Rep. 594.

The constitutional right to be secure against unreasonable searches and seizures is not violated by the seizure under a warrant of re-

quisition based upon a forged certificate, the search being made upon probable cause, supported by affidavit, since the public has an interest in preventing the use of such warrant. *Langdon* v. *People*, 24 N. E. Rep. 877; *Boyd* v. *U. S.*, *supra*; *State* v. *Thoemke*, 11 N. D. 386, 92 N. W. Rep. 480; *O'Keefe* v. *State*, 24 O. St. 175; *State* v. *Kreig*, 13 Ia. 462; *State* v. *Waltz*, 38 N. W. Rep. 494.

An affidavit on information and belief is insufficient to support a warrant of arrest in insolvency proceedings. *Koeppler* v. *Red River Valley Nat'l Bank*, 8 N. D. 406, 79 N. W. Rep. 869, and cases cited. *Fisher* v. *McGarr*, 61 Amer. Dec. 382.

Search warrants should be construed strictly. *Larthel* v. *Forgay*, 46 Am. Dec. 554; *Sanford* v. *Nichols et al*, 13 Mass. 286; *Commonwealth* v. *Intoxicating Liquors*, 109 Mass. 371; *Commonwealth* v. *Intoxicating Liquors*, 115 Mass. 145; *State* v. *Robinson*, 33 Me. 564; *Jones* v. *Fletcher*, 41 Me. 254; *State* v. *Staples*, 37 Me. 228; *State* v. *Carter*, 39 Me. 262; *Sullivan* v. *City of Oneida*, 61 Ill. 242.

Search warrants to be valid, the court must have jurisdiction to issue; there must be a strict compliance with the essentials of the statute, and the warrant must accurately describe the person, the place to be searched and the things to be seized. *Reed* v. *Rice*, 2 J. J. Marsh, 44; *Jones* v. *Fletcher*, 41 Me. 254; *Sanford* v. *Nichols*, 13 Mass. 286; *Flaherty* v. *Langley*, 62 Me. 420; *Grumon* v. *Raymond*, 1 Conn. 40; *Ashley* v. *Peterson*, 25 Wis. 621; *State* v. *Markuson*, 7 N. D. 155, 73 N. W. Rep. 82.

Geo. M. Register, state's attorney, and *F. H. Register*, for the respondent.

The injunctional order issued in this action was based upon a sufficient affidavit and complaint, and was, therefore, properly issued. Section 7605, Rev. Codes 1899.

This section expressly provides "that the affidavit, complaint or both, may be made by the state's attorney, attorney general or his assistants upon information and belief, and no bond shall be required." The affidavit of George M. Register made in this action upon which the search warrant was issued, complied with all the requirements of the above section. This affidavit shows and states that the defendants kept for sale and illegally sold intoxicating liquors, consisting in part of whisky and beer, on the premises particularly set out therein and in the search warrant, in the Northwest Hotel situated in the city of Bismarck, in that part of the

basement thereof under the east wing of said hotel east of the barber shop therein and north of the hall in the basement thereof, running east from the near foot of the stairway leading into said basement from the office or lobby of said hotel. The above description is sufficient. *Lowry* v. *Gridley,* 30 Conn. 450.

Probable cause is defined to be, such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty. Anderson's Law Dictionary, 157; *Bacon* v. *Towne,* 4 Cush. 238; *Heyne* v. *Blair,* 62 N. Y. 22; *Stacey* v. *Emery,* 97 U. S. 647, 24 L. Ed. 1035; *Wheeler* v. *Nesbitt,* 24 How. 551, 16 L. Ed. 765; 2 Bouvier's Law Dictionary, 467.

The description of the property searched was as precise and accurate as the circumstances permitted, and this is all that is required. Black on Intoxicating Liquors, 408; *State* v. *Thompson,* 44 Iowa 339.

That the complaint was verified upon information and belief does not detract from its strength. This form is permitted in all cases by the attorney of the party to an action in this state. Such a complaint before a magistrate will authorize him to issue his warrant of arrest thereon. *State* v. *Hobbs,* 39 Me. 212.

Complaint is not required to allege that the complainant has probable cause to believe; it is sufficient to allege that he does in fact believe that intoxicating liquors are kept by a person in violation of law. *State* v. *Welch,* 79 Me. 99; *State* v. *Devine,* 13 Atl. Rep. 128; *Commonwealth* v. *Certain Intoxicating Liquors,* 110 Mass. 182; *State* v. *Nowlan,* 64 Me. 531.

The complaint itself may be considered as an affidavit. *Harris* v. *Lester,* 80 Ill. 311; *Baker* v. *Williams,* 12 Barb. 557; *Barnes* v. *Doyle,* 28 Wis. 463; *State* v. *Davie,* 22 N. W. Rep. 411; *Commonwealth* v. *Leddy,* 105 Mass. 381.

Reasonable searches are allowed, and if the thing sought is found it may be seized. *Boyd* v. *U. S.,* 116 U. S. 616, 29 L. Ed. 746; *Commonwealth* v. *Dana,* 2 Met. 329; *Glennon* v. *Britton,* 40 N. E. Rep. 594; *Co-operative Building and Loan Association et al* v. *State,* 60 N. E. Rep. 146; *Shuman* v. *City of Ft. Wayne,* 26 N. E. Rep. 560; *Levy* v. *Superior Court of City and County of San Francisco,* 38 Pac. Rep. 965; *Langdon* v. *People,* 138 Ill. 382, 24 N. E. Rep. 874; *Gindrat* v. *People,* 138 Ill. 103, 27 N. E. Rep. 1085; *State* v. *Mayhew,* 2 Gil. 487; *State* v. *Newman,* 96 Wis. 258, 71 N. W.

Rep. 438; *In re Chapman,* 166 U. S. 661, 17 Sup. Ct. Rep. 677; *Boston Beer Co.* v. *Mass.,* 97 U. S. 25, 24 L. Ed. 989; *Bartmeyer* v. *Iowa,* 18 Wall. 129, 21 L. Ed. 929; *U. S.* v. *Distillery No. 28,* 6 Biss. 484; *The Luminary,* 8 Wheat. 407, 5 L. Ed. 647; *Henderson's Distilled Spirits,* 14 Wall. 44, 20 L. Ed. 815.

The disobedience of any order, judgment or decree of a court having jurisdiction to issue it, is a contempt of court, however erroneous or improvident the issuing of it may have been. *In re Cohen,* 5 Cal. 594; *Tilton* v. *Paterson,* 18 Abb. Pr. 245; Rapalje on Contempt, 19.

If a court having jurisdiction should issue an improper order, it is obligatory until reversed by an appellate court, and parties may be punished for disobedience or resistance to such order. *Sullivan* v. *Judah,* 4 Paige 442; *Moat* v. *Halbein,* 2 Edw. (Ch.) 188; *People* v. *Bergen,* 53 N. Y. 404; *Franklin* v. *Smith,* 49 Ga. 112; *Smith* v. *Fitch,* 1 Clark (N. Y.) 265; *Rutherford* v. *Metcalf,* 5 Hayw. 58 (Tenn.).

If the order is void for want of jurisdiction, disobedience of it is not contempt of court. *Harris* v. *Haines,* 35 Mich. 138; *People* v. *Sturdevant,* 9 N. Y. 263.

Whoever unlawfully interferes with property or officers and agents of the court in possession and management of it, are guilty of contempt of court. *In re Higgins,* 27 Fed. 443. An erroneous order must be questioned by direct proceedings to review it and not by disobedience. *Forest* v. *Price,* 52 N. J. Eq. 16; *Arctic Fire Ins. Co.* v. *Hicks,* 7 Abbott's Pr. 204; *People* v. *Grant,* 13 Civ. Proc. R. 305.

One having actual notice of an injunction will be bound thereby although the same is not served upon him. *Bull* v. *Thomas,* 3 Edw. (Ch.) N. Y. 236; *Ewing* v. *Johnson,* 34 How. Pr. 202; *Waffle* v. *Vanderheyden,* 8 Paige 45; *Ramstock* v. *Roth,* 18 Wis. 522; *Hull* v. *Thomas,* 3 Edw. 236; *Thebault* v. *Canova,* 11 Fla. 143.

Appearing and answering as to the merits on a charge of contempt will prevent an attack from lack of jurisdiction of the person on a decision that the party is in contempt. *Ex parte Keeler,* 31 Law. Rep. An. 678; *Eilenbecker* v. *Plymouth Co. Dist.,* 134 U. S. 31, 10 Sup. Ct. Rep. 424; *Lawton* v. *Steele,* 152 U. S. 133, 14 Sup. Ct. Rep. 499; *Callan* v. *Wilson,* 127 U. S. 540, 8 Sup. Ct. Rep. 1301; *In re Doolittle,* 23 Fed. 544; *Albertson* v. *The P. I. Nevius,* 48 Fed. 927

COCHRANE, J. Appellant, after hearing, was adjudged guilty of contempt, in that "he willfully resisted the execution of a search warrant (described), and willfully resisted George A. Welch, sheriff of Burleigh county, in making search of the premises, particularly described in said search warrant, in the basement of the Northwest Hotel, in Bismarck, in said Burleigh county," and was sentenced to thirty days' imprisonment in the county jail, and to pay a fine of $200, and, in case the fine was not paid, then to thirty days' additional imprisonment after the expiration of the first thirty days. He appeals from the judgment. The search warrant, the execution of which he was convicted of resisting, was issued in aid of an equitable action to abate an alleged liquor nuisance, begun by the state's attorney of Burleigh county, under the provisions of section 7605, Rev. Codes 1899, in which action appellant was named as one of the defendants. The complaint in the action was verified by the affidavit of the state's attorney, to the effect "that the same is true, to his best knowledge, information, and belief." The affidavit for search warrant was also made by George M. Register, state's attorney, and its averments are all made on information and belief, and none of them are sworn to positively. Upon this hearsay foundation an alleged search warrant was issued by the court, directed and delivered to the sheriff of the county, reciting the papers upon which it was based, and commanding the sheriff at the time of serving the injunction to diligently search the premises described, and carefully invoice the articles found therein and if, upon such search, intoxicating liquors of any kind should be found, to take the same into his custody, and securely hold the same to abide the final order or judgment in the action, and also to take and hold possession of the described premises, and keep the same closed, until final judgment in the action. The sheriff on the night of January 31, 1903, entered a room in the basement of the Northwest Hotel for the purpose of serving the papers in this case upon the defendants named, and otherwise performing the commands of the search warrant. The sheriff thus describes what occurred: "I found the defendant McGahey in one of the rooms of the basement—the third room from the barber shop, east. He was standing alongside the table. There were some bottles partly filled with Val Blatz beer. I reached for a bottle of beer, and took it in my hand. The defendant knocked a glass of beer from the table with one hand, and grabbed the bottle with his other hand, and tried to take

this bottle away from me. We both had hold of the bottle, and wrestled for possession for some little time, over chairs, tables, and whatever was in the way. I finally got possession of the bottle. I told him several times to let go of the bottle. I told him I would have him arrested. He did not say anything to me at all. I served the summons, complaint, affidavit, injuctional order, and search warrant there after the scuffling was done. From the time I made service of the papers upon McGahey, and until he went out of the basement, he did not do anything—only stand around and talk—and refused to leave the place."

The defendant, in answer to interrogatories propounded to him in the contempt proceedings, testified: That he knew George A. Welch had been elected sheriff of Burleigh county, and had been acting as such since January 5, 1903. That he was served by said sheriff with copies of the summons and complaint, affidavit, injunctional order and search warrant on the night in question, after and not before, the supposed resistance testified to by Mr. Welch. That Mr. Welch began to search before he served any papers of any kind, and served the papers after the alleged resistance, when defendant said to him, "'If you have a right to search this place, where is your warrant?' Then he handed me the papers, and I took them and placed them on the table." That he did not know that the sheriff had authority to search the premises, and to seize and take into his possession intoxicating liquors found upon the premises. There was a bottle on the table, and both the sheriff and defendant reached for it at the same time. Defendant did not then know that Mr. Welch had any right to the possession of it, as he had shown no papers, nor read any; and defendant testified: "I did not know he was acting in the capacity of sheriff of Burleigh county at that time, and he did not so state to me. Some of the contents of the bottle spilled in my effort to retain possession of it." Appellant did not interfere with or resist the officer in the search after being made aware by the sheriff that he was armed with, and attempting to execute, a search warrant. None of these statements of the defendant were contradicted. The record clearly shows that appellant, at the time of the acts charged to him as a contempt, was in a room in the Northwest Hotel, which the complaint alleges he, with another, "kept, used and maintained," and therefore a place where he had a right to be for all lawful purposes, and a place the sheriff had no right to enter,

unless on invitation, or, unless authorized by legal process, neither of which had been furnished him; that the sheriff entered this room, and sought to take possession of a bottle on the table, without showing that he had any right to enter or to interfere with anything in the room. Appellant naturally resisted this seeming trespass, and exhibited as strong a desire for and hold upon the Val Blatz as did the sheriff, until the law officer wrested it from the possession of appellant; and then appellant was notified that the sheriff was acting officially in the discharge of duty, when all interference on the part of appellant ceased. The acts constituting criminal contempt are classified in section 5932, Rev. Codes 1899; and the acts of appellant, found to be a contempt in this case, unless within the terms of subdivision 4 of this section, are not punishable as such. The statute reads as follows: "Every court of record shall have power to punish as for a criminal contempt persons guilty of any of the following acts and no other: * * * Subd. 4. Resistance willfully offered by any person to the lawful order or process of the court." The other subdivisions of this section can have no application to the facts of this case; so, if the appellant has not violated the subdivision quoted, his conviction was erroneous and must be reversed.

Assuming, for the purposes of this opinion, that a search warrant is an "order or process of the court," within the meaning of this statute, the resistance of which may be punishable, as a contempt, when it is willfully offered, and when the order or process is lawful, nevertheless the conviction in this case cannot be sustained. The resistance, under this statute, must have been willfully offered. The term "willful," when applied to the intent with which an act is done, implies a purpose or willingness to commit the act. Section 7713, Rev. Codes 1899; *Freeman* v. *City of Huron,* 8 S. D. 438, 66 N. W. 928. It goes without saying that one cannot form the purpose to resist an order or warrant of which he has no knowledge or notice whatever. The uncontradicted evidence in this case shows that appellant had no notice or knowledge that the sheriff was armed with the warrant when he seized and sought to retain possession of the bottle. The sheriff had not exhibited his warrant, or made any mention that he had one in his possession, or that he was acting under its authority. The resistance, therefore, was no resistance of the warrant, willfully made. *Horan* v. *State,* 7 Tex. App. 183; *Johnson* v. *State,* 26 Tex. 117; *U. S.* v. *Tinkle-*

paugh, 28 Fed. Cas. 193; *State* v. *Downer,* 8 Vt. 424, 30 Am. Dec. 482; *State* v. *Carpenter,* 54 Vt. 551; *State* v. *Phipps,* 34 Mo. App. 400.

The conviction in this case was erroneous for the further reason that the order or warrant which appellant is accused of having resisted was not a lawful order or warrant. It was issued without authority of law, and was wholly void. The only authority for a search warrant in actions to abate liquor nuisances is found in section 7605, Rev. Codes 1899. The pertinent portion of that section reads as follows: "The attorney general, his assistant, state's attorney, or any citizen of the county where such nuisance exists or is kept or is maintained, may maintain an action in the name of the state to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action in the usual manner of granting injunctions, except that the affidavit or complaint or both, may be made by the state's attorney, attorney general or his assistant upon information and belief; and no bond shall be required; and if an affidavit shall be presented to the court or judge, stating or showing that intoxicating liquor, particularly describing the same, is kept for sale, or is sold, bartered or given away on the premises, particularly describing the same, where said nuisance is located contrary to law, the court or judge must at the time of granting the injunction issue his warrant commanding the officer serving said writ of injunction, at the time of such service, to search diligently the premises and carefully invoice all the articles found therein, used in or about the carrying on of the unlawful business. * * * If such officer upon such search shall find upon such premises any intoxicating liquor or liquors of any kind, he shall take the same into his custody and securely hold the same to abide the final judgment in the action, and such officer shall also take and hold possession of all personal property found on such premises, and shall take and hold possession of such premises and keep the same closed until such final judgment." No authority is found in this statute for the issuance of the search warrant unless an affidavit is presented to the court "stating or showing that intoxicating liquor, particularly describing the same, is kept for sale." The affidavit presented to the court in this case did not state or show the required facts, but merely asserted that the state's attorney was informed and believed that the facts did exist. The affidavit is uncorroborated. It does not give the name of

the person furnishing the information; makes no statement as to where or how the information and belief was obtained, or on what information his belief was founded, or whether it was such information as would inspire belief in the mind of a less credulous person. It is mere hearsay and opinion. Judge Cooley, for the Supreme Court of Michigan, thus characterized this form of accusation: "Charges are not verified by an affidavit that somebody is informed and believes they are true. This is mere evasion of the law. The most improbable stories may be believed of any one, and the man most free from any reasonable suspicion of guilt is not safe if he holds his freedom at the mercy of any man, miles off, who will swear that he has been informed and believes in his guilt. It is easy to tell falsehoods, and those who are least fitted to judge of their credibility are generally the very persons who will believe them because they are told. But to substantiate charges, within the meaning of the law, evidence is required, and not merely suspicions or information or beliefs." *Swart* v. *Kimball,* 43 Mich. 451, 5 N. W. 635. This court, in *Kaeppler* v. *Bank,* 8 N. D. 411, 79 N. W. 871, said: "As the application for the arrest is an *ex parte* proceeding, and as it is in derogation of personal liberty, the least that can be required is that the applicant make an undoubted *prima facie* case. Under well-settled general principles, this cannot be done, in the absence of statutory sanction, by an affidavit based upon information and belief, for the very evident reason that such affidavit is not competent evidence. It is mere hearsay. If the affiant were on the stand, he would not be permitted to testify to any such matter, and he certainly would be equally restricted in an *ex parte* affidavit, where he is subjected to no cross-examination; and so are the authorities." Such an affidavit is without statutory sanction. Upon the plainest rules of statutory construction, an affidavit for a search warrant is required to be made by one with knowledge of the facts, and by positive and unqualified statements of their existence. This is shown by the fact that the legislature, in the same clause of the statute, authorizes the issuance of an injunction and search warrant in one action, and at the same time, and provides that when the affidavit or complaint for injunction is made by the state's attorney, attorney general, or his assistant, it may be made on information and belief, but omits the affidavit for search warrant from mention in the proviso; thus

impliedly declaring that information and belief will not support a search warrant. Suth. Stat. Const. sections 325, 327.

It may well be doubted whether it is within the power of the legislature to authorize the issuance of search warrants upon mere affidavit or complaint made upon information and belief. The Constitution, section 18, declares: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized." Under a similar guaranty, the Supreme Court of Illinois have held it beyond the power of the legislature to authorize a search warrant to issue upon a complaint or affidavit which is merely hearsay. *Lippman* v. *People,* 175 Ill. 101, 51 N. E. 872. *In re Dana* (D. C.) 68 Fed. 895, it is said: "The fundamental requirements of the fourth amendment (of the federal Constitution, similar to section 18, *supra*) are that the facts and circumstances tending to show criminality shall be made to appear to the magistrate on oath, whether upon examination by the magistrate himself, or by affidavit or deposition, and that the magistrate must himself find in the facts thus shown sufficient probable cause, independent of the belief of other persons." In *Swart* v. *Kimball,* 43 Mich. 443, 5 N. W. 635, the court, in dealing with the complaint made upon information and belief, said: "The Constitution itself requires a showing of cause before a warrant shall issue. The arrest in this case would therefore have been unwarranted, even if the law had been valid. See, also, *State* v. *Davie,* 62 Wis. 305, 22 N. W. 411; *In re Rule of Court,* 20 Fed. Cas. No. 12,126. Under statutes requiring facts to be shown by affidavit as a condition precedent to the issuance of orders or the granting of specific relief, an affidavit of the matter, stated on information and belief of the party making it, will not be treated as a compliance with the statute. Such an affidavit will not support an injunction. *City of Atchison* v. *Bartholow,* 4 Kan. 124; *Roome* v. *Webb,* 3 How. Prac. 327; *Smith* v. *Reno,* 6 How. Prac. 124; *Hecker* v. *Mayor,* 28 How. Prac. 211; *Bostwick* v. *Elton,* 25 How. Prac. 362; *Woodruff* v. *Fisher,* 17 Barb. 224. It will not authorize an arrest in a civil case. *Kaeppler* v. *Bank,* 8 N. D. 406, 79 N. W. 869; *Hart* v. *Grant,* 8 S. D. 248, 66 N. W. 322; *Sheridan* v. *Briggs* (Mich.) 19 N. W. 189; *Shaw* v. *Ashford* (Mich.) 68 N. W. 281; *Ex parte Fkumoto,*

120 Cal. 316, 52 Pac. 726; *Ex parte Vinich,* 86 Cal. 70, 26 Pac. 528; *People* v. *Smith* (Sup.) 10 N. Y. Supp. 589; *Finlay* v. *De Castroverde* (Sup.) 22 N. Y. Supp. 716; *Ammon* v. *Kellar* (Sup.) 47 N. Y. Supp. 595. It will furnish no foundation upon which to build a proceeding for constructive contempt. *Freeman* v. *City of Huron,* 8 S. D. 435, 66 N. W. 928; *Thomas* v. *People,* 14 Colo. 254, 23 Pac. 326, 9 L. R. A. 569; *Young* v. *Cannon,* 2 Utah, 560; *Herdman* v. *State,* 54 Neb. 626, 74 N. W. 1097; *Batchelder* v. *Moore,* 42 Cal. 412. It will not sustain a warrant of arrest of one thus accused of crime. *State* v. *Boulter* (Wyo.) 39 Pac. 883; *Swart* v. *Kimball,* 43 Mich. 443, 5 N. W. 635; *Ex parte Dimmig* (Cal.) 15 Pac. 619; *People* v. *Heffron* (Mich.) 19 N. W. 170; *State* v. *Gleason,* 32 Kan. 250, 4 Pac. 363; *U. S.* v. *Turead* (C. C.) 20 Fed. 621; *U. S.* v. *Polite* (D. C.) 35 Fed. 59; *Johnson* v. *U. S.,* 87 Fed. 187, 30 C. C. A. 612. Neither can such an affidavit, made upon information and belief, furnish the basis for a search and seizure, in the face of the Constitution and statutory safeguards hereinbefore quoted. The affidavit for search warrant did not state or show the facts required by statute to be shown as a foundation for search warrant, and gave no jurisdiction to the court to issue it, and the warrant was therefore void. *State* v. *Wimbush,* 9 S. C. 309; *Fisher* v. *McGirr,* 61 Am. Dec. 381; *Hauss* v. *Kohlar,* 25 Kan. 640; *Curnow* v. *Kessler* (Mich.) 67 N. W. 982; *People* v. *Pratt,* 22 Hun. 300; *People* v. *Heffron* (Mich.) 19 N. W. 170; *Ex parte Dimmig* (Cal.) 15 Pac. 619; *State* v. *Davis,* 2 N. D. 461, 472, 51 N. W. 942. The warrant being void for want of authority in the court to issue it, resistance of it could not be a contempt, under the statute. *In re McCain,* 9 S. D. 57, 68 N. W. 163; *Chambers* v. *Oehler* (Iowa) 77 N. W. 853; *Com.* v. *Perkins* (Pa.) 16 Atl. 525, 2 L. R. A. 223; *State* v. *Milligan* (Wash.) 28 Pac. 369; *Schwartz* v. *Barry* (Mich.) 51 N. W. 279; *State* v. *Circuit Court* (Wis.) 73 N. W. 788; *Smith* v. *People* (Colo. App.) 29 Pac. 924; *Ex parte Fisk,* 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; *In re Ayers,* 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; *Weber* v. *Weber,* (Wis.) 63 N. W. 757; *State* v. *Davis,* 2 N. D. 461-472, 51 N. W. 942.

The judgment appealed from is reversed. All concur.

(97 N. W. Rep. 865.)

F. I. LUCE *v.* FRANK JESTRAB, JR.

Opinion filed December 16, 1903.

Minor's Contract—May Disaffirm by Restoring Consideration.

1. Under the statutes of this state, a minor over eighteen years of age may contract in the same manner and with the same effect as an adult, except that he may disaffirm his contract within one year after reaching his majority (except as to contracts for necessaries) by "restoring the consideration to the party from whom it was received or paying its equivalent with interest." Section 2703, Rev. Codes 1899.

Once Affirmed, He Cannot Disaffirm—Liability Is Upon His Contract, Not Quantum Meruit.

2. The contracts of a minor over eighteen years of age are not void, but voidable merely, and are enforceable unless disaffirmed in the manner provided by statute. Such contracts are rendered entirely valid by the expiration of the period allowed for disaffirmance, or by an affirmance within such period; and when a minor has, after reaching his majority, elected to affirm the contract, he cannot thereafter disaffirm it. The minor's liability in such case is upon his contract, and not upon a *quantum meruit.*

Retention of Consideration, and Promise to Pay After Reaching Majority, Affirm Minor's Contract.

3. In an action upon a promissory note given by a minor as the purchase price of a team of horses, in which the defense of minority was pleaded, it appeared upon the trial that the defendant retained and used the team for nine months after reaching his majority, and that on two occasions he promised to pay the note; that thereafter he refused to pay, and offered to return the horses, and demanded his note; that the team, when tendered, by his use and abuse of the same, had become practically worthless. It is *held* that the trial court did not err in refusing to direct a verdict for the defendant.

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

Action by F. I. Luce against Frank Jestrab, Jr. Judgment for plaintiff, and defendant appeals.

Affirmed.

E. R. Sinkler, for appellant.

The horses bought by the minor were not necessaries under the statute. *Norse* v. *Alexander,* 55 A. R. 189; *Decell* v. *Lowenthal,* 34 A. R. 449; *Rainwater* v. *Durham,* 10 A. D. 637; *Brave* v. *Hole,*

21 Tenn. 27; *Wornack* v. *Loas,* 11 S. W. Rep. 438; *Horstmeyer* v. *Connors,* 36 Mo. App. 115.

Minor is not bound to pay contract price, but "the reasonable value" of necessaries. Rev. Codes, section 2704.

Note given for necessaries is void. *Swasey* v. *Administrators,* 10 Johns 923; *McCrillis* v. *How,* 3 N. H. 348; *McMinn* v. *Richmond,* 6 Yerg. (Tenn.) 9; *Fenton* v. *White,* 4 N. J. L. 100; 27 Cent. Digest, section 123; *Locke* v. *Smith,* 41 N. H. 346; *Beeler* v. *Young,* 1 Bibb. 519; *Treuman* v. *Hurst,* 1 T. R. 40; *Henderson* v. *Fox,* 5 Ind. 489; *Ayers* v. *Burns,* 87 Ind. 245; *Bouchell* v. *Clary,* 3 Brev. 194 (S. C.).

Unless it is tortuously injured by the infant, the vendor must take the property when restoration is offered, as he finds it. 16 Am. & Eng. Enc. of L. (2d Ed.) 295; *White* v. *Branch,* 51 Ind. 210; *Price* v. *Furman,* 16 Am. Dec. 194. Injury by the infant of the thing purchased, unless by willful tort, constitutes no defense to his right to the money paid. *White* v. *Branch,* 51 Ind. 210; *Carpenter* v. *Carpenter,* 45 Ind. 142.

The infant must restore the consideration, whether it has depreciated or increased in value. 16 Am. & Eng. Enc. of L. (2d Ed.) 295; *White* v. *Branch,* 51 Ind. 210; *Price* v. *Furnam,* 65 Am. Dec. 194, 16 Am. & Eng. Enc. of L (2d Ed.) 290; *Carpenter* v. *Carpenter,* 45 Ind. 142; *Stock* v. *Cavanaugh,* 67 N. H. 149.

Depuy & Depuy, for respondent.

The reasonable time in which a minor must restore is fixed by statute at one year. Rev. Codes, 2703. At the age of eighteen years, the contracts of a minor are as binding as those of an adult, except the additional ground of rescission is given, upon restoring the consideration. Rev. Codes 2703; *Combs* v. *Hawes,* 8 Pac. Rep. 597 (Cal.); *Dickerson* v. *Cordon,* 24 N. Y. St. R. 448; *Craig* v. *Van Bebber,* 13 S. W. Rep. 906, 18 Am. St. Rep. 569, 701, note.

The minor must restore the consideration, or its equivalent with interest. The return of the broken down horses was not such restoration. *Bartholomew* v. *Finnemore,* 17 Barb. 428.

An adult, who ratifies his infant contract, cannot thereafter disaffirm, although he attempts it within the year after attaining his majority. *Craig* v. *Van Bebber, supra;* 10 Am. & Eng. Enc. of L. (1st Ed.) 644.

Ratification is a question of intent. *Craig* v. *Van Bebber, supra;* 10 Am. & Eng. Enc. of L. (1st Ed.) 646; *Lynch* v. *Johnson,* 67 N. W. Rep. 908.

Use of the property, and its retention after majority, accepting the benefits, inexcusable silence, and promises to pay after coming of age, are all held to be ratification. *Cheshire* v. *Barrett,* 17 Am. Dec. 735; *Lawson* v. *Lovejoy,* 23 Am. Dec. 526 (Me.); *Delano* v. *Blake,* 11 Wend. 85, 25 Am. Dec. 617; *Lynch* v. *Johnson,* 67 N. W. Rep. 908 (Mich.); *Philpot* v. *Sandwich Co.,* 24 N. W. Rep. 428 (Neb.); *Johnson* v. *N. W. Mut. Life Ins. Co.,* 59 N. W. Rep. 992 (Minn.); *Goodnow* v. *Empire Lbr. Co.,* 18 N. W. Rep. 283 (Minn.); *Orvis* v. *Kimball,* 3 N. H. 314; *Bester* v. *Hickney,* 41 Atl. 555 (Conn.); *Hilton* v. *Shepherd,* 42 Atl. 387 (Me.); *Barlow* v. *Robinson,* 51 N. E. Rep. 1045 (Ill.); *Ready* v. *Pinkham,* 63 N. E. Rep. 887 (Mass.); *Kincaid* v. *Kincaid,* 53 N. E. Rep. 1126 (N. Y.); *Whyte* v. *Rosencrantz,* 56 Pac. Rep. 436 (Cal.).

The infant's contract being voidable only upon failure to disaffirm by restoring the consideration or its equivalent with interest within a year after majority, or upon ratification, suit should be brought upon the original contract. *Craig* v. *Van Bebber, supra;* 10 Am. & Eng. Enc. of L. (646 n. 1; 27 Cent. Dig. c. 1158).

YOUNG, C. J. Plaintiff sues upon a promissory note for $225 executed and delivered by the defendant on April 13, 1901, and by its terms due on October 1st thereafter. The defendant, in his answer, admitted the execution of the note, but denied that he is indebted thereon, and alleged as a defense that on the date of the execution of the note he was a minor; that he did not reach his majority until May 12, 1901; that the note was given for a team of horses purchased by him from the plaintiff, and for no other consideration; that on the 4th day of February, 1902, and within one year after reaching his majority, he restored the team to the plaintiff, and rescinded the purchase, and demanded a return of his note. The case was tried to a jury, and a verdict was returned for the plaintiff for the full amount of the note, with interest. Defendant moved for a new trial, upon a statement of case, in which he specified, as grounds therefor, twenty-five alleged errors. This appeal is from the order denying the motion for new trial.

Counsel for defendant assigns in his brief, as grounds for reversal, all of the errors specified in the statement. A large number

of these are "merely assigned, and not supported in the body of the brief by reasons or authorities," as required by rule 14 of the revised rules of this court, and must therefore "be deemed to have been abandoned."

The assignment chiefly relied upon is the court's refusal to direct a verdict in defendant's favor. The motion for a directed verdict was upon the ground (1) that the plaintiff cannot recover upon the note, but must recover, if at all, only the reasonable value of the horses which constituted the consideration of the note; and (2) that the evidence showed that the defendant had rescinded and disaffirmed the contract, and restored to the plaintiff everything of value which he had received for the note. Neither of these grounds is tenable, and the motion was therefore properly denied. The conflict which exists in judicial opinion elsewhere as to the legal effect of contracts of minors, and as to the steps necessary to avoid such contracts, has been removed in this state by statute. Section 2701, Rev. Codes 1899, reads as follows: "A minor cannot give a delegation of power, nor under the age of eighteen make a contract relating to real property or any interest therein, or relating to any personal property not in his immediate possession or control." Section 2702: "A minor may make any contract other than as above specified in the same manner as an adult, subject only to his power of disaffirmance under the provisions of this chapter and subject to the provisions of the chapters on marriage and on master and servant." Section 2703: "In all cases other than those specified in sections 2704 and 2705, the contract of a minor, if made while he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within one year's time afterwards; or in case of his death within that period, by his heirs or personal representatives; and if the contract is made by the minor while he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received, or paying its equivalent with interest." Section 2704: "A minor cannot disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for his support or that of his family entered into by him when not under the care of a parent or guardian able to provide for him or them."

It is entirely clear, under section 2703, *supra,* that the contract of a minor who is over eighteen years of age is not void, but merely voidable—that is, it is enforceable unless disaffirmed within the

period and in the manner provided by the statute; and, further, that his liability rests upon his contract, and not upon a *quantum meruit.* The action was properly brought upon the note.

The evidence wholly fails to show a disaffirmance of the contract. On the contrary, it shows a complete ratification by the defendant after attaining his majority. It appears that when the defendant purchased the team he lacked but twenty-nine days of his majority; that he was the owner of 160 acres of land, which he was then farming, and that he also farmed 480 acres of other land, which he had rented; that after the purchase of the team he used it in plowing his land, harvesting and threshing his crop, and marketing his grain, and for general farming purposes. On two different occasions he promised the plaintiff to pay the note—once in August, and again in November. On February 4th thereafter he delivered the team at a livery barn, and served notice on plaintiff that he had disaffirmed the contract upon the ground that he was a minor when he made the purchase. There is no complaint that the team was not in good condition when purchased, or that the sale was in any respect unfair. When the defendant attempted to disaffirm his contract and return the team, one of the horses was practically worthless, and the other was worth not to exceed $30. He retained possession of the team and used it for almost nine months after reaching his majority. The worthless condition of the team was due to his use of the same, and to his abuse and neglect. Upon this state of facts, we are of opinion that the defendant's attempted disaffirmance was without legal effect. The first reason for this conclusion is that after reaching his majority he unequivocally ratified the contract. When he purchased the team he was over eighteen years of age. His contract, therefore, under the statute, was not void, but, as we have seen, was voidable at his option—that is, it was enforceable until avoided by a disaffirmance; and it could be disaffirmed only in the manner provided by the statute. He had the right of election for one year after reaching his majority to affirm or disaffirm. He elected to affirm. This is evidenced by nine months' continuous use of the property, and by his promises to pay the note. By affirming the contract after reaching his majority, he lost the right to thereafter disaffirm it. A minor, after reaching his majority, has full capacity to choose for himself, and may, within the statutory period, make his election; but he cannot affirm and thereafter disaffirm his voidable contracts.

He is bound by his ratification. Ratification, when once made, creates no new contract, but merely removes the objection to the voidable contract. It is said that "the supposed incapacity of infants to judge of the value of property, or its fitness for their use, and the danger to which they are exposed from the arts and devices of bad men, is the foundation of the rule which exempts them from liability on contracts made by them during their infancy. But when they have attained full age, and are capable of exercising a matured judgment in the review of past transactions, they may, without violation of the principle, be permitted to affirm or disaffirm their contracts. They are then supposed to be competent to determine how far these contracts have been beneficial, and how far injurious, and, having made the election to be bound or not, the law in most cases will confirm and enforce it." It is the privilege of the minor to fully disaffirm the contract, and until he does so, the other party is bound by it. When he becomes of age, he may regard it as beneficial to him, and elect to affirm it. If he does so, he is bound by his ratification. And the rule is well settled that, where a "ratification is once validly made, the contract entered into by the party while an infant is binding upon him, and cannot be recalled or disaffirmed." In this case the retention of the property and its use by the defendant, including his promises to pay the note, all occurring after he reached his majority, constituted a complete ratification of the contract. The following cases will be found to fully sustain the views above expressed: *Craig* v. *Van Bebber,* 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569, 701, note; *Hastings* v. *Dollarhide,* 24 Cal. 195; *Derrick* v. *Kennedy,* 4 Port. 41; *McCarthy* v. *Nicrosi,* 72 Ala. 332, 47 Am. Rep. 418; *Little* v. *Duncan,* 64 Am. Dec. 760; *Carr* v. *Clough,* 26 N. H. 280, 59 Am. Dec. 345; *Cheshire* v. *Barett,* 4 McCord, 241, 17 Am. Dec. 735; *Lawson* v. *Lovejoy,* 8 Greenl. 405, 23 Am. Dec. 526; *Boody* v. *McKeeney,* 23 Me. 517; *Deason* v. *Boyd,* 1 Dana 45; *Delano* v. *Blake,* 11 Wend. 85, 25 Am. Dec. 617; *Robbins* v. *Eaton,* 10 N. H. 561; *Boyden* v. *Boyden,* 9 Metc. (Mass.) 519; *Henry* v. *Root,* 33 N. Y. 526; *Taft* v. *Sergeant,* 18 Barb. 320; *Bartholomew* v. *Finnemore,* 17 Barb. 428.

But if it were conceded that the defendant did not ratify his voidable contract, and that he still had the power to disaffirm when he attempted to do so, still we would be compelled to hold that his attempt was without legal effect. As we have seen, he could only

disaffirm "upon restoring the consideration to the party from whom it was received or paying its equivalent with interest." This he did not do. He received a team which was in good condition. When he returned it, the horses were practically worthless, and he made no offer of compensation for the difference in condition. This was not such a restoration of the consideration as is required by the statutes. See *Bartholomew* v. *Finnemore, supra.*

The statute does not extend the period of a minor's disability one year beyond majority. It is true, he is accorded one year after majority in which to disaffirm, but he is not under disability during this period. On the contrary, he is competent to judge and act for himself, and his election to affirm is just as binding upon him as in the case of any other person. The purpose of the statute is to shield minors, as such, from fraud and imposition practiced upon them during their minority. It is not its purpose to place in their hands an instrument for perpetrating fraud when they have reached their majority.

The several errors assigned upon the instructions cannot be considered, for the reason that there is no foundation for them in the record. An amended abstract filed by the respondent discloses that no exceptions to the instructions were filed within the statutory period, and that the time for filing the same was not extended. The errors assigned upon the admission of evidence, so far as they are argued, are ruled by the conclusions already announced upon the refusal of the court to direct a verdict.

Finding no error in the record, the order appealed from will be affirmed. All concur.

(97 N. W. Rep. 848.)

ARRISON *v.* COMPANY D, NORTH DAKOTA NATIONAL GUARD, ET AL.

Opinion filed January 11, 1904.

National Guard—Incorporation—Armory Buildings—Mechanics' Liens.

1. A corporation organized under chapter 101, p. 159, Laws 1897, which authorizes three or more members or ex-members of the national guard to incorporate for the purpose of erecting an armory building, is a private, and not a public corporation; and, save as to taxes and charter fees, which are excepted by the act, it has the same powers, and is subject to the same duties and liabilities, as any other

private corporation, and its property is subject to the operation of mechanics' lien laws.

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

Action by J. M. Arrison against Company D, North Dakota National Guard, and another. Judgment for plaintiff, and defendant appeals.

Affirmed.

Townsend & Denoyer, for appellants.

R. Goer (*Gooler & Gooler,* of counsel), for respondents.

YOUNG, C. J. This is an action to foreclose a mechanic's lien. The complaint alleges that the defendant, "Company D, North Dakota National Guard," is a corporation organized under the authority of section 1425a, Rev. Codes 1899; that said corporation contracted with the defendant O. T. White for the erection of an armory building upon certain lots in Devils Lake; that the plaintiff performed work, labor, and services as a subcontractor on said building of the agreed and reasonable value of $43.47; that he filed his claim for a lien therefor under chapter 77 of the Civil Code, and asks judgment for that sum, with interest, and the foreclosure of his lien. The defendants joined in a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendants appeal from the order overruling the same.

The single contention of the appellants is that an armory building erected and owned by a corporation organized under section 1425a, Rev. Codes 1899, is not subject to mechanics' liens. This section was enacted as chapter 101, p. 159, Laws 1897, and is as follows: "Any number of persons, not less than three, being members or ex-members of regularly enrolled companies of the national guard of this state, may form a corporation for the purpose of erecting, obtaining and maintaining a building to be used by the company of which they are members or ex-members, as a military training school, armory and place of meeting, which corporation shall possess the powers and be subject to the duties and liabilities of other corporations, except as herein otherwise provided. The principal office of said corporation must be located at the town or city wherein the national guard company for the benefit of whom the military training school is erected or maintained, is stationed. The general management of such company shall be

vested in a board of not less than three nor more than eleven directors, each of whom shall during his term of office be a member of the national guard of the state of North Dakota. Such corporation may lease or buy real estate upon which to erect a military training school, armory or drill hall to be by the corporation erected or maintained, and may purchase or lease land upon which a rifle range may be maintained, and all such land, and the buildings thereon which are used for a military training school, drill hall, armory or rifle range, shall be exempt from taxation. The articles of incorporation of such corporation shall be filed and a certificate of incorporation issued by the secretary of state without fee." Counsel for appellants contend that Company D, North Dakota National Guard, is "a corporation in aid of a distinct branch or arm of the government," organized for the benefit of the state, and not for private gain; and that its property is, from reasons of public policy, exempt from the remedy afforded by the mechanics' lien laws. We are of opinion that this corporation does not come within the protection of the doctrine which is invoked. There is a well-settled rule, resting upon grounds of public policy, that "mechanics' lien laws do not, in the absence of express provisions, apply to public buildings erected by states, counties, and towns for public uses." 2 Jones on Liens, section 1375, and cases cited, note 3. It is well settled that "public property cannot be the subject of such a lien unless the statute shall expressly so provide. It is by implication excepted from lien statutes, as much as from general taxation laws, and for the same reason." *Knapp* v. *Swaney,* 56 Mich. 345, 23 N. W. 162, 56 Am. Rep. 397, and cases cited. In many cases the fact that the property of the corporation could not be sold upon execution is held to be decisive against the right to a mechanic's lien. *Board* v. *Greenbaum,* 39 Ill. 609; Jones on Liens, section 1375; *Loring* v. *Small,* 50 Iowa 271, 32 Am. Rep. 136; *Charnock* v. *Dist. Tp.* (Iowa) 50 N. W. 286, 33 Am. Rep. 116; *Brinckerhoff* v. *Board,* 6 Abb. Prac. (N. S.) 428; *Leonard* v. *City of Brooklyn,* 71 N. Y. 498, 27 Am. Rep. 80; *Patterson & Co.* v. *Penn. Reform School,* 92 Pa. 229; *Knapp* v. *Swaney,* 56 Mich. 345, 23 N. W. 162, 56 Am. Rep. 397. In Philipps on Mechanics' Liens, section 179, it is said that: "Property which is exempt from seizure and sale under an execution upon grounds of public necessity must, for the same reason, be equally exempt from the operation of the mechanics' lien law, unless it appears by the law itself that property

of this description was meant to be included." See, also, 20 Am. & Eng. Enc. of L. (2d Ed.) 295, and cases cited. The ground upon which the property of a municipal or strictly public corporation is exempt from mechanics' liens is stated in *Board* v. *Greenbaum, supra,* to be "that such a proceeding against a municipal corporation would break it up, and that, possessing the taxing power, which it can be compelled by mandamus to exercise, its debts can be paid and all its liabilities met in that mode. Creditors against such corporation have this distinct and most efficient remedy." In this state express provision is made by statute for indemnity to those who perform labor upon or furnish material for public works. Chapter 78 of the Civil Code provides that: "Whenever any public officer shall under the laws of this state enter into contract in any sum exceeding one hundred dollars with any person for making any public improvements, or for constructing any public building or making repairs on the same, such officer" shall exact a bond in amount equal to the contract price to secure all indebtedness for labor and material, and any person to whom there is due any sum for labor or material furnished is authorized to bring an action upon the bond for his indebtedness. The defendant is not a public corporation. Corporations are classified and defined by the Civil Code as follows: Section 2854: "Corporations are either (1) public; or (2) private." Section 2855: "Public corporations are formed or organized for the government of a portion of the state. Such corporations are regulated by the Political Code or by local statutes." Section 2856: "All corporations not public are private." The defendants cannot claim immunity upon the ground that it is a public corporation, for it is clear that it cannot be so classified. There are, however, certain private corporations, which, because of their nature, purposes, duties to the public and the direct interest of the public therein, are generally held to be exempt from the operation of mechanics' lien laws, unless the intent to extend the remedy to them is plainly expressed. This class includes those corporations in which the interest of the public is direct and enforceable, such as railroads, canals, and turnpike corporations. See 1 Freeman on Executions, section 126a. The classification made by Chief Justice Thompson in *Foster* v. *Fowler,* 60 Pa. 27, has been uniformly approved both by courts and textwriters: "Most people acquainted at all with corporate action, understand that corporations other than municipal, which are purely public, naturally divide

into public and private corporations; that is, into those that are agencies of the public directly affecting it and those which only affect it indirectly by adding to its prosperity in developing its natural resources or in improving its mental or moral qualities. Of the former are corporations for the building of bridges, turnpike roads, railroads, canals, and the like. The public is directly interested in the results to be produced by such corporations, in the facilities afforded to travel and the movements of trade and commerce. It is well settled that this use is not to be disturbed by the seizure of any part of their property essential to their active operations by creditors. They must recover their debts by sequestering their earnings, allowing them to progress with their undertaking, to accommodate the public. This direct benefit to and accommodation of the public very clearly distinguishes this class of corporations from the second class, viz., private corporations, or those in which the public is but indirectly interested, such as mining and manufacturing or coal and iron companies, etc., or libraries, literary societies, schools, and the like. Whether they progress or cease, the public is not directly affected, and hence liens are enforceable against them without, as a general thing, any regard to their effect upon their operations." *Girard Point Storage Company* v. *Southwark Co.*, 105 Pa. 248; *McLeod* v. *Central Normal School*, 152 Pa. 575; 25 Atl. 1109; *Guest* v. *Lower Merion Water Co.* (Pa.) 21 Atl. 1001, 12 L. R. A. 324; Philipps on Mechanics' Liens, section 180. The courts, while generally denominating the first class as *quasi* public corporations, "have with practical unanimity held that, if the whole interest does not belong to the public, or if the corporation is not created for the administration of political or municipal powers, it is a private corporation." 1 Beach on Pub. Corp. 7. The court, in *McLeod* v. *Central Normal School, supra,* in pointing out the distinction between private corporations and *quasi* public corporations not of a strictly private nature, said that: "In order that a private corporation may be regarded as *quasi* public, it must exist directly for the public use. The corporate franchise must be such as is held in the nature of a public trust, and such that the public has standing to assert and enforce its right. * * * A railroad company is bound to maintain and operate its line. It cannot alienate its franchise, or the property essential to the operation of the road, without express authority. It is bound to carry all persons and goods offered it for transportation, and this

public right is capable of enforcement. *Thomas* v. *Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Canal Co.* v. *Bonham*, 9 Watts & S. 27, 42 Am. Dec. 315; *Union Pacific R. R. Co.* v. *Hall*, 91 U. S. 343, 23 L. Ed. 428; *R. R. Com'rs* v. *Railroad Co.*, 63 Me. 269, 18 Am. Rep. 208; *State* v. *R. R. Co.*, 29 Conn. 538; *People* v. *New York Cent. & H. R. R. Co.*, 9 Am. & Eng. R. Cas. 1. 'The true criterion, therefore, by which to judge of the character of the use, is whether the public may enjoy it by right or only by permission.' Mills on Eminent Domain, section 14. If by right, then the property of the corporation may be said to be in the direct use of the public at large, though under the control of private persons or of a corporation. It is not so much a question of what public services the corporation is actually performing as what public services it must perform." Again, in *Twelfth Street Market Co.* v. *Philadelphia, etc., R. R. Co.* (Pa.) 21 Atl. 989, it was said that: "The test whether a use is public or not is whether a public trust is imposed upon the property, or whether the public has a legal right to the use which cannot be gainsaid or denied or withdrawn at the pleasure of the owner. * * * The general public must have a definite and fixed use of the property; a use independent of the will of the private person or corporation in whom the title is vested; a public use, which cannot be defeated by the private owner, but which is guarded and controlled by law." It will thus be seen that the test whether the property of a corporation may be subjected to a mechanic's lien is not merely whether the public is interested and aided by it. It must also be an enforceable interest. Where this interest exists and is enforceable, the right to a mechanic's lien has been generally denied, as in the case of railroad, canal, turnpike corporations, etc. Where the benefit is indirect, and the continuation of the use is optional with the corporation, the exemption does not exist. That was the case in *McLeod* v. *Central Normal School, supra*, in which a mechanic's lien had been filed against the Central Normal School, a corporation recognized by the state and the recipient of state aid. The state also appointed a number of its trustees. It was said that: "Whilst normal schools are no doubt engaged in a most necessary and useful public work, and have been valuable auxiliaries in the education of the masses of the people, the mere fact that they have been incorporated for this particular purpose, and are actually engaged in this work, will not of itself give them the essential qualities of a public corporation. Their

charter is in form and effect that of a private corporation merely. Their work is but indirectly for the public use, and they must be answerable for their debts and engagements under the same forms of procedure and to the same extent as other private corporations and individuals." See also, *Girard Point Storage Co.* v. *Southwark Co., supra.*

It is clear, we think, that the defendant is not a *quasi* public corporation. It may be conceded that by erecting and maintaining an armory building it aids the state in educating its citizens in military science. But the continuation of this benefit is optional with the defendant. It is not legally bound to maintain the building. It may decide not to do so. The state does not own or control the building, and has no voice in the management of the defendant corporation, and the latter may decide to wind up its affairs and sell its property whenever it chooses to do so, and the state has no standing to interfere. Further, while it may be said that the erection and maintaining of an armory building is not profitable, it is not wholly without compensation. The state makes an annual appropriation for rental. See chapter 112, p. 153, Laws 1899, and chapter 20, p. 26, Laws 1903. The only particulars in which this corporation differs from other private corporations are those enumerated in chapter 101, p. 159, Laws 1897, under which it is organized. By incorporating under, and complying with, this act, the corporation secures the promise of the legislature of immunity for its property from taxation and from the payment of the fees of the secretary of state. The act does not exempt the defendant from any further liabilities. On the contrary, it expressly provides that in all other respects the "corporation shall possess the powers and be subject to the duties and liabilities of other corporations." This corporation is therefore liable for its debts, and is subject to the ordinary remedies for their enforcement, the same as any other private corporation.

The demurrer was properly overruled, and the order is affirmed. All concur.

(98 N. W. Rep. 83.)

F. B. SCHNELLER *v.* WILLIAM PLANKINTON, PEHR PETERSON ET AL.

Opinion filed January 8, 1904.

Maintenance—Conveyance by One Out of Possession.

1. A conveyance of real estate held adversely by another under color of title, by one who has not been in possession or taken rent for the space of one year prior thereto, is void as against such adverse possessor. Following *Galbraith* v. *Paine,* 96 N. W. Rep. 253, 12 N. D. 164.

Vendee's Possession, That of Vendor.

2. The possession of real estate by a vendee under an executory contract of purchase is, in law, the possession of his vendor.

Adverse Possession—Quieting Title.

3. On an appeal from a judgment quieting title to certain real estate in plaintiff, the defendant assigns error upon the conclusion of law of the trial court that the plaintiff is entitled to a decree quieting title in him. It appears from the findings of fact upon which the conclusion is based that the plaintiff's grantor, when he executed the deed of conveyance upon which plaintiff bases his title and right of action, had not been in possession or taken the rents for the space of one year prior thereto, and that the defendant was then, and for ten years prior thereto had been, in adverse possession under color of title. *Held,* that the conclusion of the trial court was erroneous, and that the judgment must be reversed and the action dismissed.

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

Action by F. B. Schneller against William Plankinton and others. Judgment for plaintiff, and defendant Plankinton appeals.

Reversed.

Purcell & Bradley, for appellant.

Actual possession of land consists in exercising acts of dominion over it and in taking the profits of which it is susceptible. *Webber* v. *Clarke,* 15 Pac. Rep. 431; *Barstow* v. *Newman,* 34 Cal. 90; *Goodrich* v. *VanLandigham,* 46 Cal. 601; *Kelly* v. *Mack,* 49 Cal. 524.

An inclosure is not necessary. *Hicks* v. *Coleman,* 25 Cal. 132; *Sheldon* v. *Mull,* 7 Pac. Rep. 710. Nor any building thereon, or the occupation such as a stranger would observe in passing. *Murray* v. *Hudson,* 32 N. W. Rep. 889; *Morrison* v. *Kelley,* 74 Am. Dec. 179; *Costello* v. *Edson,* 46 N. W. Rep. 299; *Whitaker* v. *Shoot-*

ing Club, 60 N. W. Rep. 983; *Ewing* v. *Burnet,* 11 Pet. 41, 9 L. Ed. 624; *Fuller* v. *Elizabeth City,* 23 S. E. Rep. 922.

A deed issued pursuant to foreclosure proceedings, a judgment or decree, or sale, although such proceedings back of it are void or voidable, affords "color of title." *Mason* v. *Ayres,* 73 Ill. 121, 1 Am. & Eng. Enc. of L. (2d Ed.) 817 and note 1; 1 Cyc. of L. 1093, sub. M., note 16; *Packard* v. *Moss,* 8 Pac. Rep. 818, 3 Wait. Act. & Def. 17; *Brooks* v. *Bruyn,* 35 Ill. 394; *La Frombois* v. *Jackson,* 8 Cow. 589. So an unrecorded deed purporting to convey title. *Lee* v. *Polk County Copper Mining Co.,* 21 How. 493 (U. S.) 16 L. Ed. 203, 62 U. S. 493; *Dickinson* v. *Breeden,* 30 Ill. 279; *Hanna* v. *Renfro,* 32 Miss. 125; *Webber* v. *Clarke,* 15 Pac. Rep. 431; *Falls of Neuse Manuf'g Co.* v. *Brooks,* 11 S. E. Rep. 456; *Orr* v. *Owens,* 27 N. E. Rep. 493; *Clark* v. *Clough,* 23 Atl. 526; *Grant* v. *Fowler,* 39 N. H. 101; *Forest* v. *Jackson,* 56 N. H. 357; *Goodman* v. *Nichols,* 23 Pac. Rep. 956; *Walker* v. *Hill,* 12 N. E. Rep. 387; *Hall* v. *Law,* 102 U. S. 461, 26 L. Ed. 217; *Tremaine* v. *Wetherby,* 12 N. W. Rep. 609; *Sands* v. *Hughes,* 53 N. Y. 297; *Chandler* v. *Spear,* 22 Vt. 388; *Hoys* v. *Swan,* 5 Md. 237; *Humphries* v. *Huffman,* 33 Oh. St. 395; *Murphy* v. *Doyle,* 33 N. W. Rep. 222.

Defendant did not hold as a mortgagee in possession, and the decree should not have been for equitable redemption. *Sexton* v. *Barker,* 50 N. E. Rep. 109; *Mason* v. *Ayers,* 73 Ill. 121; *Norris* v. *Ile,* 38 N. E. Rep. 762.

Under an executory contract the possession of a vendee is the possession of the vendor. *McAuliffe* v. *Parker,* 38 Pac. 744; *Brown* v. *Huey,* 30 N. E. Rep. 429; *Avent* v. *Arlington,* 10 N. E. Rep. 991; *Whitney* v. *Wright,* 15 Wend. 171; *Briggs* v. *Prosser,* 14 Wend. 227; *Brown* v. *Brown,* 11 S. E. Rep. 650; *Mabary* v. *Dollarhide,* 11 S. W. Rep. 611; *Beal* v. *Brooks,* 23 Am. Dec. 401; *Kruse* v. *Wilson,* 79 Ill. 233; *Hale* v. *Gladfelder,* 52 Ill. 91; *Valentine* v. *Cooley,* 33 Am. Dec. 166.

When rents and profits are claimed prior to the commencement of the action, the complaint must show plaintiff's title as existing at a prior date and continuing to the commencement of the action. *Payne* v. *Treadwell,* 16 Cal. 221; *Clark* v. *Boyreau,* 14 Cal. 635; *Thompson* v. *White,* 8 How. Pr. 520; 3 Sedgwick on Damages, 912.

The deed, exhibit C, is void under sections 7002 and 3920, Rev. Codes. 3 Am. & Eng. Enc. of L.; Art on Contracts, Par. 49; *Galbraith* v. *Paine,* 96 N. W. Rep. 258, 12 N. D. 164.

Freerks & Freerks, for respondent.

Defendant claims to have acquired title under section 3491a, Rev. Codes, and that he has been in actual, open, adverse and undisputed possession of the land under color of title for ten years prior to the commencement of this action, and paid all legal taxes levied against the premises during such time. *Power* v. *Kitching,* 86 N. W. Rep. 737, 88 Am. St. Rep. 691.

Plankinton was never personally in possession, nor did he personally pay any taxes, but claims to have done so by the possession and occupancy of his so-called licensees, Holstrom and Peterson, and that such payment inured to his benefit under section 3491a. There is no proof to show any contract between defendant and Holstrom and Peterson, or that their occupancy was ever ratified.

A mortgagee does not assign a mortgage by executing a deed, as he has no title. *Yankton Building and Loan Ass'n* v. *Dowling,* 74 N. W. Rep. 438.

The separate possession and payment of taxes by Holstrom and Peterson do not avail under section 3491a. *J. B. Streeter, Jr., Co.* v. *Frederickson et al,* 91 N. W. Rep. 692, 11 N. D. 300.

Findings must be within the issues made by the pleadings. *Morenhout et al.* v. *Barron,* 42 Cal. 591; *Marks* v. *Sayward,* 50 Cal. 57; *Harkins* v. *Cooley et al,* 58 N. W. Rep. 560; *Cobb et al.* v. *Cole,* 56 N. W. Rep. 828; *Arnold* v. *Angell,* 62 N. Y. 508; *Brennan* v. *Bigelow,* 8 Kan. 332; *Brocker* v. *Esterley,* 12 Kan. 152; *Hubberdston Lumber Co.* v. *Bates,* 31 Mich. 158; *Sanford* v. *Thorp,* 45 Conn. 242; *Gardner* v. *Case,* 111 Ind. 494; *Burton* v. *Morrow,* 133 Ind. 221.

Findings of fact not found on any issue made by the pleadings are nullities. *Newby* v. *Meyers,* 44 Kan. 477, 24 Pac. Rep. 971.

Findings of the court should be statements of the ultimate facts only and not of the probative facts. *Gull River Lumber Co.* v. *School District No. 38,* 1 N. D. 500, 48 N. W. Rep. 427; *Glascock* v. *Ashman et al,* 52 Cal. 420; *Snyder* v. *Ashworth,* 34 Minn. 426, 26 N. W. Rep. 233; *Conlan* v. *Grace,* 36 Minn. 276, 30 N. W. Rep. 880.

Ultimate facts are the facts in issue; probative facts are facts in controversy. *Marshall* v. *Shafter,* 32 Cal. 177; *Mitchell* v. *Clinton,* 99 Mo. 153.

A finding that "the defendant has a good and perfect title to the demanded premises" supports a judgment for him, whether regarded as a finding of fact or conclusion of law. *Frazier* v. *Crowell,* 52 Cal. 399.

Findings of ultimate facts control findings of probative facts. *Perry* v. *Quackenbush,* 105 Cal. 299, 38 Pac. Rep. 740; *Smith* v. *James et al,* 30 N. E. Rep. 902.

YOUNG, C. J. The plaintiff instituted this action to determine adverse claims to eighty acres of agricultural land situated in Richland county. The complaint, which is substantially in the form prescribed by chapter 5, p. 9, of the Laws of 1901, alleges that the plaintiff is the owner in fee simple of the land; and that the defendants claim interests therein adverse to the plaintiff, and prays that said claims be adjudged null and void, and the title to said premises be quieted in the plaintiff as to all of said defendants, and for costs and disbursements. The defendant Plankinton alone answered. His answer alleges title in himself, under section 3491a, Rev. Codes 1899, and sets forth adverse occupancy and payment of taxes for ten years under color of title. He also alleges that he has an unpaid mortgage on the premises for $450 and interest. The case was tried to the court without a jury, and resulted in a judgment for plaintiff, quieting title in him as against all liens, claims and demands of the defendants. The defendant appeals from the judgment. Appellant caused a statement of case to be settled, in which he demands a review of the entire case in this court. He also assigns error on the statutory judgment roll.

Counsel for respondent contends that the evidence cannot be reviewed in this court because of the alleged absence from the statement of case of certain papers which he claims constitute a part of the proceedings had at the trial, and that in the absence of such papers the court is without authority to try the case *de novo* under section 5630, Rev. Codes 1899, and upon this theory made a motion at the hearing to strike out the statement of case and to affirm the judgment. Counsel did not agree at the hearing as to what papers were in the statement, or as to whether the papers alleged to be missing in fact constituted a part of the proceedings held at the trial. The motion was denied without an examination of the record,

and the case argued upon the merits; leave being granted to the appellant to cause the statement to be returned to the district court for correction, if necessary. We find it entirely unnecessary to explore the record or to settle these disputed questions, for the reason that the error assigned by appellant upon the judgment roll proper is fatal to the judgment, and requires its reversal. As conclusions of law from the facts found, the trial court found "that the plaintiff is entitled to a judgment and decree of this court quieting the title to the premises involved in this action in him, free and clear from all claims, liens, or demands held or claimed to be held by the defendant and all persons claiming or to claim any right, title, interest, estate, lien or demand under or through him, and for his costs and disbursements in this action." The foregoing conclusion is assigned as error. The assignment must be sustained. The facts found by the trial court, so far as they are material to a consideration of the assignment in question, are substantially as follows: On March 7, 1884, Willard M. Davis was the owner of the land in question. On that date he executed and delivered to the defendant William Plankinton, a mortgage thereon for $450, and on the same day executed and delivered a mortgage to F. T. Day for $45. Thereafter, and on September 13, 1887, a sheriff's deed was issued to F. T. Day under an invalid foreclosure of his mortgage. December 17, 1890, Day deeded to Plankinton. Prior to his deed to Plankinton, Day, through his agents, gave a contract for a deed to one Gust Holmstrom, who went into possession, farmed the land continuously until 1894, and paid taxes for the years 1890, 1892, and 1893. Day paid the taxes for 1891. In 1894 Plankinton made a contract of sale with one Pehr Peterson, whereby he agreed to make, execute, and deliver to said Peterson a good and sufficient warranty deed upon the performance of the conditions of the contract. Peterson entered into possession under said contract, cultivated the land, and continued to do so from year to year until the commencement of this action, and paid all the taxes levied against the premises from 1894 up to and including the year 1901. No one has actually resided upon the premises for the ten years preceding the commencement of this action, except by cultivating the same each year. On March 19, 1900, the defendant Plankinton, for the purpose of clearing the record title, signed, acknowledged and recorded a satisfaction of the $450 mortgage; said satisfaction reciting that the debt secured thereby has

been fully liquidated and paid. As a matter of fact, neither Willard M. Davis, the mortgagor, nor any one for him, ever paid said mortgage, or any part thereof. On August 23, 1901, Willard M. Davis and wife, in consideration of the sum of $100, executed and delivered a special warranty deed of the premises to the plaintiff.

From these facts it appears that the deed of conveyance from Davis to the plaintiff, and upon which the plaintiff's claim of title and his rights in this action are based, was executed and delivered while the land was adversely held by the defendant under claim of title, and that the plaintiff's grantor, Davis, had not been in possession of the land, or taken the rents or profits thereof, for the space of one year prior thereto. As to the defendant, who was in adverse possession under color of title, the deed was void. This case is ruled by the conclusions announced in *Galbraith* v. *Paine,* 12 N. D. 164, 96 N. W. 258, in which we held that in this state "the common law doctrine which condemns as void a grant of land which is adversely held under claim of title by a grantor who has not been in possession or taken rent for the space of a year prior thereto, as an act of maintenance, was not abolished by the Revised Codes of 1895, but was perpetuated and remains in force in this state," and that a deed executed in violation thereof is void as to persons in adverse possession, claiming title, although valid between the grantor and grantee and third persons. Counsel for respondent seek to sustain the validity of the deed by contending "that the prohibition of sections 7001, 7002, Rev. Codes 1899, which perpetuate the common law doctrine, cannot be invoked against plaintiff's deed, because (a) the defendant Plankinton is not an adverse possessor; and (b) that, even though he were such, he cannot raise this question for the first time in the Supreme Court." Neither of these contentions can be sustained. It is true, Plankinton was not personally in possession; but he had color of title, and the possession of Holmstrom and Peterson under their contracts, in law, was his possession. *Whitney* v. *Wright,* 15 Wend. 171; *Jackson* v. *Johnson,* 5 Cow. 74, 15 Am. Dec. 433. The purchaser of real estate, entering into possession under an executory contract, holds under his vendor; and, under statutes relating to adverse possession, it is universally held that the possession of the purchaser is, in legal effect, the possession of his vendor. In *Hale* v. *Gladfelder,* 52 Ill. 91, it was said that "the relation of vendor and purchaser is such that, when the latter enters into possession under

the contract to purchase, his possession is that of the vendor. By the purchase he recognizes the vendor's title, and, like a tenant, in all proceedings for the recovery of possession by the vendor he is estopped from disputing his title. He enters and holds under the title of the vendor, and his occupancy is subservient and subordinate to that title; and from this relation, and for the same reason, his possession becomes as fully that of the vendor as does that of a tenant become that of the landlord." See, also, *Mabary* v. *Dollarhide,* 98 Mo. 198, 11 S. W. 611, 14 Am. St. Rep. 639; *Brown* v. *Brown,* 106 N. C. 451, 11 S. E. 647; *Brown* v. *Huey,* 103 Ga. 449, 30 S. E. 429; *Kruse* v. *Wilson,* 79 Ill. 233; *Avent* v. *Arrington,* 105 N. C. 377, 10 S. E. 991; *McAuliff* v. *Parker* (Wash.) 38 Pac. 744. The policy of the common law doctrine, which has been perpetuated in this state by statute, is "to restrain all persons from transferring any disputed right to strangers." 3 Bac. Abr., "Maintenance." Or, as was said by Selden, J., in *Crary* v. *Goodman,* 22 N. Y. 170, "to prevent the transfer of disputed titles, and compel their settlement between the original parties." It appears from the findings of fact in this case that the plaintiff's deed is within the condemnation of both the letter and the spirit of this doctrine. The plaintiff's deed is void as to this defendant, and will not sustain his action. The interests of the defendant can be litigated and determined only in an action prosecuted in the name of the plaintiff's grantor. In such an action the equities existing between the adverse claimants can be adjusted.

Neither do we agree with counsel's contention that the legal effect of the deed cannot be inquired into under the assignment. It is said that the deed was admitted in evidence without objection, and counsel relies upon section 5630, Rev. Codes 1899, which provides that "no objection to evidence can be made for the first time in the Supreme Court." The assignment under consideration is not directed to the admission of the deed in evidence. It is directed solely to the conclusion of law made and filed by the trial court after the trial proper had been concluded, and merely challenges the correctness of the legal conclusion upon the facts found. The question as to the legal effect of a deed executed and delivered under the facts narrated in the findings is not a question of evidence, but a legal conclusion, and, as we have seen, it follows from the facts found in this case that the deed upon which the plaintiff's right of action and claim of title rest is void as to the

defendant, and will not sustain the judgment rendered against him. It is proper to state that this case was tried and determined before the decision in *Galbraith* v. *Paine, supra,* was handed down.

The district court is directed to enter an order vacating its judgment, and to enter a judgment dismissing the action. Appellant will recover costs of both courts. All concur.

(98 N. W. Rep. 77.)

JOHN MCNAB *v.* NORTHERN PACIFIC RAILWAY COMPANY.

Opinion filed January 22, 1904.

Review of Questions of Fact—New Trial.

1. Questions of fact will not be reviewed in the Supreme Court on appeal from a judgment, in cases tried before a jury, unless a motion for a new trial was first made in the court below.

Directed Verdict—Exceptions.

2. The action of the court in directing a verdict for either party must be excepted to, and the ruling and exception brought into a settled statement of the case, and made a part of the judgment roll; else such ruling will not be available for error on an appeal from the judgment.

Same.

3. Where, at the close of the evidence, defendant moved that a verdict be directed in its favor, and such motion was denied, but no exception reserved, such ruling, if erroneous, constituted an error of law occurring at the trial, and, as such, could only be made available on appeal upon exception taken.

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

Action by John McNab against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Ball, Watson & Maclay, for appellant.

Courts have jurisdiction to entertain garnishment proceedings at the suit of a resident, or nonresident plaintiff against a resident garnishee owing a debt to the principal debtor and defendant, whether the latter is a resident or nonresident, and whether process is served upon him personally or by publication. *Railway Co.* v. *Strum,* 174 U. S. 710; *Tootle* v. *Coleman,* 107 Fed. 41; *King* v.

Cross, 175 U. S. 396; *Rothschild* v. *Knight,* 184 U. S. 341; *Mooney* v. *Buford,* 72 Fed. 32; *The National Fire Insurance Co. of Hartford,* v. *Chambers,* 32 Atl. Rep. 663; *Lancashire Insurance Co.* v. *Corbetts,* 46 N. E. Rep. 631; *Bank* v. *Huntington,* 129 Mass. 444; *Howland* v. *Railway,* 36 S. W. Rep. 29; *Wyeth* v. *Long,* 29 S. W. Rep. 1010; *Harvey* v. *Great Northern Railway Co.,* 52 N. W. Rep. 905; Waples, Debtor and Creditor, 180.

The question of exemptions immaterial. *Railway* v. *Strum, supra.*

E. R. Sinkler, for respondent.

Alleged errors cannot be considered, as no exceptions were taken, there was no motion for a new trial, and no exception to the direction of a verdict. *DeLendrecie* v. *Peck,* 48 N. W. Rep. 341, 1 N. D. 422; *Kirch* v. *Davies,* 11 N. W. Rep. 689; *Holum* v. *Chicago, M. & St. P. Ry.,* 50 N. W. Rep. 99; *Anstedt* v. *Bentley,* 21 N. W. Rep. 807; *Geisinger* v. *Boyl,* 37 N. W. Rep. 423; *Selby* v. *Detroit Ry. Co., et al,* 21 N. W. Rep. 106; *London & N. W. Amer. Mortgage Co.* v. *McMillan,* 80 N. W. Rep. 841; *Frenzer* v. *Phillips,* 77 N. W. Rep. 668; *D. M. Osborne & Co.* v. *Williams,* 35 N. W. Rep. 371; *McCormack* v. *Phillips,* 34 N. W. Rep. 39; *Olmstead* v. *National Life Insurance Co.,* 7 N. W. Rep. 403; *McKinnon* v. *Atkins,* 27 N. W. Rep. 564; *Dahl* v. *Stakke,* 12 N. D. 325, 96 N. W. Rep. 353.

The municipal court of St. Paul failed to get jurisdiction, as the plaintiff in this case—defendant in the proceedings in St. Paul—was never served with process, and had no notice of the proceedings in that court; he was served, if at all, by publication. *Alabama & S. Ry. Co.* v. *Chumbey,* 9 So. Rep. 286; *Illinois Central Ry. Co.* v. *Smith,* 12 So. Rep. 461; *Drake* v. *Lake Shore & M. S. Ry. Co., et al,* 37 N. W. Rep. 70; *Mo. Pac. Ry. Co. et al.* v. *Maltby et al,* 8 Pac. Rep. 235; *Crisp* v. *Fort Wayne & E. Ry. Co.,* 57 N. W. Rep. 1050; *Renier* v. *Hurlbut et al,* 50 N. W. Rep. 783; Rev. Codes, section 3803; *Purcell* v. *St. P. F. & M. Ins. Co.,* 64 N. W. Rep. 943; *Union Pac. Ry. Co.* v. *Smersh,* 36 N. W. Rep. 139; Rood on Garnishment, section 83; *Terre Haute & I. R. Ry.* v. *Baker,* 24 N. E. Rep. 85; *Mo. Pac. Ry.* v. *Whipsiker,* 13 S. W. Rep. 639; 1894 Statutes of Minnesota, section 5314; 1895 Laws of Minnesota, page 756; *Swedish American National Bank of Minneapolis* v. *Bleecker,* 75 N. W. Rep. 740.

COCHRANE, J. At the close of the testimony in the district court, both parties moved for a directed verdict, whereupon the court directed a verdict in favor of the plaintiff and against the defendant for $47.76. A verdict was returned accordingly. No exception was saved to the ruling of the court in denying defendant's motion for a directed verdict, or in his action in directing a verdict for plaintiff. No motion was made in the court below to set aside the verdict, or for a new trial, and no motion was made for judgment notwithstanding the verdict. Defendant, without exceptions, caused a statement of the case to be settled, containing all the evidence, and specifying as a part thereof the same alleged errors which are assigned in its brief upon this appeal. The appeal is from the judgment entered upon this verdict.

The assignments of error predicated upon the action of the court in denying its motion for a directed verdict, and upon granting plaintiff's motion for a verdict in his favor, cannot be considered. Such rulings, if error at all, are errors in law occurring at the trial, and, under the imperative language of the statute, can be made available on appeal only when exceptions were saved. Subdivision 7, section 5472, Rev. Codes; *DeLendrecie* v. *Peck*, 1 N. D. 422, 48 N. W. 343; *McKenzie* v. *Water Co.*, 6 N. D. 361, 71 N. W. 608; *Ness* v. *Jones*, 10 N. D. 588, 88 N. W. 706, 88 Am. St. Rep. 755; *Dahl* v. *Stakke*, 12 N. D. 325, 96 N. W. 354. Chapter 63, p. 74, Laws 1901, does not change the rule or do away with the necessity of exceptions to rulings as a prerequisite to consideration of the ruling on appeal.

Appellant assigns for error that the evidence is insufficient to justify the verdict. The particulars wherein it is claimed to be insufficient are set out in the specifications—a part of the statement of the case. The statute (section 5627, Rev. Codes) provides that "questions of fact shall not be reviewed in the Supreme Court in cases tried before a jury unless a motion for a new trial is first made in the court below." *Dahl* v. *Stakke, supra; Ness* v. *Jones, supra.* Before this provision was added to section 5627, Rev. Codes, a motion for a new trial was a necessary preliminary to consideration of this form of assignment on appeal. Omitting the above-quoted sentence, section 5627, Rev. Codes, is substantially the same as section 5237 of the Compiled Laws of the territory, from which it was inherited, and section 463 of the Code of Civil Procedure of South Dakota. Under these statutes, such assignments could not be

reviewed on an appeal from a judgment unless a motion for new trial was first made in the court below. *First National Bank* v. *Comfort,* 4 Dak. 167, 28 N. W. 855; *Hawkins* v. *Hubbard,* 2 S. D. 633, 51 N. W. 774; *Pierce* v. *Manning,* 2 S. D. 517, 51 N. W. 332; *Myers* v. *Longstaff,* 14 S. D. 98, 84 N. W. 233; and other South Dakota cases. The addition of the concluding paragraph of section 5627, *supra,* by the statute of 1891, puts this question at rest in this jurisdiction.

That the evidence is insufficient to justify the verdict is ordinarily a question of law, and not one of fact. So considered, it cannot be reviewed on this appeal, because not an error in law occurring upon the trial and excepted to. But to be made an error in law reviewable at all, the court which received the verdict should have been asked to set it aside and grant a new trial on this ground. Its action one way or the other, when excepted to, might then be assailed as an error in law. If the evidence as a whole will not sustain the verdict, or if the verdict is in conflict with the evidence, advantage cannot be taken of the point on appeal from the judgment, when no motion for new trial was made in the court below, for the reason that the statute (section 5627, *supra*) enumerates what rulings or matters may be reviewed in this form of appeal without motion for a new trial, and that the evidence is insufficient is not one of them.

The claim that under section 5462, Rev. Codes, a verdict is deemed excepted to, and may be reviewed as to the sufficiency of the evidence, both on motion for new trial and on appeal, as fully as if exception thereto had been expressly taken, does not affect the determination of this question, for, had an exception to the verdict been expressly reserved, it would not have obviated the necessity for a motion for new trial in the court below. There is nothing before this court to consider.

Judgment affirmed. All concur.

(98 N. W. Rep. 353.)

PEDER S. PEDERSON *v.* LEONARD DIBBLE.

Opinion filed January 29, 1904.

Specific Performance—Evidence.

1. Upon a review of the entire case in an action for the specific performance of a contract to convey real estate, the findings of fact, conclusions of law, and judgment of the trial court awarding specific performance are sustained.

Contract Must Be Mutual Both as to Obligation and Remedy.

2. The contract in this case obligated the vendor to convey the land upon the delivery to him of a specified quantity of merchantable wheat, or its equivalent in money, determined by the market value of wheat when delivery was due, and bound the vendee to make such delivery or payment. When this action was brought and tender of performance by plaintiff was made, the time for delivery of the deed had arrived. It is *held,* that the contract is enforceable under the rule which requires, as a condition for the enforcement of a contract by specific performance, that it shall be mutual both as to obligations and remedy.

Appeal from District Court, Benson county; *Morgan,* J.

Action by Peder S. Pederson against Leonard Dibble. Judgment for plaintiff, and defendant appeals.

Affirmed.

Townsend & Denoyer and *Guy C. H. Corliss,* for appellant.

Equity will not decree specific performance where both parties are not bound by the contract with respect to the same matters. *Frink* v. *Thomas,* 12 L. R. A. 244 and note; Clark on Contracts, 168; 22 Am. & Eng. Enc. L. (1st Ed.) 1019; *Litz* v. *Gooseling,* 21 L. R. A. 127; *Graybill* v. *Brugh,* 21 L. R. A. 133; *Boucher* v. *Van Buskirk,* 2 A. K. Marsh, 345; 3 Pom. Eq. Jur. section 1405; *Cooper* v. *Pena,* 21 Cal. 404; Waterman on Spec. Per. section 196; *Norris* v. *Fox,* 45 Fed. 406; *Heiland* v. *Ertel,* 44 Pac. Rep. 1005; *Welty* v. *Jacobs,* 40 L. R. A. 98; *Smith* v. *Wilson,* 61 S. W. Rep. 597-599; *Wood* v. *Dickey,* 17 S. E. Rep. 818; *Glass* v. *Rowe,* 15 S. W. Rep. 334-341; Fry Specific Perf. section 286.

There is an apparent exception in the case of options. But where the party holding the option accepts, within the time given him, and upon the terms stated, the obligation becomes mutual and capable of enforcement at the instance of either party. *Wilks* v.

Railway Co., 79 Ala. 180; *Weston* v. *Collins,* 11 Jur. N. S. 190; *Harding* v. *Gibbs,* 125 Ill. 85, 17 N. E. Rep. 60; *Weaver* v. *Burr,* 31 W. Va. 736, 3 L. R. A. 94; *Shields* v. *Horvi,* 30 Neb. 536; *Longfellow* v. *Moore,* 102 Ill. 289; *Mason* v. *Payne,* 47 Mo. 517; *Carter* v. *Phillips,* 144 Mass. 100; *Vassault* v. *Edwards,* 43 Cal. 458; *Potts* v. *Whitehead,* 20 N. J. Eq. 55; *Kemp* v. *Humphreys,* 13 Ill. 573; *Longworth* v. *Mitchell,* 26 O. St. 334; *Stembridge* v. *Stembridge,* 87 Ky. 91; *Magoffin* v. *Holt,* 1 Duv. 95; *Ranelagh* v. *Melton,* 10 Jur. N. S. 1141; *Master* v. *Willoughby,* 2 Bro. P. C. 244; *Brooks* v. *Garrod,* 27 L. J. Ch. 226; *Pegg* v. *Wisden,* 16 Veav. 239; *Ide* v. *Leaser,* 10 Mont. 5; *Coleman* v. *Applegrath,* 68 Md. 21; *Richard* v. *Taylor,* 122 Fed. 931; *Hollmann* v. *Conlan,* 45 S. W. Rep. 277; *Watterman* v. *Banks,* 144 U. S. 394, 12 Sup. Ct. Rep. 646.

Appellant did not bind himself to convey the land, but to convey or return the wheat received. Having refused to convey, he should restore the wheat, or pay its equivalent in money. *Jaquith* v. *Hudson,* 5 Mich. 123; *Cotheal* v. *Talmadge,* 9 N. Y. 551; *Bagley* v. *Peddie,* 16 N. Y. 469; *Chamberlain* v. *Bagley,* 11 N. H. 234; *Williams* v. *Dakin,* 22 Wend. 201; *Hahn* v. *Concordia Soc.,* 42 Md. 460.

P. J. McClory, for respondent.

Want of mutuality is no defense where the party not bound has performed all of the conditions of the contract and brought himself within its terms. 22 Am. & Eng. Enc. of L. (1st Ed.) 1021, 12 L. R. A. 245; 2 Beach on Contracts, section 889.

Time being of the essence of the contract, plaintiff must comply with the conditions, as to time. Section 3934, Rev. Codes 1899.

Rescission when not effected by consent, can be accomplished only by compliance with the conditions of the above section. *Anderson et al.* v. *Wallace Lumber and Mfg. Co.,* 70 Pac. Rep. 247.

Failure of purchaser to make payment when it is due is waived by vendor's failure to declare a forfeiture for three months thereafter, and a purchaser is entitled to specific performance on tender of purchase price when next installment falls due. *Pier* v. *Lee,* 14 S. D. 600, 86 N. W. Rep. 642; *Boyum* v. *Johnson,* 8 N. D. 306, 79 N. W. Rep. 149.

YOUNG, C. J. This is an action to compel the specific performance of a contract to sell and convey real estate. The trial court granted the relief prayed for. Defendant appeals from the judg-

ment, and demands a review of the entire case in this court under the provisions of section 5630, Rev. Codes.

The complaint alleges that on June 1, 1891, the defendant and one Sivert Pederson "entered into an agreement in writing whereby Sivert Pederson agreed to buy and the said defendant agreed to sell the land in question for 2,500 bushels of wheat; * * *" that said Sivert Pederson delivered 1,000 bushels of said wheat; that on March 14, 1896, the said Sivert Pederson, "by and with the consent of the defendant," sold and assigned his interest in said contract to the plaintiff; that since that date the plainiff has continued in the possession of the premises under said contract, and made payments thereon; that he has tendered full performance, with interest on defaulted payments, and demanded a deed, which tender and demand was refused. Copies of the contract and assignment are attached to and made a part of the complaint. The defendant in his answer admits the making of the contract as alleged; denies that he had any knowledge of the assignment of the same to the plaintiff, or that he assented thereto; and alleges that the contract in question was canceled and annulled by a written agreement entered into between defendant and Sivert Pederson, with the knowledge and consent of this plaintiff; that after the cancellation of said contract the defendant leased the land to Sivert Pederson, and that the latter has since occupied the same under said lease. The trial court found that the defendant consented to the assignment of the contract; that the alleged cancellation was made without plaintiff's knowledge, and that he has not consented thereto; that the defendant has waived all defaults in the performance of the contract; that the amount due upon the contract, with interest, is the sum of $591.80. The judgment required the defendant to execute a good and sufficient deed of conveyance to the plaintiff upon the payment of said sum by the latter into court for his use.

We are entirely satisfied, from an examination of the evidence, with the correctness of the foregoing findings of fact, and the judgment meets with our entire approval. Aside from the controverted questions of fact, which were properly resolved against the appellant, he contends that the contract imposed no obligation on Sivert Pederson to purchase the land; that it is unilateral, and cannot, therefore, be specifically enforced. This contention was not presented to the trial court, and for that reason it may well be doubted whether it can properly be urged in this court. How-

ever that may be, the contention is not meritorious. Appellant relies upon the general rule which requires, as a condition for the enforcement of a contract by specific performance, that there shall be mutuality of obligation and remedy; that is, "the contract must be of such a nature that both a right arises from its terms in favor of either party against the other, while the corresponding obligation rests upon each towards the other; and also that either party is entitled to the equitable remedy of a specific execution of such obligation against the other contracting party." Pomeroy on Spec. Perf. section 163; Fry on Spec. Perf. section 440; Waterman on Spec. Perf. section 196; *Easton* v. *Lockhart,* 10 N. D. 181, 86 N. W. 697; 22 Am. & Eng. Enc. of L. (1st Ed.) 1019. This general doctrine is embodied in section 5025, Rev. Codes, which provides that: "Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform everything to which the former is entitled under the same obligation. * * *" The rule invoked is not applicable here, for the reason that the contract in question in this case is mutual both as to obligation and remedy. It is far from a model in form, but its meaning is ascertainable, and at no time has there been a controversy between the parties as to the obligations it imposed. It is signed by both parties, and the promises of the vendor and vendee are mutual; that is, there is promise for promise. The vendor promises to convey the land, and the vendee promises to pay the consideration agreed upon. It recites that Sivert Pederson, the vendee, has given to Dibble, the vendor, "five promissory notes, to be satisfied and paid in full by the delivery to the said Leonard Dibble each fall as said notes shall become due, five hundred bushels of good merchantable wheat at the market value for the same or its equivalent." The five "notes," described in the contract, constitute a part thereof, and contain the vendee's unconditional promise to deliver to the vendor 500 bushels of good merchantable wheat on the 1st day of November of the years 1891, 1892, 1893, 1894, and 1895, or its equivalent in money at the market value when delivery is due. The contract provides that Dibble, "on payment of said notes and taxes, shall, whenever requested," execute and deliver a deed of the land to Pederson. In the written assignment delivered by the vendee to the plaintiff the latter agreed to fulfill the obligations which the contract imposed upon his assignor, including the delivery of the

wheat or payment of its equivalent in money. This obligation the defendant could compel the plaintiff to perform. The time for performance having arrived when plaintiff made his tender and brought this action, the promises then being dependent, an action by the defendant to recover the purchase price would be classed as an action for specific performance. It is well settled that, where the time for the delivery of the deed has arrived before suit is brought, an action by the vendor for the purchase price is one for specific performance. See *Shelley* v. *Mikkelson*, 5 N. D. 22, 28, 63 N. W. 210, and cases cited. In Pomeroy on Spec. Perf. section 165, it is said that "the purchaser's obligation in a contract for the sale of land, although nothing more, perhaps, than a liability to pay a certain sum of money, may always be enforced by a suit in equity on behalf of the vendor, since the purchaser may in the same manner obtain the performance of the vendor's duty to convey." The remedy which the plaintiff invokes was open to the defendant. The contract was mutual both as to its obligations and remedy, and the action is properly maintained.

Judgment affirmed. All concur.

MORGAN, J., having presided at the trial of the above action, took no part in the decision, Judge C. J. FISK, of the First judicial district, sitting in his place by request.

(98 N. W. Rep. 411.)

ANNA M. KICKS, ADMINISTRATRIX OF THE ESTATE OF JOHN H. KICKS, DECEASED, *v.* STATE BANK OF LISBON.

Opinion filed February 1, 1904.

Vendor and Purchaser—Recovery of Money Paid on Contract.

1. On a vendor's breach of a contract to convey land after payment therefor out of crops raised thereon, the vendee may recover the money paid on such contract as money had and received.

Measure of Damages on Breach of Contract.

2. As a general rule, the measure of damages in such a case is the money paid on the contract, with interest if the vendor retains possession, and without interest if the vendee has possession.

When Vendee Is Not in Default, Tender Unnecessary.

3. In such a case, if the vendee has fully complied with the contract by turning over the prescribed share of the annual crops, and is

not in default, a tender of the unpaid purchase price is not necessary before commencement of an action to recover the money paid.

Waiver of Default—Promptness in Cancellation.

4. Nonpayment of taxes by the vendee, as required by the contract, is no defense to an action for money had under such a contract, as defendant has waived such nonpayment by not promptly canceling the contract on that ground.

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

Action by Anna M. Kicks, administratrix of John H. Kicks, against the State Bank of Lisbon. Judgment for plaintiff, and defendant appeals.

Modified.

Rourke & Kvello, for appellant.

The proper measure of damages, where the vendor has failed to fulfill his part of the contract is "the money paid with interest, less the value of the use and occupancy of the land." *Todd* v. *McLaughlin*, 84 N. W. Rep. 146.

Respondent being first in default, cannot recover. *Aikman* v. *Sanborn*, 52 Pac. Rep. 729; *Arnett* v. *Smith*, 11 N. D. 55, 85 N. W. Rep. 1037; *Maloy* v. *Muir*, 86 N. W. Rep. 916.

The purchaser before beginning action must offer to perform on her part, or show that at the time performance was due on the part of the vendor, it could not furnish a good title to the land. *Joyce* v. *Shaffer*, 32 Pac. Rep. 320; *Townsend* v. *Tufts*, 30 Pac. Rep. 528; *Senate* v. *Sheehan*, 27 Minn. 328; *Way* v. *Johnson*, 58 N. W. Rep. 552.

Neither the conveyance to a third person by the vendor, nor allowing his title to be lost by foreclosure, will justify the vendee in treating the contract as abandoned before the time for performance by the vendor has arrived. Vendee must offer to perform or show that when performance was due, the vendor could not furnish title. *Gaberino* v. *Roberts*, 41 Pac. Rep. 857; *Pate* v. *McConnell*, 18 So. Rep. 98; *Ziehan* v. *Smith*, 42 N. E. Rep. 1080.

Where vendor fails to perform his contract, or renders himself unable to, it is not a rescission, but affords ground for rescission by the vendee. The purchaser cannot rescind if he is first in default. *Aikman* v. *Sanborn*, 52 Pac. Rep. 729; *Aikman* v. *Murphy*, 55 Pac. Rep. 1099.

Before vendee can recover money paid on contract for the purchase of land, he must show performance on his part, a tender of the amount to the vendor under the contract, or a rescission by the parties. *Way* v. *Johnson, supra.*

When one party to a contract has partly performed it, and then refuses further performance, the other party being ready and willing to perform, cannot recover for what has been advanced. *Ketchum* v. *Evertson,* 7 Am. Dec. 384.

A vendee voluntarily in default cannot recover money paid on contract. *Satterlee* v. *Cronkhite,* 72 N. W. Rep. 616.

Conveyance of the land by the vendor, before the time of performance, is not a breach of the contract. *Garbarino* v. *Roberts,* 41 Pac. Rep. 187.

M. A. Hildreth, for respondent.

Previous default in payment of interest or taxes on the part of vendee is waived by the vendor by his subsequent acceptance of payment. *Fargusson* v. *Talcott et al.,* 7 N. D. 183, 73 N. W. Rep. 207; *Buckholz* v. *Leadbetter,* 11 N. D. 473, 92 N. W. Rep. 830.

Offer of performance by vendee was not required when vendor had by its own acts made performance unnecessary. *Wilhelm* v. *Fimple,* 31 Ia. 131, 7 Am. Rep. 117; *Bennett* v. *Phelps,* 12 Minn. 326; *Warner* v. *Lockerby,* 28 Minn. 30; *Herrick* v. *Newell,* 51 N. W. Rep. 819.

If the vendor of real estate, under an executory contract, is unable to perform on his part, at the time provided by the contract, a formal tender or demand on the part of the vendee is not necessary in order for him to maintain an action to recover the money paid on the contract or for damages. *Hudson* v. *Swift,* 20 Johns. 24; *Fuller* v. *Hubbard,* 6 Cow. 13; *Greene* v. *Greene,* 9 Cow. 47; *Hartley* v. *James,* 50 N. Y. 38; *Bigler* v. *Morgan,* 77 N. Y. 312; *Burwell* v. *Jackson,* 9 N. Y. 547; *Borgardas* v. *N. Y. Life Insurance Co.,* 101 N. Y. 328, 4 N. E. Rep. 522; *Tamsen* v. *Schaefer et al.,* 108 N. Y. 604, 15 N. E. Rep. 731; *Zeihen* v. *Smith,* 148 N. Y. 558, 42 N. E. Rep. 1080; *Cooke* v. *Daggett,* 2 Allen 439; *Trinkle* v. *Reeves,* 25 Ill. 214; *Richards* v. *Allen,* 17 Me. 296; *Smith* v. *Lamb,* 26 Ill. 396; *Appleton* v. *Chase,* 19 Me. 74; *Colville* v. *Besly,* 2 Denio. 139; *Greene* v. *Greene,* 9 Cow. 47; *Selleck* v. *Tolman,* 87 N. Y. 106; *Page* v. *McDonald,* 55 N. Y. 299; *Lawrence* v. *Miller,* 86 N. Y. 131; *Dennis* v. *Strassburger,* 89 Cal. 583, 26 Pac. Rep. 1070; *Phelps*

v. *Brown*, 95 Cal. 572, 30 Pac. Rep. 774; *Drew* v. *Pedlar et al.*, 87 Cal. 443, 25 Pac. Rep. 749; *Scott* v. *Glenn*, 87 Cal. 221, 25 Pac. Rep. 405; *Easton* v. *Montgomery*, 90 Cal. 307, 27 Pac. Rep. 280; *Anderson* v. *Strassburger*, 92 Cal. 38, 27 Pac. Rep. 1095.

The usual rule of damages on failure of vendee to take the property purchased is the difference between the actual contract price and the actual value of the land at the time of the breach. *Drew* v. *Pedlar*, 87 Cal. 443, 25 Pac. Rep. 749.

Where there is a rescission or abandonment of a contract, either by the parties or by operation of law, the vendee is clearly entitled to recover what was paid under the contract so rescinded. *Tice* v. *Zinnser*, 13 Hun. 366; *Bohall* v. *Diller*, 41 Cal. 433; *Shively* v. *Semi-Tropic M. and W. Co.*, 99 Cal. 259, 33 Pac. Rep. 848; *Merrill* v. *Merrill*, 103 Cal. 287, 35 Pac. Rep. 768, 37 Pac. Rep. 392; *Glock* v. *Howard & Wilson Colony Co.*, 123 Cal. 1, 55 Pac. Rep. 713, 69 Am. St. Rep. 17.

MORGAN, J. In December, 1892, John H. Kicks and the State Bank of Lisbon entered into a contract for the sale of eighty acres of land in LaMoure county under the crop payment plan. Said Kicks died soon thereafter, and the plaintiff, Anna M. Kicks, succeeded to all his rights under said contract, after a due administration of his estate. The price to be paid to said bank for the land was $800, with 8 per cent interest on deferred payments. At the time the contract was entered into the land was wild land, without any house or improvements thereon. Under the contract forty acres were to be broken in 1893, and the balance in 1894. Forty acres were broken in 1893, thirty acres in 1894, and ten acres in 1895. There was no house on the land, and plaintiff lived on adjoining land in a house thirty rods from the land in suit. Payment was to be made by turning over to the bank one-half of the crop raised each year, and credit was to be given on the contract for such sum as the crop turned over amounted to at the then market price. Taxes were to be paid by the plaintiff. The bank agreed in the contract to execute and deliver to Kicks a good and sufficient warranty deed of said land upon full payment of said sum of $800 and interest. Time was not of the essence of the contract, by express terms or otherwise. The plaintiff farmed the land up to and including the year 1900, and made payments on the contract, aggregating $557.27, by turning over one-half of the crops raised. Taxes were paid by plaintiff during three years, aggregating $32.35.

When the contract was entered into there was a mortgage on the land. This mortgage was not mentioned during the negotiations nor in the contract. In December, 1899, this mortgage was foreclosed, and in December, 1900, a sheriff's deed was issued under the mortgage sale to the mortgagee, as no redemption was made by the bank from such sale. This mortgage included in it other lands than the eighty acres in suit, and the total amount for which the sale was made was over $6,000. The plaintiff rented the land from the owner, under the sheriff's deed, for 1901, and after that year had nothing more to do with the land. This action is brought to recover the money paid by her on the contract and for the amount paid for taxes, as money had and received under the contract. The answer alleges, (1) a forfeiture of said contract by plaintiff's failure to pay taxes thereon since 1895; (2) a forfeiture of said contract by plaintiff's failure to turn over to it the proceeds of the 1900 crop; (3) a counterclaim growing out of the plaintiff's use of the land from 1892 to 1899. The trial court ordered judgment for the plaintiff for the sums paid, with legal interest thereon from date of payment. Defendant appeals from the judgment, and requests a review of the entire case.

It is contended by the appellant that the plaintiff cannot recover in this action, for the reason that she forfeited all rights under the contract by failure to pay the taxes after the year 1895. The taxes were not paid by the bank, but by the mortgagee, to protect his security. The bank received the proceeds of the crops up to and including the year 1899, and no action was taken by it to forfeit the contract on account of such nonpayment of the taxes for those years. The bank accepted the proceeds of the crops unconditionally, without suggestion that the taxes had not been paid, and without paying them itself and deducting from the credit given on the contract the amount paid, as it had done on two previous years. Under prior decisions of this court, it cannot now claim such nonpayment as a ground for forfeiting the contract. If it desired to cancel the contract on this ground, it should have moved promptly, and by failure to do so the default was waived. *Fargusson* v. *Talcott*, 7 N. D. 183, 73 N. W. 207; *Buckholz* v. *Leadbetter*, 11 N. D. 473, 92 N. W. 830; *Ross* v. *Page*, 11 N. D. 458, 92 N. W. 822; *Russell* v. *Timmins*, 13 N. D. —, 99 N. W. 48.

It is further claimed by appellant that plaintiff is barred from recovering in this action, because no tender was made of the

unpaid purchase money, and no deed was demanded before the action was commenced. That the demand and tender were not made is true, nor could a tender of the balance to become due be made. That balance was not due until realized out of the land by raising crops thereon. The plaintiff had fully performed the contract by turning over one-half of the crop for each year up to 1900, and was not, therefore, in default. No tender could therefore be claimed before the suit was commenced, under the terms of the contract. All the terms of the contract had been performed up to the time of the foreclosure. The defendant had permitted its title to become vested absolutely and beyond redemption in another. The bank had no right to the unpaid purchase money, as it had permitted its title to vest in another. As a matter of law, a tender would not have changed the status of the parties in reference to the contract. Their rights had been determined by the action of the defendant in abandoning the contract and the land. A tender would therefore have been ineffectual and useless. *Ziehen* v. *Smith,* 148 N. Y. 558, 42 N. E. 1080; *Wilhelm* v. *Fimple,* 31 Iowa, 131, 7 Am. Rep. 117; *Richards* v. *Allen,* 17 Me. 296; *Hartley* v. *James,* 50 N. Y. 38; *Burwell* v. *Jackson,* 9 N. Y. 535; *Hawkins* v. *Merritt* (Ala.) 19 South. 589; *Smith* v. *Lamb,* 26 Ill. 396, 79 Am. Dec. 381. 2 Warvelle on Vendors, section 925, lays down the rule as follows: "Yet, if the vendor does not possess the title to the bargained property, and for that reason is unable to comply with the terms of the contract, the vendee becomes absolved from any duty or obligation thereunder. He need not tender the balance due, for the law requires no useless ceremony, and, if it appears that the vendor was not entitled to and could not receive the unpaid purchase money, he has no right to claim a tender of the same. The vendee in such cases has a right to repudiate the contract as forfeited by the vendor, and to recover the money paid on the same as for money had and received." By allowing the foreclosure to ripen into a perfect title, the defendant violated its contract, and placed it beyond its power to comply with it. Such was the situation when the plaintiff ignored the defendant's contract and rented the land from the owner. The conduct of the plaintiff and defendant constituted a rescission of the contract. The defendant abandoned the contract by not redeeming. The plaintiff abandoned the contract by suing to recover what was paid under it. What was said in *Bannister* v. *Read,* 1 Gilman, 99, applies here: "The breach of one party

may be treated by the other as an abandonment of the contract, authorizing him, if he chooses to do so, to disaffirm it; and thus the assent of both parties to the rescission of the contract is sufficiently manifested; that of the one by his neglect or refusal to perform his part of the contract, and of the other by his suing, not for the breach, but for the value of any act done or payment made by him under the contract as if it had never existed." See also, *Baston* v. *Clifford,* 68 Ill. 67, 18 Am. Rep. 547. The contract, therefore, stands by the acts of the parties as rescinded, as a matter of law, and plaintiff is entitled to recover what she paid on the contract while in force. The failure of the defendant to redeem from the sale, and the issuing of a deed upon the sale, justify the conclusion of its intention to abandon the contract, or its inability or unwillingness to abide by it. The plaintiff cannot be held without remedy in this case for the reason that she did not remain in possession until she had fully paid the price of the land from crops raised thereon and then rely on a stranger to her contract for title. She did not live upon the land. Her possession was for purposes of cropping the land only. The owner under the foreclosure deed had a right to go into actual possession at any time, and plaintiff's contract would give her no rights as against such purchaser. She could not defend nor maintain an action as against such owner. Even if in actual possession and residing upon the land, the defendant's course amounted to a constructive eviction of her from the premises. Having lost the possession of the land and her interest in the land through defendant's wrongful violation of the contract, she is entitled to recover what she paid on the contract as moneys had and received.

Has the defendant a right to have its counterclaim for the use of the land by plaintiff under the contract allowed? The trial court disallowed the counterclaim, and gave plaintiff judgment for the sums paid by her, with 7 per cent interest from the date of payment. The measure of recovery in this class of actions is a matter of diverse holding, and difficult of adjustment so as to accomplish the end to be attained—to do justice between the parties by placing them in the same situation as they were in when the payments were made. A recovery is permitted against the defendant for the money received by it, on the ground that it would be unjust for it to enrich itself by retaining money paid under a contract which it had violated. On the other hand, plaintiff has

received benefits under the contract by the possession of the premises for years. The object to be sought by the judgment in the case is to place the parties, as nearly as possible, in *statu quo.* If no possession is gained under the contract, and money has been paid, the general rule of damages in this class of actions is the money paid, with interest. If possession be taken by the vendee under the contract, and such possession be a benefit, some cases allow the benefit of such possession to be counterclaimed as against the money paid. *Todd* v. *McLaughlin* (Mich.) 84 N. W. 146; *Baston* v. *Clifford,* 68 Ill. 67, 18 Am. Rep. 547. The general rule, however, is that interest on the purchase money paid and the use of the land under the contract shall offset each other. In case the whole purchase price is paid when possession is taken, this rule does justice between the parties while possession continues. 2 Warvelle on Vendors (2d Ed.) p. 229, indorses such a rule, and says: "When a contract for the sale of land which the purchaser has paid for and was put in possession of is rescinded for causes free from fraud, the use of the money and the use of the land are held to balance each other. The decree should in general restore the money to the purchaser without interest, and the land to the vendor without rents and profits. But if the purchaser has made valuable and lasting improvements on the land, or if it has suffered in his hands through neglect or mismanagement, then these things are the subject of valuation, account, and final settlement by the decree." *Worrall* v. *Munn,* 38 N. Y. 137. See, also, Sutherland on Damages (2d Ed.) section 589, p. 1312; 3 Sedgwick on Damages (8th Ed.) section 981; Rawle on Covenants (5th Ed.) section 196; *Harding* v. *Larkin,* 41 Ill. 413; *Hutchins* v. *Roundtree,* 77 Mo. 500; *Flint* v. *Steadman,* 36 Vt. 210; *Conrad* v. *Trustees,* 64 Wis. 258, 25 N. W. 24; *Williams* v. *Rodgers,* 2 Dana, 375; *Baxter* v. *Ryerss,* 13 Barb. 267; *Fernandez* v. *Dunn,* 19 Ga. 497, 65 Am. Dec. 607; *Click* v. *Green,* 77 Va. 827; *Spring* v. *Chase,* 22 Me. 505, 39 Am. Dec. 505. Section 4981, Rev. Codes 1899, lays down the rule that: "The detriment caused by the breach of a covenant of seizin, of right to convey, of warranty or of quiet enjoyment in a grant of an estate in real property is deemed to be, (1) the price paid to the grantor; * * * (2) interest thereon for the time during which the grantee derived no benefit from the property not exceeding six years." The actions contemplated by this section are analogous to this action. If benefits derived from possession are to balance

interest in these actions, it seems that no distinction can be made as to recovery in actions for money had and received under the contract. Some of the cases cited above are actions for damages for a breach of covenants, wherein the principle declared by this statute is followed. Hence they apply in this case, in view of the similarity of the actions with the one here considered. These cases are also authority for the principle that, if the vendee in a contract becomes liable to the holder of a paramount title for the rents and profits of the land, interest on the purchase price paid is recoverable. These cases also show the difficulty in this class of actions in measuring the rights of the parties by a general rule, without in some cases doing some injustice to one or the other of the parties; that to attain the object sought, that of placing each party in the same condition as when the contract was made, each case is often considered upon its own facts. In this case the whole of the purchase price of the land was not paid by the vendee, and hence the rule that interest on the purchase price shall balance the value of the use of the land does not fully compensate the defendant for the use of his land. But the plaintiff, while breaking and preparing the land for crops, received no benefit from the land as a matter of fact. She did not receive the full beneficial use of the land as a residence during any of the time. To allow her the use of the land, and the defendant the use of the money without interest, is as practical and just an adjustment of the mutual rights of the parties as can be made under the evidence submitted in the case. To allow her interest on what she paid and the free use of the land would not be such an adjustment as contemplated by the rule that the parties are to be placed in *statu quo*. *Taylor* v. *Porter*, 25 Am. Dec. 158.

The district court is directed to modify its judgment by disallowing interest on the sums paid and order judgment in plaintiff's favor for the payments actually made, towit, $585.62. The plaintiff will recover costs.

Modified and affirmed. All concur.

(98 N. W. Rep. 408.)

NORTHWESTERN TELEPHONE EXCHANGE COMPANY *v.* E. B. ANDERSON, D. A. DINNIE, F. W. SCHLABERG AND ANDREW KNUDSON.

Opinion filed February 8, 1904.

Mover of Houses Liable for Damage to Telephone Lines.

1. A person licensed to move houses in the city of Grand Forks is legally liable for damages done by him while moving a house, such damage being done to the wires and property of a telephone company, duly authorized by ordinance to establish a telephone system in said city and maintained therein.

City Franchise to Telephone Company Creates a Vested Right, Not Impairable by Subsequent Private Grants.

2. By the passage of such ordinance, which gave the city benefits, and its acceptance by the company, and its expenditures thereunder, a contractual relation was created between the company and the city, which became a vested right that could not be impaired by subsequent action of the city directly or indirectly annulling it for purposes not public and for purposes of a personal or private nature.

Removal of Buildings Is an Extraordinary Use of Streets, Subject to Public and Vested Rights.

3. The use of a street for moving houses is an extraordinary use thereof. Such use may be permitted, but not so as to destroy the use of the street for travel or necessary public purposes, and cannot be legally done in destruction or impairment of vested rights.

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

Action by the Northwestern Telephone Exchange Company against E. B. Anderson and others. Judgment for plaintiff. Defendants appeal.

Affirmed.

Guy C. H. Corliss, for appellants.

The city authorities cannot bargain away the public right to the use of streets; the power of such streets is vested in the governing body of the city as a trust for the general public. *Commissioners* v. *Street,* 22 So. Rep. 629; *Hibbard* v. *City of Chicago,* 50 N. E. Rep. 256; *Snyder* v. *City of Mt. Pulaski,* 52 N. E. Rep. 62.

If plaintiff has contract rights, it took them subject to the authority of the city to allow the removal of buildings over the streets thereof.

The party removing a building is not liable for a tort; if there is any liability, such liability exists on the part of the city.

The plaintiff took its franchise "subject to all reasonable regulations and ordinances of a public nature as the city council may authorize or see proper at any time to adopt, not destructive of the rights herein granted." The removal of buildings is a reasonable use of the streets of a city.

Tracy R. Bangs, for respondents.

The unanimous opinion of courts of last resort is, that the acceptance of the terms and conditions of an ordinance granting to a telephone company the use of the streets and alleys of a city, constitutes a contract between it and the city, and the construction of its line, at large expense, vests in such company certain inviolable rights. *The Northwestern Tel. Ex. Co.* v. *City of Minneapolis,* 83 N. W. Rep. 527, 53 L. R. A. 175; *City of New Orleans* v. *Gt. So. Telephone and Tel. Co.,* 8 Am. St. Rep. 502; *Michigan Tel. Co.* v. *St. Joseph,* 80 N. W. Rep. 383, 47 L. R. A. 87, 80 Am. St. Rep. 520.

The purpose of public streets is to provide the public with means to travel from place to place, on foot and in vehicles of all description, to transmit intelligence by letter, or other contrivance, as by telegraph or telephone, to transmit gas, water and sewage for the use of the public, etc. *Taylor* v. *Portsmouth, etc., St. Ry. Co.,* 64 Am. St. Rep. 216.

There is no common law right to move a house along the streets of a city; it is an extraordinary use for which the municipality may exact a license. 24 Am. & Eng. Enc. of L. (1st Ed.) 119.

The plaintiff's rights with the city are contractual; and the latter can grant no privilege to any private person for any private enterprise that interferes with the plaintiff's rights under its franchise. The grant of a right to remove a building is an unusual and extraordinary use, as a matter of favor to individuals, in which the public has no interest. The right of the defendant, Anderson, to remove the building is subject to all of plaintiff's rights under its contract. *Day* v. *Green,* 4 Cush. 433; *Dickson* v. *Kewanee Electric Light and Motor Co.,* 53 Ill. App. 379; *N. Y. and N. J. Tel. Co.* v. *Dexheimer,* 14 N. J. Law, 295; *Penn. Tel. Co.* v. *Varnan,* 15 Atl. Rep. 624; *Williams* v. *Citizens' Ry. Co.,* 130 Ind. 71, 29 N. E. Rep. 408, 15 L. R. A. 63, 30 Am. St. Rep. 201; *City of Eureka* v. *Wilson,* 48 Pac. Rep. 41.

MORGAN, J. This action is brought to recover damages alleged to have been caused to plaintiff's property by the defendants while moving a house through and upon the streets of the city of Grand Forks. The complaint alleges the incorporation of the plaintiff company under the laws of the state of Minnesota, doing business as a telephone company in said state and in the state of North Dakota by legal authority; that in August, 1890, the city of Grand Forks, under statutory authority, passed an ordinance, which was duly approved by the mayor, and published as provided by law, granting the plaintiff company a franchise to erect telephone poles in the streets and alleys of said city, to place wires and cross-bars thereon, and to do the same for the purpose of supplying said city and its citizens the benefits to be derived from communication by telephone between themselves; that such ordinance provided that it should take effect in ten days after the acceptance by the plaintiff of certain conditions and restrictions imposed by the ordinance upon said telephone company. Among such conditions, and as a consideration for granting such franchise, was one to the effect that such telephone poles were to be placed at such places, and the wires stretched across or along said streets at such height, as directed by the city engineer and approved by the city council. A further condition to and consideration for the granting of such franchise was that said company should allow said poles to become a city instrumentality for attaching thereon, at the upper arm thereof, the city's fire alarm or police wires, and that said city should have the use of one telephone free of charge, and such others as it desired for its business at 75 per cent of the usual price charged therefor. Said company unconditionally accepted all the conditions imposed by such ordinance by an acceptance thereof in writing, duly filed in the city clerk's office. The complaint further alleges that the plaintiff, upon its acceptance of the conditions imposed by the ordinance, established a telephone system in said city at a large expense, and has ever since maintained the same as a local telephone system and as a long distance system, with facilities for communication between said city and other cities in North Dakota and in Minnesota, South Dakota, Wisconsin, and Iowa; that in April, 1900, the defendant Anderson notified the plaintiff that he intended to move a building known as the "Arlington Hotel" through and along some of the streets of said city, naming them, and notified the plaintiff to give its wires the required attention in

view of such moving. The plaintiff thereupon commenced an action against said defendant, and procured from the district court of Grand Forks county a preliminary injunction against the moving of said building as an interference with its property rights, as such moving would injure its property by breaking its wires; that upon the service of such injunctional order, summons, and complaint the defendant appeared in said action, and moved that such injunctional order be set aside. The court made an order denying such motion unless the defendant Anderson would furnish a bond indemnifying the plaintiff against all damages incurred by it by reason of the moving of said building by destruction of its property. The bond was furnished and the building moved. This action is brought on the bond. Damages are alleged at $207.95. The answer alleges that the defendant rightfully moved such building under legal authority granted to him by virtue of a permit to move said building, issued to him pursuant to a valid ordinance of said city, authorizing the building inspector of said city to issue such permits to persons entitled thereto, as the defendant was as a duly licensed "house mover"; and that he gave to the city a bond, as provided by its ordinances, indemnifying the said city against any liability incurred by it by reason of damages incurred by it on account of moving of houses by him pursuant to such permit. The case came to trial before a jury upon admitted facts. The trial court directed a verdict for the plaintiff. Judgment was entered pursuant to such verdict, and defendants excepted thereto. The defendants appeal from such judgment.

The only error assigned is that the court erred in directing a verdict for the plaintiff. Two questions only are involved in this appeal: (1) Plaintiff's right under the ordinance granting it a franchise to establish and maintain a telephone system within said city; (2) defendant Anderson's rights, under the permit issued to him to move said building, based on the ordinances of said city. The plaintiff claims that by its acceptance of the conditions of the ordinance granting the right to establish a telephone system in said city, and its expenditure of large sums of money in establishing and maintaining such system, a contract was entered into with said city under such ordinance, and vested in said company inviolable rights, which it cannot be deprived of by the use of said streets in matters of a private nature not included in the lawful use of said streets for traveling purposes by the public, and that the use of

said streets for house moving purposes is not a use of them for traveling purposes, and not the primary or usual use of them. On the part of the defendant it is claimed that Anderson, having been licensed, and by special permit authorized to move the building, his acts in doing so were rightful and legal, and that the city had no power to grant plaintiff privileges that would bargain away defendants' right to move buildings along the streets, as said business is a lawful, necessary and usual use of the city's streets. The city council of Grand Forks is authorized under its charter "to lay out, establish, open, alter, widen, grade, pave or otherwise improve streets, alleys, avenues, * * * and vacate the same, * * * and to regulate the use of the same." Comp. Laws, subds. 7, 9, section 885. Subdivision 10 of said section provides that it may prevent and remove obstructions and encroachments upon its streets. Subdivision 17 of said section 885 authorizes the city council "to regulate and prevent the use of streets, sidewalks and public grounds for signs, sign posts, awnings, telegraph or telephone poles," etc. A telephone system is classed as a public use, and to further its establishment the right of eminent domain may be exercised. Section 5956, subd. 7, Rev. Codes 1899. The sections above referred to confer upon the city the power to pass the ordinance under which the plaintiff company was granted the franchise under which it established and maintains its telephone system in said city. The city council's authority to pass such ordinance as one of its granted powers is not contested in this case. It is claimed, however, that it could not, by so doing, impose any burdens upon the defendant Anderson in properly exercising his license to use the streets in his business of moving houses. In *Donovan* v. *Allert*, 11 N. D. 289, 91 N. W. 441, 58 L. R. A. 775, this court held that city councils may authorize the use of the streets for appliances necessary to the maintenance of telephone systems, but that, having done so, abutting owners are not thereby deprived of the right to compensation therefor as owners of the fee to the streets. The city council having, under such statutory authority, granted plaintiff the right to use the streets of the city for this purpose under an ordinance with proper restrictions upon the exercise of the right so that travel shall not be interfered with, the question remains for answer, what are plaintiff's rights so far as this litigation is concerned? Was the right granted a naked permission to set poles and string wires on the streets, or was it accompanied by protection

from damages by reason of other uses of the streets permitted by the council for private purposes? The city receives pecuniary benefit from the plaintiff in the free use of plaintiff's property. This was exacted as a condition precedent to the ordinance becoming operative. The conditions imposed on the plaintiff before the streets should be used by it were accepted. The plaintiff company applied for the franchise. The city granted this privilege upon terms imposed as a consideration. The plaintiff accepted the franchise with the conditions imposed. It has thereafter expended large sums in carrying into effect its acceptance of the ordinance with its conditions. A contract was thereby, in effect, entered into between the two corporations. The contract cannot now be impaired by the city in granting to persons the use of the streets for private purposes. "So an ordinance authorizing a telephone company to maintain lines on its streets, without limitation as to time, for a stipulated consideration, when accepted and acted upon by the grantee by a compliance with its conditions, becomes a contract which the city cannot abolish or alter without consent of the grantees." *Rutland Co.* v. *Marble City Co.*, 65 Vt. 377, 26 Atl. 635, 20 L. R. A. 821, 36 Am. St. Rep. 868. "Certainly, after the expenditure in the erection of poles, made in reliance upon the municipal designation, the company obtains a vested right, of which they cannot be stripped by a subsequent revocation of such designation." *Hudson Tele. Co.* v. *Jersey City*, 49 N. J. Law, 304, 8 Atl. 124, 60 Am. Rep. 619. "Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant, when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside, or to interpolate new and more onerous conditions therein. Such has been the well recognized doctrine of the authorities since the Dartmouth College case, 4 Wheat. 518, 4 L. Ed. 629." *City of New Orleans* v. *Gt. So. Tele. Co.* (La.) 3 South. 533, 8 Am. St. Rep. 502. "When the construction company and the complainant accepted the privileges granted to them by the laws of the state, and the municipality had duly given its permission, and the corporations had expended their money in valuable improvements, contracts were entered into which neither the state nor the municipality could impair or destroy in the absence of power to do so being reserved in the grant itself, or in the Constitution, which becomes a part of such contracts." *Mich. Tel. Co.* v. *St. Joseph* (Mich.) 80 N. W. 383, 47 L. R. A. 87, 80

Am. St. Rep. 520; See, also, *N. W. Tel. Ex. Co.* v. *Minneapolis* (Minn.) 83 N. W. 527, 53 L. R. A. 175; *City of St. Louis* v. *Western Union Tel. Co.* (C. C.) 63 Fed. 68; *Meyers* v. *Hudson County Elec. Co.*, 60 N. J. Law, 350, 37 Atl. 618; *City* v. *Tel. & Tel. Co.*, 40 La. Ann. 41, 3 South. 533, 8 Am. St. Rep. 502; *Knoxville* v. *Africa*, 77 Fed. 501, 23 C. C. A. 252. It is true that the ordinance under which the plaintiff is maintaining this system was not repealed, but the effect of granting defendant the right to move the building was destructive of plaintiff's property, and therefore a violation of plaintiff's contractual rights under the ordinance. Whether such contractual rights could be relied on in case of changes in the location of poles or damages done to them demanded by a necessary and usual use of the streets by the city, is not here presented. Whether the use of the streets in moving houses is inconsistent with plaintiff's use of the streets under the ordinance, or impairs its right to use such streets, is the only question passed on here.

The city gave the defendant permission to move the building in question. The defendant was licensed to move houses in said city. The license was granted only on condition that he give a bond to indemnify the city against any loss occasioned by the defendant in that business to property, public or private. A license fee of $25 was also exacted as a condition to the granting of such license, and paid by defendant. By granting the license under the ordinance, the council acted under the statutory power given it to regulate the use of the streets. That the council can rightfully do so under restrictions is undoubtedly true. It is not an absolute right that any one can demand, but the power is to be exercised or not, as a matter of discretion. *Woodward* v. *Boston*, 115 Mass, 81; *Eureka City* v. *Wilson*, 15 Utah 53, 48 Pac. 150, 62 Am. St. Rep. 904. The use of the streets for moving houses is not, however, a usual, but is rather an extraordinary, one. It does not pertain to the primary right to the use of the streets for travel or other public purposes. The public derives no benefit therefrom generally. Such extraordinary use of a street may, however, be permitted as a favor, under restrictions safeguarding the rights of the public to the street in certain cases, as necessity may require. In *Millville Traction Co.* v. *Goodwin*, 53 N. J. Eq. 448, 32 Atl. 263, the court said: "Because of the privilege thus secured to it by the law and the action of the city authorities, the company has invested

its money, and they thereby perfected obligations which the Constitution says shall not be impaired. The defendants propose to occupy the highway not for the purpose of ordinary travel or communication, but for the purpose of moving a very large frame building, to do which nearly the entire street is occupied. This, it must be admitted, is an obstruction of the street. It certainly interferes more or less with ordinary travel, but the question is not whether or not they may so occupy the street in case by doing so they do not become a nuisance to others who desire and have a lawful right to use the streets for the purposes for which they are established, but the question is whether or not they have a right, in using the street, to prevent the company from the full, free and complete exercise of the franchises with which it is clothed. I think the statement of the question brings with it the correct answer. While all persons ordinarily have a right to use the street to the same extent with the car company, yet they have no right unduly or unreasonably to occupy the street, and so to prevent the passage of trains." In that case the defendant had no license or permit to move the house. Hence the case is in point only in principle in this case. In *N. Y. & N. J. Telegraph Co.* v. *Dexheimer,* 14 N J. Law J. 295, the defendant was a licensed housemover, and in moving a house cut the wires of the company's system. Suit was brought for damages, and the jury was charged that the defendant was liable if he cut any wires that were put up and maintained in accordance with the city ordinance under which they were put up, and ordered damages assessed in plaintiff's favor for such as were thus maintained and were cut, and these only. In *Williams* v. *Citizens' Ry. Co.*, 130 Ind. 71, 29 N. E. 408, 15 L. R. A. 64, 30 Am. St. Rep. 201, the court said: "Where a right to use a street is acquired pursuant to statute and under a license from a municipality, it is in the nature of a contract right, and the municipality itself cannot destroy or materially impair it. * * * It is undoubtedly true that all such rights are subordinate to the paramount power, usually denominated the 'police power,' for that power cannot be annihilated by contract. * * * It would violate the plainest principles of law to permit an individual citizen to confiscate or destroy the property of a corporation which has assumed to exercise rights under the laws of the state, and to which the officers of the government have given recognition by granting it the right to use the streets of a city. * * *

The appellants in this case are not asking to be allowed to make an ordinary use of the streets of the city. They are, on the contrary, asking that they be permitted to use the streets in an extraordinary mode, and for an unusual purpose. * * * It would be strange, indeed, if large buildings could be moved along the thronged streets of a city without control or restriction, and it would be equally strange if the owner of a building could destroy the property of others in order to enable him to move his building from one place to another." In *Dickson* v. *Kewaunee Electric L. and M. Co.*, 53 Ill. App. 379, the jury were instructed "that the company had a right to place its wires in the street, if allowed by corporate authority, if it did not interfere with the ordinary use of the public in the streets, and that removing a house along the streets was not within the rights enjoyable by the public as a use of the public streets." This instruction was sustained in the appellate court. See, also, *Penn. Tel. Co.* v. *Varnau* (Pa.) 15 Atl. 624; *Day* v. *Green*, 4 Cush. 433; *Graves* v. *Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *Townsend* v. *Epstein* (Md.) 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. Rep. 441.

The evidence shows that the wires were stretched and the poles placed in compliance with the ordinance under the supervision of the city officers. The building which was moved was a large building, and forty-three feet high when being moved, and seven feet higher than the highest of plaintiff's telephone wires, as placed pursuant to such ordinance. Our conclusion is that the defendant's rights to the street for house-moving purposes were subordinate to those of the plaintiff; that plaintiff was given paramount rights to the streets by virtue of the ordinance containing no provision for direct or indirect revocation for private purposes; that defendant was a mere licensee, with privileges to use the streets in a manner not unreasonably interfering with the use of the streets for traveling purposes, and without interference with those having prior rights to them under ordinances that have ripened into relations in the nature of contracts, thereby becoming vested rights; that the use of the streets by defendant for such purposes was not an ordinary, but an exceptional and extraordinary, use thereof, out of which the public as such derives no benefit; that neither the defendant's license nor the special permit to move this building did or could protect him from liability for damages to plaintiff arising out of the exercise of the permission given him to move this building. The

council did not, and would have no power to, grant a license to move the building, and give therewith immunity from damages consequent upon the exercise of the license. Such permission can only be given by the council for the use of the street for such purpose; that is, for moving the building. To add to such permission expressly or in effect a provision that the exercise of the permission would leave those damaged thereby without remedy against the defendant, would be a void, unreasonable, and inoperative provision. Its effect would be to impair and nullify the previous grant to the plaintiff, under which vested rights ripened. To compel plaintiff to remove its wires or repair them whenever called upon to do so by persons moving houses would add a burdensome and unreasonable condition to the ordinance under which it acts, not contemplated by its terms as passed. So far as the plaintiff is concerned, and its property rights, defendant was a trespasser, acting without any legal authority. Appellants' contention is that plaintiff accepted the terms of the ordinance with knowledge that the council possessed the power to authorize the moving of buildings, and possessed such power as a trust which could not be impaired. This would be true of any usual use of the streets, or for traveling purposes, or necessities arising in the interests of the public. So far as purely private interests are concerned, the plaintiff's rights cannot be jeopardized by imposing new and unreasonable conditions. We think it more reasonable to say that the plaintiff accepted the ordinance under a presumption, which it had a right to indulge in, that its rights were paramount so far as extraordinary uses of the streets were concerned, and only subject to impairment by the usual and necessary use of the streets, or when public necessities demand it.

The defendants are legally liable for the damages incurred, and the judgment will be affirmed. All concur.

COCHRANE, J., having been of counsel in the court below, took no part in the decision, Judge W. J. KNEESHAW, of the Seventh Judicial District, sitting in his place by request.

(98 N. W. Rep. 706.)

THE SINGER MANUFACTURING COMPANY *v.* GEORGE W. FREERKS AND GEORGE T. PROPPER.

Opinion filed February 11, 1904.

Notice to Sureties of Obligee's Acceptance.

1. Where an employe, as principal, and two others, as sureties, in consideration of the principal's employment as agent by a sewing machine company, and his agreement to furnish a bond for the faithful performance of the duties of his agency, and to pay over and account for all moneys and property which might come to his hands by virtue of his employment as such agent, executed the bond in suit as the undertaking which their principal had agreed with such company to give, and left such bond with the principal for delivery to the company, such bond was and became a binding and enforceable undertaking on delivery, and no notice of its acceptance by the obligee was required.

Principal in Bond as Sureties' Agent for Delivery.

2. Where the signers of a bond, which the employer of the principal had agreed with him to accept to secure the performance of the duties of his employment, executed the same and left it with the principal for delivery to the obligee, with knowledge that the obligee had agreed to accept it, they thereby constituted such principal their agent for the delivery of the bond; and when the employer, after delivery of such bond, intrusted the principal with money and properties in the course of his employment, which he embezzled, the sureties on such bond could not thereafter be heard to question its binding obligation, or to assert that it was a mere unaccepted offer of guaranty.

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

Action by the Singer Manufacturing Company against George W. Freerks and others. Judgment for defendants, and plaintiff appeals. Reversed.

Ball, Watson & Maclay, for appellant.

The bond is a joint and several obligation of the obligors, that the principal therein will faithfully perform his duties and pay over all moneys in his hands. *Cox* v. *Weed Sewing Mach. Co.*, 57 Miss. 350; *Nelson* v. *Howe Sewing Mach. Co.*, 10 Ky. Law. Rep. 37; *Page* v. *White Sewing Mach. Co.*, 34 S. W. Rep. 988; *Saint* v. *Wheeler & Wilson Sew. Mach. Co.*, 10 So. Rep. 539; *Hall* v. *Weaver*, 34 Fed. Rep. 108; *Wheeler* v. *Rohrer*, 52 N. E. Rep. 780; *Durand & Kasper Co.* v. *Rockwell et al*, 54 N. E. Rep. 711; *Rapp* v. *Insurance Co.*, 113 Ill. 390.

Either of the three obligors had authority to deliver the bond; and delivery to the principal was presumably to enable him to deliver to the obligee. *Cox* v. *Weed Sewing Mach. Co., supra; Snyder* v. *Click,* 13 N. E. Rep. 581; *McIntosh* v. *Reed,* 89 Fed. 464; *Haywood* v. *Townsend,* 38 N. Y. Supp. 517; *Wolfe* v. *Driggs,* 14 Atl. Rep. 480; *Singer Mfg. Co.* v. *Drummond,* 40 Hun. 260; *Dair* v. *U. S.,* 16 Wall 1, 83 U. S. 1, 21 L. Ed. 491; *Taylor* v. *King,* 73 Ia. 153, 34 N. W. Rep. 774; *Butterfield* v. *Mountain Ice and Cold Storage Co. et al.,* 39 Pac. Rep. 824.

The bond was not a letter of credit, nor the guaranty of an ordinary debtor and creditor accounts; but an agreement that the principal would perform all the duties of his trust under his contract with the obligee in the bond. *Bryant et al.* v. *Stout,* 44 N. E. Rep. 68; *Davis Sewing Mach. Co.* v. *Jones,* 61 Mo. 409; *Nelson* v. *Howe Sewing Mach. Co.,* 10 Ky. Law. Rep. 37; *Furst & Bradley Mfg. Co.* v. *Black et al.,* 12 N. E. Rep. 504; *Cox* v. *Weed Sewing Mach. Co.,* 57 Miss. 350.

Freerks & Freerks, and *H. N. Morphy,* for respondents.

A guarantor becomes bound for the performance of a prior or collateral contract upon which the principal is alone indebted. A surety is bound with the principal upon the contract under which the principal's indebtedness arises. *Singer Mfg. Co.* v. *Litter et al,* 9 N. W. Rep. 905; *LaRose* v. *Logansport Nat. Bank,* 1 N. E. Rep. 805.

On a bond conditioned "that he would well and truly keep and perform in all respects according to its true intent and meaning," the contract and sureties' liability were determined on the basis of guarantors. *Locke* v. *McVean,* 33 Mich. 473; *Farmers' & Mechanics' Bank* v. *Kercheval,* 2 Mich. 505; *Gage* v. *Lewis,* 68 Ill. 606; *Ward* v. *Wilson,* 100 Ind. 52; *Reigert* v. *White,* 52 Pa. St. 438; *Woods* v. *Sherman,* 71 Pa. St. 100.

The paper signed by the defendants is an offer of guaranty.

Section 4630, Rev. Codes, provides that a mere offer to guarantee is not binding until notice of its acceptance is communicated by the guarantee to the guarantor. *Standard Sewing Machine Co.* v. *Church,* 11 N. D. 420, 92 N. W. Rep. 805; *Davis Sewing Machine Co.* v. *Richards,* 115 U. S. 524, 29 L. Ed. 480; *Davis* v. *Wells, Fargo & Co.,* 104 U. S. 159, 26 L. Ed. 686; *Gardner* v. *Lloyd,* 2 Atl. 566; *Barnes Cycle Co.* v. *Reed,* 84 Fed. 603; *De Cremer* v.

Anderson et al., 71 N. W. Rep. 1090; *Winnebago Paper Mills* v. *Travis*, 58 N. W. Rep. 36; *German Savings Bank* v. *Drake Roofing Co.*, 51 L. R. A. 758, 83 N. W. Rep. 960; *Lackman & Jacobi* v. *Block et al.*, 28 L. R. A. 255; *Central Savings Bank* v. *Shine*, 48 Mo. 456; *Neagle* v. *Sprague*, 63 Ill. App. 25; *Farmers Bank* v. *Tatnall*, 7 Houst. 287; *Beebe* v. *Dudley*, 26 N. H. 249; *Oaks* v. *Weller*, 37 Am. Dec. 583; *Mussey* v. *Rayner*, 22 Pick. 223; *Craft* v. *Isham*, 13 Conn. 28.

COCHRANE, J. This action was submitted to the court below for determination upon an agreed statement of facts. Defendant had judgment, and plaintiff appealed. The action is founded upon the following bond, which was duly signed and executed by defendants at the request of S. S. Clement, the principal therein, and was left with said Clement to be, and it was by him, delivered to plaintiff, towit:

"Know all Men by These Presents, That we, S. S. Clement, of Wahpeton, North Dakota, as principal, and George W. Freerks and George T. Propper, as sureties, obligors, are hereby held and firmly bound unto 'The Singer Manufacturing Company,' a corporation, duly incorporated and organized under the laws of the state of New Jersey, doing business in the state of North Dakota, and whose corporate existence and capacity to sue are hereby distinctly admitted, in the sum of five hundred dollars, and ten per cent attorney's fees; for the payment of which, well and truly to be made to the said 'The Singer Manufacturing Company,' their successors, representatives, or assigns, at their office in the city of Fargo, North Dakota, without relief from appraisement, valuation, or stay laws, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the 15th day of January, one thousand nine hundred.

"The condition of the above obligation, which is expressly intended as a continuing guaranty, is such, that whereas the above bounden S. S. Clement has entered the employ of the said 'The Singer Manufacturing Company' for the transaction of such business as they may intrust to him. Now, therefore, if the said S. S. Clement shall well and faithfully perform his duties as such employe, pay to said company all rebates or other dues, and account for, pay over, and deliver to said company, all moneys, credits, notes, leases, accounts, receipts, books, property and effects of any

and every kind and nature whatsoever belonging to them that may be entrusted to him, or may come into his possession or under his control; by virtue of his said employment or otherwise; and whether under or in the absence of any present or future new or different agency or appointment, contract, agreement or understanding, covering the same or any lesser or greater duties or responsibilities, verbal or written, or any change whatever therein; either with or without notice to either of said obligors, other than the said employe, and repay to the said company all outlay and expense which they may incur, in ascertaining the nature and extent of a violation of any of the conditions of this bond, or for ascertaining and adjusting any dispute or difference touching the same, then this obligation to be void; but otherwise to remain in full force and effect. And it is agreed that receipts issued or lost, or for any reason not returned by the said employe, and his reports by receipt stubs or otherwise, to the said company, of collections made by him, shall be conclusive evidence as against each and both of said obligors that the said employe received and collected the moneys mentioned in said receipts and reports. And the said obligors hereby waive all right of homestead and other exemptions under the laws of said state as against any judgment which may be obtained upon this obligation.

"S. S. Clement. (Seal.)
"George W. Freerks. (Seal.)
"George T. Propper. (Seal.)

"Signed, sealed and delivered in presence of us:
"A. G. Divet.
"W. M. Hughes."

Clement was employed as agent, salesman, and collector for the plaintiff corporation on January 10, 1900. His duties were as enumerated in the bond. In consideration of said employment, Clement agreed that he would give to the plaintiff a guaranty or bond for the due and faithful performance of said agreement on his part, and the defendants signed the foregoing instrument as the guaranty or bond agreed to be furnished by said Clement. The only person who requested defendants to sign the bond was Clement, and the plaintiff did not, after the receipt of the instrument, or at any time, communicate to defendants, or either of them, notice of its acceptance of the same. The bond was delivered to plaintiff on January 15, 1900, and the employment of Clement

terminated on the 15th day of November, 1901. Between these dates Clement defaulted in the sum of $626.02. Demand of payment was made upon Clement before suit, and demand for damages to the amount of the penalty of the bond, including $50, attorney's fees, was also made upon the respondents. Neither demand was complied with.

Respondents' position is, and the trial court found, that the bond above set forth was a mere offer of guaranty by the defendants, and did not become binding, because no notice of acceptance of the instrument as a guaranty was ever communicated to the defendants, or either of them, by the plaintiff. The case was considered as within the rule declared in *Standard Sewing Machine Company* v. *Church,* 11 N. D. 420, 92 N. W. 805. In this the trial court erred. The mutual assent necessary to constitute this a binding contract, and which distinguished it from a mere unaccepted offer, is found in the facts stipulated: "That in consideration of his employment Clement agreed that he would give to the plaintiff a guaranty or bond for the due and faithful performance of his agreement, and that the defendants signed the instrument as the guaranty or bond agreed to be furnished by Clement." When respondents signed this bond, and left it with Clement to deliver to the machine company as the bond Clement had agreed to furnish, the mutual assent was given and sufficiently evidenced, and no further act or notice of acceptance was required to make it a binding obligation. The machine company had agreed in advance to accept this bond, and could not refuse to do so. The respondents, by intrusting the bond to Clement for delivery to the machine company as the bond he had agreed to give in part consideration of his employment, constituted Clement their agent for the purpose of making such delivery. By such act they enabled Clement to enter upon the discharge of the duty of his employment, and to get the money and property of plaintiff which he misappropriated; and they cannot now be heard to repudiate this obligation, to the detriment of the party it was given to secure. *Wolf* v. *Driggs,* 44 N. J. Eq. 363, 14 Atl. 480; *Haywood* v. *Townsend* (Sup.) 38 N. Y. Supp. 517; *Russell* v. *Freer,* 56 N. Y. 67; *Singer Mfg. Co.* v. *Drummond,* 40 Hun. 260; *Snyder* v. *Click,* 112 Ind. 293, 13 N. E. 581; *Butterfield* v. *Storage Co.,* 11 Utah 194, 39 Pac. 824; *Taylor Co.* v. *King,* 73 Iowa 153, 34 N. W. 774, 5 Am. St. Rep. 666. This disposes of the only defense in the case.

Upon the argument and in the briefs of counsel an interesting discussion was presented as to whether the contract in suit was a contract of suretyship or one of guaranty. This point it is unnecessary to decide. If, technically, it is a contract of guaranty, defendants are liable. This is also true if adjudged a contract of suretyship under the facts stipulated. The limit of liability under the bond is $550, including attorney's fees.

The judgment appealed from is reversed. The district court is directed to order judgment for plaintiff for $550, with interest. Appellant will recover costs. All concur.

(98 N. W. Rep. 705.)

WILLIAM J. CLAPP, SPECIAL ADMINISTRATOR OF LOUIS HOUG *v.* LOUIS HOUG, OTHERWISE KNOWN AS LOUIS H. OLSON.

Opinion filed February 11, 1904.

Subdivision 2 of Section 6325, Rev. Codes 1899, Unconstitutional.

1. Subdivision 2 of section 6325, Rev. Codes 1899, providing for the appointment of a special administrator in cases where "the death of the person whose estate is in question is not satisfactorily proved, but he is shown to have disappeared under circumstances which afford reasonable grounds to believe either that he is dead, or has been secreted, confined, or otherwise unlawfully done away with," is invalid, as depriving the person of his property and its possession without notice or due process of law, when applied to the property of a person living, although such special administrator has no power to administer such estate generally.

Taking Possession of Property by Special Administration.

2. The taking of the possession of the property of such person under letters of administration issued without notice is not such notice to such owner as will validate the proceedings

Such Possession Not Proper Exercise of Police Power.

3. The taking of possession of a person's property under such circumstances cannot be upheld as a proper exercise of the police power of the state.

Costs.

4. Costs and disbursements incurred by such special administrator, acting in good faith, are not a legal charge against such person or his property, as the proceedings are wholly void.

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

Proceedings between William J. Clapp, special administrator of Louis Houg, and Louis Houg, otherwise known as Louis H. Olson. From the judgment the administrator appeals.

Affirmed.

F. H. Peterson and *William J. Clapp, pro se.*

It is conceded that the property in the special administrator's hands should be turned over to the respondent; but appellant should be allowed his disbursements and fees. The case at bar differs from *Scott* v. *McNeil,* 154 U. S. 34, 14 Sup. Ct. Rep. 1108, 38 L. Ed. 896, and cases therein cited. In this they were all cases of straight administration. No administrator can be appointed upon the estate of a living person. In the case at bar, no general administrator was appointed.

By paragraph 2 of section 6325, Rev. Codes 1895, no general administrator is contemplated, nor a change of form of personal property, nor its disposition or distribution. The duties of an administrator under this section are to collect and hold property until the return of the owner, or proof of his death and the appointment of an administrator. Upon the occurrence of either of these events, the property is to be turned over to the person entitled to receive it. The purpose of the statute is to preserve the property from waste, depreciation and forfeiture for taxes. The effect of the provision is not the disposal of property without due process of law, but to protect it, and turn it over to the owner or his duly appointed representatives. The statute in question is a copy of that of New York and other states, and its validity has never been questioned in any state where it is in force.

Guy C. H. Corliss, for respondent.

By the statute in question, the legislature assumes to vest in the county courts jurisdiction over the estates of living persons, and section 6325, Rev. Codes, so far as it assumes to give jurisdiction to appoint a special administrator of the estate of a living person, is a nullity. Administration proceedings as to the estate of parties living are a nullity. *Allen* v. *Dundas,* 3 T. R. 125; *Griffith* v. *Frazier,* 8 Cranch. 9, 3 L. Ed. 471; *Burnes* v. *Van Loan,* 29 La. Ann. 560-563; *Jochumsen* v. *Suffolk Sav. Bank,* 3 Allen 87; *Moore* v. *Smith,* 73 Am. Dec. 122; *Melia* v. *Simmons,* 45 Wis. 334; *Andrews*

v. *Avory,* 14 Gratt. 229, 73 Am. Dec. 355; *Withers* v. *Patterson,* 27 Texas 495, 86 Am. Dec. 643; *Morgan* v. *Dodge,* 44 N. H. 255, 82 Am. Dec. 213; *Duncan* v. *Stewart,* 25 Ala. 408, 6 Am. Dec. 527; *McPherson* v. *Cunliff,* 11 S. & R. 422, 14 Am. Dec. 642; *Stevenson* v. *Superior Court,* 62 Cal. 60; *Johnson* v. *Beazley,* 65 Mo. 250, 27 Am. Rep. 276; *D'Arusement* v. *Jones,* 4 Lea. 251, 40 Am. Rep. 12; *Thomas* v. *People,* 107 Ill. 517, 47 Am. Rep. 458; *Waters* v. *Stickney,* 12 Allen. 1-13; *Day* v. *Floyd,* 130 Mass. 488; *French* v. *Frazier,* 7 J. J. Marsh, 425-427; Peebles' App. 15 S. & R. 39-42; *State* v. *White,* 29 N. C. 116; *Perry* v. *Railway Co.,* 29 Kan. 420-423; *Devlin* v. *Commonwealth,* 101 Penn. St. 273, 41 Am. Rep. 710.

Even if the statutes and constitution of North Dakota permitted administration proceedings with respect to the property of living persons, such proceedings would constitute taking property without due process of law, within the meaning of the fourteenth amendment to the Federal Constitution. The proceedings are not directed against the person as a living person, or against him at all, and he has no notice whatever thereof; the assumed proceedings, therefore, are void in so far as they attempt to affect his property rights, as to accord them such effect would be to deprive the living owner of his property without due process of law. *Thomas* v. *People,* 107 Ill. 517, 47 Am. Rep. 458; *Thompson* v. *Whitman,* 18 Wall. 457, 21 L. Ed. 897; *Wheelwright* v. *Depeyster,* 1 Johns. 471, 3 Am. Dec. 345; *Rose* v. *Himely,* 4 Cranch. 269, 2 L. Ed. 608; *Carr* v. *Brown,* 38 Atl. Rep. 9; *Levan* v. *Bank,* 18 Blatchf. 1 Fed. Rep. 641; *Scott* v. *McNeal,* 154 U. S. 34, 14 Sup. Ct. Rep. 1108, 38 L. Ed. 896; *Epping* v. *Robinson,* 21 Fla. 36; *Martin* v. *Robinson,* 67 Tex. 368; *Thomas* v. *People,* 116 N. C. 12, 118 N. C. 33.

MORGAN, J. In December, 1899, one Louis Houg, thirty years of age, disappeared from Grand Forks county under circumstances which afforded reasonable grounds for the belief that he was dead, or had been secreted or otherwise unlawfully made away with. Upon his disappearance, search was made for him by the public authorities, and a reward offered by the county commissioners of said county for the production of his body and the apprehension of his murderers. All his relatives were notified of the facts relating to his disappearance. Some of the relatives resided in Minnesota, and others in Norway. Upon their request, a most careful and thorough search was again made for his body. One Swenson, a brother-in-law of Houg, consulted the states attorney, and upon his

advice an application was made for the appointment of a special administrator, and for this purpose Swenson was given a power of attorney from all the relatives of said Houg to act as their representative. When Houg disappeared he left in the house, on the farm on which he worked as a foreman, personal property consisting of clothing, a trunk, carpenters tools, and one promissory note for $500, and some other personal property. There were no creditors. All of his personal property was worth about $540. The appellant, William J. Clapp, was duly appointed special administrator on April 30, 1901, under subdivision 2 of section 6325, Rev. Codes 1899, and duly qualified by giving a bond for the faithful discharge of his duties. He inventoried the property, and took the same into his possession. Said Houg was not dead, however, and informed his relatives of his whereabouts in January, 1902. He had secretly left the place on which he worked, and had gone to the state of Washington, where he worked without communicating to any of his former friends or his relatives his whereabouts, although able to do so; he being of good health during all this time, and capable of writing to them if he so desired. The expenses of the special administrator, attorneys' fees, court fees, searching for the body, and other disbursements, amounted to $245.84. The probate court disallowed the bill for expenses and disbursements, and the administrator appealed to the district court. The trial court found that the order of the county court appointing a special administrator of Houg's estate was null and void, for the reason that said Houg was not dead, but a living person, and denied the administrator's application for costs and necessary disbursements and expenses incurred while acting as such special administrator. The administrator appeals from the judgment entered on such finding.

It is conceded by the respondent that the administrator and all persons concerned in the appointment of an administrator acted in good faith. It is also conceded by the respondent that the disbursements, as presented for allowance, are reasonable in amount, in view of the services rendered. It is conceded by the appellant that the order appointing the special administrator was properly set aside, but he contends that the necessary expenses of such administration should be allowed and paid before he can be compelled to turn over the property. The grounds of his contention are that the statute under which the appointment was made does not contemplate a general administration of the estate, but simply taking pos-

session of the estate of the absentee until his return, or until satisfactory proof of his death is received, and a general administrator appointed. The statute under which the appointment was made reads as follows:

"Section 6325. A special administrator shall be appointed when necessary or proper for the protection of the property or the rights of creditors or other persons interested in the estate, in either of the following cases: * * * (2) In a special proceeding in which probate or general administration is denied because the death of the person whose estate is in question is not satisfactorily proved; but he is shown to have disappeared under circumstances which afford reasonable grounds to believe either that he is dead or has been secreted, confined or otherwise unlawfully made away with."

"Section 6328. A special administrator has the same authority as a general administrator to take into his possession personal property, to secure and preserve it, to collect debts due the estate, and to take charge of the real estate and preserve it from waste or other injury and receive the rents, profits and income thereof, and for either of those purposes he may maintain any action or special proceeding. He must also make an inventory and render an account and may sell perishable property or do any other act which he may be specially required to do by direction of the court, but cannot act generally in matters pertaining to the settlement of the estate."

"Section 6331. When letters testamentary or of general administration on the estate are granted, the powers of a special administrator cease and he must forthwith deliver to the executor or administrator all the property and effects of the decedent remaining in his hands."

It will be observed that the appointment of a special administrator is to continue, under the terms of the statute, until a general administrator or an executor is appointed. The statute makes no provision for the disposition of the property by the special administrator in case of the return of the person believed to be dead. Nor is there any provision for allowance of his costs or for his compensation in the event of the person returning and demanding his property. The appellant claims that he should be allowed his costs in the proceeding, on the ground that the statute contemplates taking care of an absentee's property, and does not provide for its final distribution, and that it is, in that view, a valid law.

Respondent contends that the entire proceeding is based upon an assumption of death, and is one authorizing taking possession of property under the belief that the absentee owner is dead, and holding the same until satisfactory proof of his death is made, and general administration initiated, and that the proceedings in this case are void because taken upon the estate of a living person. Appellant concedes that the estate of a living person cannot be administered and distributed.

We shall not determine in this case whether this statute is applicable to the estate of dead or of living persons, or both, nor whether the statute is unconstitutional, as conferring powers upon the probate court, in respect to preserving the property of absentees, not vested in it by section 111 of the Constitution. Conceding, for the purposes of this case only, that such power may be conferred upon the county court in respect to the property of living absentees, we reach the conclusion that the law, so far as it affects the property of living persons, contravenes the provision of the fourteenth amendment of the Federal Constitution, that persons shall not be deprived of their property without due process of law. The proceedings under which special administrators are appointed in cases like the one at bar follow a refusal to appoint a general administrator on account of the failure of satisfactory proof of the death of the owner of the property to be taken into possession. No additional notice is given after the refusal to appoint a general administrator. The notice previously given as provided by section 6317, Rev. Codes 1899, is a notice to all persons interested in the estate, and rests on the assumption that the owner is dead. This is in no sense a notice to the owner of the estate, but is a notice to those interested therein adversely to him. *Scott* v. *McNeal,* 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896; *Carr* v. *Brown* (R. I.) 38 Atl. 9, 38 L. R. A. 294, 78 Am. St. Rep. 855. He is not a party to the notice, nor to the proceedings. No hearing is afforded him on any question. The fact that he "has disappeared under circumstances which afford reasonable grounds to believe either that he is dead or has been secreted, confined or otherwise unlawfully made away with," is adjudicated without any finding of any kind of an attempt to notify him. The possession of the property is transferred to another. The tangible form of the property is changed by suits and collections. What may be deemed perishable property is sold. Costs and expenses are in-

curred. He is now called upon to pay these expenses, or his property will necessarily be sold to pay them. This is claimed to be done for his benefit, by preserving his property. If this law in fact contemplates the taking possession of the property of a living person, he should have an opportunity to be heard, upon some kind of notice, before the steps are taken; and taking them, without some prescribed notice to him to be given in some way indicated, is depriving him of his property without due process of law. In *Thomas* v. *People,* 107 Ill. 517, 47 Am. Rep. 458, it was said: "The general rule unquestionably is that no one is bound by an adjudication of which he had no notice, or to which he was not a party. Testing the present case by this rule, appellee is clearly not bound." In *Scott* v. *McNeal,* 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896, the court said: "As the jurisdiction to issue letters of administration upon his estate rests upon the fact of his death, so the notice given before issuing such letters assumes that fact, and is addressed, not to him, but to those who after his death may be interested in his estate, as next of kin, legatees, creditors, or otherwise. Notice to them cannot be notice to him, because all their interests are adverse to his. The whole thing, so far as he is concerned, is *res inter alios acta.*" In *Hollingsworth* v. *Barbour,* 4 Pet. 475, 7. L. Ed. 922, the court said: "It is an acknowledged general principle that judgments and decrees are binding only upon parties and privies. The reason of the rule is founded on the immutable principle of natural justice that no man's right should be prejudiced by the judgment or decree of a court, without an opportunity of defending the right. This opportunity is afforded (or supposed, in law, to be afforded) by a citation or notice to appear, actually served, or constructively, by pursuing such means as the law may in special cases regard as equivalent to personal service." In *Walden's Lessee* v. *Craig's Heirs,* 14 Pet. 154, 10 L. Ed. 393, the court said: "It is admitted that the service of process or notice is necessary to enable a court to exercise jurisdiction in a case, and, if jurisdiction be taken where there has been no service of process or notice, the proceeding is a nullity. It is not only voidable, but it is absolutely void." See, also, *Boswell's Lessees* v. *Otis,* 9 How. 336, 13 L. Ed. 164; *Nations* v. *Johnson,* 24 How. 203, 16 L. Ed. 628.

Appellant's contention on the question of notice is that this is a proceeding *in rem,* and taking possession of the property is

notice to the owner. The proceedings were taken and the administrator appointed before possession was taken of the property, so that the possession of the property was taken under an order void, as to him, for want of notice. It is the petition that gives the county court jurisdiction to act at all, and the filing of the petition is not followed by giving the owner notice and an opportunity to be heard. He is not bound at all unless he can be bound by void proceedings. We discover no difference in this case from other proceedings *in rem* in state courts. No contention will be made that in attachment and foreclosure of real estate mortgages by advertisement, and like proceedings, notice would be given to the owner by taking the possession of the property. Even in proceedings strictly *in rem,* in admiralty courts, notice is generally essential, unless the proceeding is brought against the property, as defendant. In such cases, taking possession is deemed notice to the owner under the federal practice. As was said in *Hollingsworth* v. *Barbour, supra*: "The course of proceedings in admiralty causes, and some other cases where the proceeding is strictly *in rem,* may be supposed to be exceptions to this rule. They are not properly exceptions. The law regards the seizure of the thing as constructive notice to the whole world, and all persons concerned in interest are considered as affected by this constructive notice. But if these cases do form an exception, the exception is confined to cases of the class already noticed, where the proceeding is strictly and properly *in rem,* and in which the thing condemned is first seized, and taken into the custody of the court." See, also, *Lavin* v. *Bank* (C. C.) 18 Blatchf. 224, 1 Fed. 641. Under the cases cited, the taking of the property in this case would not be constructive notice to the owner. It was taken under an order of the county court, made without any notice or pretended notice. It was not taken by virtue of valid process. In *Thomas* v. *People,* 107 Ill. 517, 47 Am. Rep. 458, the court said: "But it is said the grant of letters upon an estate is in the nature of a proceeding *in rem,* and therefore the case in hand does not come within the rule mentioned—that, the proceeding being against the estate itself, those having an interest in it must look out for themselves. Conceding this to be so, what follows? Are we to conclude, because the law confers power upon the probate court to grant administration on a dead man's estate upon a mere *ex parte* petition, that it therefore follows the court may lawfully make such grant upon a live

man's estate, and that even without giving him an opportunity to be heard?" The absence of notice renders the proceedings void, and the statute is of no validity, as against the property of a living person, because it does not provide for notice to him. In no case, under state procedure, is the mere taking of possession of property equivalent to notice of action to be taken in reference to such property. We do not refer, in what has been said, to destruction or regulation of property under what is denominated the police power of the state.

It is lastly claimed that the proceedings can be sustained, although based on no notice, and the statute upheld as constitutional, under the police power of the state. No case is cited, and we find none, bringing this case within the regulations of that power. Such power extends to protection of life, health, general welfare, and the property of citizens from injurious results from the actions of others, or in the use of their property, but does not generally go to the extent of depriving them of such property, or its possession, without notice and due process of law. Generally, and except in cases of danger to health or property rights, the exercise of such power is subject to the constitutional guaranty of the fourteenth amendment. It is only in such and other similar cases that property can be taken without notice. "Due process of law" has been defined as follows: "By the 'law of the land' is most clearly intended the general law—a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society." *Dartmouth College* v. *Woodward,* 4 Wheat. 579, 4 L. Ed. 629; Cooley on Const. Lim. (5th Ed.) 432; *Burdett* v. *Allen* (W. Va.) 13 S. E. 1012, 14 L. R. A. 337; *City of Ft. Smith* v. *Dodson* (Ark.) 11 S. W. 687, 4 L. R. A. 252, 14 Am. St. Rep. 62. In *Scott* v. *McNeal,* 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896, the court said: "The appointment by the probate court of an administrator of the estate of a living person, without notice to him, being without jurisdiction and wholly void as against him, all acts of the administrator, whether approved by that court or not, are equally void. The receipt of money by the administrator is no discharge of a debt, and a conveyance of property by the administrator passes no title. * * * And he is not bound either by the order of appointing the administrator, or by a judgment in any

suit brought by the administrator against a third person, because he was not a party to, and had no notice of, either." The effect of holding that the special administrator lawfully took possession of the property in this case would be that a person, by absenting himself as Houg did, subjects his property to be taken and dissipated in paying the expenses of court proceedings. We do not think that such a construction was intended, nor that possession of the property was intended to be taken under such circumstances as are here presented. The property consisted of inanimate personal property. Leaving it, as was done, in no way affected the public, or the public health or welfare. The injury following its abandonment was to Houg alone. If the property was of such character that its presence was injurious to others, or of such character that it should be cared for in order to preserve life or prevent suffering, the general statutes afford ample authority for taking possession of it for such purpose. Section 7560, Rev. Codes 1899. But the taking of possession of it under this law, in the interests of the absentee, without, at least, notice to him, cannot be done without his consent, under the circumstances of this case; and, as the law provides for no notice, it must be held invalid to that extent, at least.

The language of the court in *Moore* v. *Smith,* 11 Rich. 569, 73 Am. Dec. 122, may be quoted as applicable to this case to some extent: "Under a comparison of the several merits of these parties, blame and *laches* have been imputed to the plaintiff for his long continued neglect of his property and friends, by which others were misled. Of the reasons of the plaintiff's conduct, we are not informed. It is enough that he was under no legal obligation to stay where his property was, or to give information concerning himself when he was away. He encountered the risk of the statute of limitations, which, if his absence had been a little longer, would have forever barred him."

For a general discussion upon the validity of statutes similar to the one under consideration, see Woerner's Am. Law of Adminis., vol. 1, section 212.

The judgment is affirmed.

YOUNG, C. J., concurs. COCHRANE, J., having been of counsel in the court below, took no part in the decision.

(98 N. W. Rep. 710.)

INDEX

ABATEMENT OF ACTION. See PARTIES, 242.

ABUSE OF DISCRETION. See EVIDENCE, 61; CRIMINAL LAW, 495; COSTS AND DISBURSEMENTS, 135.

ACTION. See FINDINGS, 478; MAINTENANCE, 164.

1. An action is deemed pending until its final determination on appeal, or the time for appeal has expired. Sykes v. Beck, 242.
2. Purchaser of the subject matter of an action after judgment is a purchaser *pendente lite*. Sykes v. Beck, 242.
3. Executor or administrator may maintain an action to quiet title to real estate belonging to a decedent. Blakemore v. Roberts, 394.

ADMISSIONS. See INSURANCE, 463.

ADVERSE CLAIMS. See FINDINGS, 478.

1. In an action to determine adverse claims, findings that plaintiff is the owner, and that defendant has no claim or right of possession, will support a judgment confirming plaintiff's title. Chaffee-Miller Land Co. v. Barber, 478.
2. In an action to determine adverse claims under chapter 5, page 9, Laws of 1901, a complaint basing the action on several tax liens, states but one cause of action. Blakemore v. Roberts, 394.
3. Complaint in statutory action to determine adverse claims need not allege that tax liens were based on regular assessment and levy. Blakemore v. Roberts, 394.
4. In actions to determine adverse claims, if the complaint in the statutory form states additional matter, it is not demurrable. Blakemore v. Roberts, 394.

ADVERSE POSSESSION.

1. A conveyance of real estate by one who has not been in possession, or taken rent for a period of one year prior thereto, is void as against an adverse possessor under color of title. Schneller v. Plankinton, 561. Galbraith v. Payne, 164.
2. Where the plaintiff's grantor, when he conveys land to the plaintiff, had not been in possession of it, or taken rents therefrom, for one year prior to such conveyance, and defendant was then in adverse possession and had been for ten years prior thereto under color of title, it was error to quiet title in the plaintiff. Schneller v. Plankinton, 561.

AFFIDAVIT. See APPEAL AND ERROR, 193, 197; JUSTICE OF THE PEACE, 88.

1. The Supreme Court will not consider an affidavit, outside of the record, in disposing of an appeal. Nichols v. Roberts, 193.
2. Affidavit upon information and belief in an action for the abatement of a liquor nuisance, gives no jurisdiction to issue search warrant. State v. McGahey, 535.
3. Where the affidavit for an attachment is false, such attachment should be vacated upon motion. Sonnesyn v. Akin, 227.

AGENT. See PRINCIPAL AND AGENT.

ALIMONY. See DIVORCE, 17.

1. Alimony under section 2761, Rev. Codes 1899, may be granted in gross amount in lieu of payments at stated periods. DeRoche v. DeRoche, 17.
2. Where the husband has an estate of $14,000 and a good business, $7,000 alimony awarded to wife, charged with the custody of three minor children, is not excessive. DeRoche v. DeRoche, 17.

AMBIGUITY. See PLEADINGS, 336.

AMENDMENT. See PLEADINGS, 122; APPEAL AND ERROR, 74.

APPEAL AND ERROR. See STATEMENT OF THE CASE, 242; CRIMINAL LAW, 425; JUSTICE OF THE PEACE, 88, 106, 402.

1. When a motion for judgment *non obstante* has been granted in the District Court for insufficiency of the evidence, without motion for a directed verdict, on appeal the judgment will not be sustained on grounds independent of, and not included in, such motion in the District Court. Johns v. Ruff, 74.
2. The absence of any, or proper, assignments of error in the brief is not grounds for dismissal of appeal; but the appellate court will, in its discretion, review errors not assigned, permit amendments, or strike brief from the file, upon motion. Johns v. Ruff, 74.
3. Matter extraneous to the record, not considered by the Supreme Court in the disposal of appeals. Nichols v. Roberts, 193; Fisher v. Betts, 197.
4. Insufficiency of the evidence to justify the verdict will not be considered, when it is not particularly specified wherein such evidence is insufficient. Gagnier v. City of Fargo, 219.
5. An appeal will not be dismissed because the subject matter of the action has been transferred after judgment and before appeal, which was in fact taken and prosecuted by the assignee. Sykes v. Beck, 242.
6. An appeal will not be dismissed because the statement of the case does not contain all the evidence offered; the sufficiency or insufficiency

APPEAL AND ERROR—Continued.

of the statement only affects the power of the Supreme Court to review the evidence. Sykes v. Beck, 242.

7. The sufficiency of the evidence to justify a directed verdict upon appeal from an order denying a motion for a new trial, will be reviewed, although no exception was taken to the direction of the verdict. Dahl v. Stakke, 325.
8. In an action tried by the court under section 5630, Rev. Codes 1899, the refusal or failure of the court to make findings upon all the issues is not ground for new trial or reversal of the judgment; the remedy is an appeal from the judgment and trial *de novo*. Chaffee-Miller Land Co. v. Barber, 478.
9. Granting a new trial is in the sound legal discretion of the trial court and will be disturbed only for abuse. State v. Howser, 495.
10. A motion for new trial is not provided for under section 5630, Rev. Codes, and an appeal from an order denying it will not be entertained. Bank v. Town of Norton, 497.
11. On appeal in cases tried under section 5630, Rev. Codes 1899, errors of law occurring at the trial will be reviewed only in connection with a review of the facts on the merits. Bank v. Town of Norton, 497.
12. Questions of fact will not be reviewed in the Supreme Court, on an appeal from a judgment, in a jury case, without a motion for a new trial first made in the court below. McNab v. Northern Pacific Ry. Co., 568.
13. The action of the court in directing a verdict must be excepted to, and the ruling and exceptions brought into the statement of the case, and made a part of the judgment roll, or such ruling will not be available for error upon an appeal from the judgment. McNab v. Northern Pacific Ry. Co., 568.

ARMORY BUILDINGS. See MECHANIC'S LIEN, 554.

ASSAULT AND BATTERY. See CRIMINAL LAW, 33.

ASSESSMENT AND TAXATION. See TAXATION.

1. Under the general charter cities may pay for public improvements by a special assessment upon adjoining property, but are not restricted to that method. Pine Tree Lumber Company v. City of Fargo, 360.

ASSIGNMENT. See VENDOR AND PURCHASER, 452.

1. Assignment of a note carries with it the mortgage securing it without a formal writing. Brynjolfson v. Osthus, 42.
2. A bill of sale describing certain notes and mortgages by naming the parties thereto, their place of residence and the county where the mortgages are recorded, and which was in the grantee's possession, is prima facie sufficient to identify the notes and mortgages, and convey title thereto, and is admissible as evidence of the grantee's ownership. Persons v. Smith, 403.

ASSIGNMENT—Continued.

3. Assignment of the subject matter of an action after judgment, is not ground for dismissal of an appeal taken by the assignee. Sykes v. Beck, 242.

ATTACHMENT.

1. To sustain a levy upon personal property incapable of manual delivery, strict compliance with subdivision 4, section 7632, Rev. Codes 1899, and delivery of a copy of the warrant of attachment, and a notice showing the property attached, are indispensable. Ireland v. Adair, 29.
2. The return upon warrant of attachment must show the acts performed by the sheriff in the execution of its mandate, to enable the court to determine upon its sufficiency. Such return is presumed to state all the facts done toward effecting a levy. Ireland v. Adair, 29.
3. Where there is no service of summons, personally or by publication, nor otherwise, except by leaving at the dwelling house of a nonresident defendant, outside of the state, the attachment is void. Bank v. Holmes, 38.
4. Attachment based on the ground, "when the debt upon which the action is commenced was incurred for property obtained under false pretense," should be issued only when the debt has been assented to by the defendant, and not in an action to recover damages for torts. Sonnesyn v. Akin, 227.
5. When the affidavit for an attachment is untrue, the attachment should be vacated upon motion. Sonnesyn v. Akin, 227.

ATTORNEYS AT LAW.

1. A party, without the consent of his attorney may dismiss his action. Paulson v. Lyson, 354.

BAIL. See WORDS AND PHRASES, 474; CRIMINAL LAW, 474.

BANKRUPTCY.

1. Referees in bankruptcy are judicial officers and their orders in bankruptcy proceedings, including allowance and rejection of claims, are entitled to the respect due officers who act judicially. Clendening v. Bank, 51.
2. An order of a referee permitting a creditor to retain alleged preferences and allowing claim for balance, was an adjudication that items in question were not preferences. Clendening v. Bank, 51.
3. Orders of referees in bankruptcy allowing claims are reviewable only in bankruptcy courts, and state courts are without authority to review, revise or reverse such orders. Clendening v. Bank, 51.
4. An adjudication by a referee in bankruptcy, so far as shown by his records, cannot be contradicted, and parol evidence impeaching such records is inadmissible. Clendening v. Bank, 51.

BILLS AND NOTES. See NEGOTIABLE INSTRUMENTS, 42, 325.

BILL OF PARTICULARS. See PRACTICE, 420.

BILL OF SALE. See AMENDMENT, 403.

BONDS. See CRIMINAL LAW, 137, 280; PRINCIPAL AND SURETY, 595; JUSTICE OF THE PEACE, 402.

1. Where an employe and surety execute a bond to a sewing machine company in consideration of his employment, and such bond is left with the principal for delivery, such surety cannot question the bond when the principal defaults thereunder. Singer Mfg. Co. v. Freerks, *et al.*, 595.
2. Error cannot be based on the failure to furnish a bond for postponement in justice court, when raised for the first time in the district court on appeal, and not brought to the attention of the justice. Lyman-Eliel Drug Co., v. Cooke, 88.

BURDEN OF PROOF. See EVIDENCE, 122, 242, 463, 267.

1. Burden of proof to establish payment is upon the party who alleges it. Satterlund v. Beal, 122.
2. One attacking the validity of a tax has the burden of proof. Sykes v. Beck, 242.
3. In an action on an accident policy, the burden of proof is upon the insurer to show that the injury was intentional and not accidental. Stevens v. Continental Casualty Co., 463.
4. A party claiming damages for negligence in setting fire to his buildings, has the burden of proof to show both the cause of the fire, and the negligence of the defendant. Balding v. Andrews and Gage, 267.

BURGLARY. See CRIMINAL LAW, 425.

1. Indictment for burglary in the third degree for breaking and entering a railway car with intent to steal will sustain a conviction for entering such car with intent to steal. State v. Tough, 425.

CARRIERS. See RAILROADS, 61.

CASES CRITICIZED, MODIFIED OR OVERRULED.

1. The sufficiency of evidence to sustain a directed verdict is reviewable in this court although no exception was taken to the direction of a verdict when a motion for new trial has been made on that ground. DeLendrecie v. Peck, 1 N. D. 422, overruled as to this point. Dahl v. Stakke, 325.
2. Where defects, omissions or deviations pervade the whole work done under a building contract, the contractor cannot recover on the theory of substantial performanpce. Anderson v. Todd, 8 N. D. 158, followed. Braseth v. Bank, 486.
3. Lee v. Crawford overruled in Nichols v. Roberts, 193.
4. Galbraith v. Paine, followed in Schneller v. Plankinton, 561.

COLLATERAL ATTACK. See RECEIVERS, 422; HABEAS CORPUS, 527.

1. The finding of a committing magistrate, when acting within his jurisdiction, is conclusive against collateral attack by habeas corpus. State *ex rel.* Styles v. Beaverstad, 527.
2. Orders of a referee in bankruptcy are not subject to collateral attack in state courts. Clendening v. Bank, 51.

COMMITTING MAGISTRATE.

1. Where there is competent evidence before a magistrate tending to show an offence committed, and that accused committed it, the court will not review the same upon habeas corpus, nor release one committed upon such evidence. State *ex rel.* Styles v. Beaverstad, 527.
2. A committing magistrate must act upon evidence; and upon habeas corpus, the court will only see that this jurisdictional requisite is observed. State *ex rel.* Styles v. Beaverstad, 527.
3. The finding of a magistrate, when acting within his jurisdiction, is conclusive against collateral attack upon habeas corpus. State *ex rel.* Styles v. Beaverstad, 527.

COMPLAINT. See PLEADING, 336, 343, 360; EMINENT DOMAIN, 348; QUIETING TITLE, 394; PRACTICE, 420; DEMURRER, 394.

CONDEMNATION PROCEEDINGS. See EMINENT DOMAIN, 348; EQUITY, 435.

CONSIDERATION. See EVIDENCE, 175; DEEDS, 325; LANDLORD AND TENANT, 95; MORTGAGES, 1; MINORS, 548; NEGOTIABLE INSTRUMENTS, 325.

1. The consideration expressed in a deed is not conclusive and may be inquired into. Forester v. Van Auken, 175.
2. The real consideration for a note given for land conveyed by warranty deed with covenant against incumbrances, is the title free from such incumbrances, and not the covenant against them. Dahl v. Stakke, 325.
3. A minor over eighteen on disaffirming his contract must return the consideration or its equivalent with interest. Luce v. Jestrab, 548.

CONTEMPT.

1. Resistance wilfully offered to the lawful order of a court, is punishable as a criminal contempt, but one cannot be convicted of the wilful resistance of a search warrant of which he had no notice or knowledge, when such resistance was made. State v. McGahey, 535.
2. Resistance of an order or warrant, void for lack of authority in the court to issue it, is not punishable as a contempt. State v. McGahey, 535.

CONTRACTS. See CONSTITUTIONAL LAW, 137, 197, 280, 585; INSURANCE, 385; MUNICIPAL CORPORATIONS, 360, 585; PLEADING, 336; VENDOR AND PURCHASER, 572, 576, 453.

1. Injury or damages must result from the fraudulent representations that induced the making of a contract, before they are available as a defense to such contract. Nelson v. Grondahl, 130.
2. Before a contractor can recover on a building contract, not fully complied with, on the principle of substantial performance, he must show such failure to be through mistake or inadvertence, and not intentional; and not such as to result in a building substantially different from the one contracted for. Braseth v. State Bank of Edinburg, 486.
3. Where defects, deviations and omissions pervade the work on the whole building, plaintiff cannot recover on the theory of substantial performance. Braseth v. State Bank of Edinburg, 486.
4. A minor over eighteen may contract the same as an adult, subject to his right to disaffirm after his majority by returning the consideration or its equivalent with interest. Luce v. Jestrab, 548.
5. The contract of a minor once affirmed cannot be disaffirmed. Luce v. Jestrab, 548.
6. Contracts of a minor over eighteen, are not void but voidable, and are enforceable unless disaffirmed according to law. Luce v. Jestrab, 548.
7. Where a writing purports to contain the whole contract, it cannot be varied by parol evidence; but if the contract is incomplete to express the entire agreement, and so shows on its face, then, upon proper allegations the parol part of the contract may be proven. Johnson v. Kindred State Bank, 336.
8. The statute, under which a mutual insurance company is organized and authorized to do business, its by-laws, applications for insurance and policies, are parts of the contract of insurance. Montgomery v. Whitbeck, 385.

CONTRACTS, EXECUTORY AND EXECUTED. See LIENS, 519.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE, 159.

CONSTABLES. See SHERIFF AND CONSTABLE, 29.

CONSTITUTIONAL LAW.

1. Rights vested by contract under a statute are not impaired or annulled by its repeal. May *et al.* v. Cass County *et al.*, 137.
2. A law substituting the penitentiary for the county jail for a prisoner's confinement pending execution of a death sentence, and directing execution thereafter to be had within the penitentiary, does not operate to change the punishment to the prisoner's disadvantage, and is not *ex post facto* as applied to one convicted before its passage. State v. Rooney, 144.

CONSTITUTIONAL LAW—Continued.

3. No subsequent legislation can repeal an act in force at the time of a tax sale, so as to change the effect of a tax deed as evidence, as such legislation would impair the validity of a contract. Fisher v. Betts, 197.
4. Lands granted to the state for educational purposes, and the proceeds of the sale thereof, constitute a permanent fund, the interest and income of which alone may be used by the state, and then only for the support of such schools as are designated by the enabling act and the state constitution. State v. McMillan, 280.
5. Normal schools are not school corporations or legal entities; and the power of its trustees to contract debts is limited to legislative appropriations, and when contracted, are debts of the state. State v. McMillan, 280.
6. The board of university and school lands is restricted to four classes of securities and investments for the permanent school fund, one of which is "bonds of the State of North Dakota," which include only those that are valid and within the constitutional debt limit, and so certified by the state auditor and secretary of state and secured by an irrepealable tax levy in the act authorizing them. State v. McMillan, 280.
7. An act for the issuance of bonds to erect and equip buildings for a state normal school, and appropriating the income dedicated to the support of the institution to repay the principal and interest borrowed on such bonds, is unconstitutional and void, because, 1st, it authorizes the creation of a state debt in excess of the state debt limit; 2d, it authorizes the creation of a state debt and does not provide for a tax levy to pay the principal and interest, as required by section 182 of the state constitution; 3d, it diverts the interest and income dedicated to the support of the institutions to the payment of a state debt in violation of both. State v. McMillan, 280.
8. By the passage of an ordinance giving a city certain benefits, and its acceptance and the expenditure of money under it, by a telephone company, a contractual relation was established, which became a vested right that could not be impaired by the subsequent action of the city, directly or indirectly annulling it for purposes not public. Northwestern Tel. Ex. Co. v. Anderson, 585.
9. The appointment of a special administrator under a law providing, "when the death of the person whose estate is in question is not satisfactorily proved, but he is shown to have disappeared under circumstances which afford reasonable grounds to believe either that he is dead or has been secreted, confined or otherwise unlawfully done away with," is invalid, as depriving a person of his property without due process of law. Clapp v. Houg, 600.

CORPORATIONS. See RECEIVERS, 42; INSURANCE, 385; MUNICIPAL CORPORATIONS, 348, 360, 585.

1. A corporation organized under a law which authorizes three or more members or ex-members of the national guard to incorporate for erecting an armory, is a private and not a public corporation, with the same powers and duties and is subject to the same liabilities as other private corporations, except the exemptions provided in such law. Arrison v. Company D, North Dakota National Guard, 554.

COSTS AND DISBURSEMENTS.

1. Under subdivision 5, section 5575, the prevailing party is entitled to the same cost for a reargument as for an argument in the Supreme Court. Crane v. Odegard, 135.
2. The expense of printing briefs in the Supreme Court may be taxed as a part of the costs, although filed out of time by leave of court. Crane v. Odegard, 135.
3. Allowance of $15 motion costs is not an abuse of discretion. Crane v. Odegard, 135.
4. Where the court ordered judgment cancelling a note and mortgage, awarding costs was discretionary. Brown v. Skotland, 445.
5. Where a special administrator has been appointed upon the estate of a living person, upon the supposition that he was dead, the costs and disbursements incurred by such special administrator, acting in good faith, are not a legal charge against such person or his property, as the proceedings are wholly void. Clapp v. Houg, 600.

COURTS. See JURISDICTION, 29.

1. Orders of a referee in bankruptcy are reviewable only in the bankruptcy courts, and state courts have no authority to review, revise or reverse them. Clendening v. Bank, 51.
2. A court has power to compel an injured party to submit to a physical examination by physicians or surgeons designated by the defendant, when, in the exercise of sound judgment, it appears to the court that the necessity of the case requires it. Brown v. Chicago, M. & St. P. Ry. Co., 61.
3. A court of equity can stay the execution of a judgment of ejectment against a railroad corporation to enable it to prosecute condemnation proceedings. Griswold v. Minneapolis, St. P. and S. Ste. M. Ry. Co., 435.

COVENANTS. See DEEDS, 325, 435.

CRIMINAL LAW. See CONSTITUTIONAL LAW, 144; INSTRUCTIONS, 425; HABEAS CORPUS, 527.

1. When the offense charged in an information includes a smaller constituent offense, charging the latter will not render the information duplicitous. State v. Climie, 33.

CRIMINAL LAW—Continued.

2. On indictment or information for assault and battery with a dangerous weapon, without justifiable or excusable cause, and with intent to do bodily harm, a conviction of simple assault and battery will be sustained. State v. Climie, 33.
3. An information, that sets out every ingredient of the offense defined by statute, in the language of the statute, with the identifying particulars indicated by sections 8039, 8040, 8047, Rev. Codes, is sufficient. State v. Climie, 33.
4. Indictment will be set aside only on grounds enumerated by statute, which are exclusive of all others. State v. Tough, 425.
5. Where an attorney appeared with and assisted the state's attorney in the prosecution of a criminal case, with the consent of the judge of the district court in which the case was tried, it will be presumed, in the absence of a showing to the contrary, that he was rightfully there; and an objection to his appearance must appear upon the record to be considered upon appeal. State v. Tough, 425.
6. An indictment for burglary in the third degree for breaking and entering a railroad car with intent to steal, as defined in section 7406, Rev. Codes 1899, will sustain a conviction for the minor and constituent offense defined by section 7411, of entering a railroad car with intent to steal. State v. Tough, 425.
7. A conviction for entering a railroad car with intent to steal will be sustained against an objection that the evidence is insufficient to show a burglary, the verdict amounting to an acquittal of burglary. State v. Tough, 425.
8. A prisoner under bail will not be discharged under section 8679, when the delay is on his own application. State v. Larson, 474.
9. When the court offers to summon a jury, and the prisoner declines the offer, the delay is upon his own application. State. v. Larson, 474.
10. The granting of a new trial for insufficiency of the evidence to sustain the verdict is in the sound legal discretion of the court and will not be disturbed upon appeal save for abuse. State v. Howser, 495.

CROPS. See TRESPASSER, 452.

DAMAGES. See FRAUD, 130.

1. To authorize a recovery of treble damages for forcible ejectment from real property, under section 5007, Rev. Codes 1899, the entry must be forcible, but the force need not be actually applied; it is enough if present, threatened and justly to be feared. Wegner v. Lubenow, 95.
2. Damages for pain and mental suffering growing out of the injury complained of, are recoverable, although not specially pleaded. Gagnier v. City of Fargo, 219.
3. The measure of recovery on abandonment of a contract to convey land after payment of the purchase price, is the money paid

DAMAGES—Continued.

on the contract with interest, if the vendor retains possession, and without interest if the vendee has possession. Kicks v. Bank, 576.

4. A person, licensed to move houses, is liable for damages done to telephone wires and property of a company authorized to establish and maintain a telephone system in the streets of the city. Northwestern Tel. Exch. Co. v. Anderson, 585.

DEEDS.

1. Deeds executed in violation of section 7002, Rev. Codes 1899, against maintenance, are void. Galbraith v. Payne, 164.
2. Deed will be declared a mortgage on the ground of mistake, only when such mistake is mutual. Forester v. Van Auken, 175.
3. The consideration expressed in a deed is not conclusive and may be inquired into. Forester v. Van Auken, 175.
4. A deed absolute in form and a contemporaneous agreement to reconvey lands between the same parties for equal considerations, *held* to be a mortgage. Wells v. Geyer, 316.
5. A covenant against incumbrances in a warranty deed is broken when made, if incumbrances exist on the land conveyed when the deed is delivered. Dahl v. Stakke, 325.
6. The real consideration for a note for the purchase price of land conveyed by a warranty deed, containing a covenant against incumbrances, is the title to the land free therefrom, and not the covenant against them. Dahl v. Stakke, 325.
7. Where the owner of land conveys it to a railroad company, with a condition in the deed that title should revert if grantee failed to erect and maintain a depot at a point named therein, *held,* 1st, such a provision was a condition subsequent and not a covenant; 2d, that the condition was not against public policy, as it did not restrict such erection and maintenance at other points; 3d, on failure to fulfil such condition the title and right to possession reverted; 4th, under the facts of the case plaintiff is not estopped, either against the defendant or the public, to assert his right to possession in ejectment. Griswold v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 435.

DEMURRER.

1. Demurrer is proper when pleadings show a deficiency of parties; but where it appears that too many parties are joined it will be overruled. Olson v. Shirley, 106.
2. A complaint in the form prescribed by chapter 5, page 9, Laws of 1901, is not demurrable because it states facts in addition to those prescribed in such form. Blakemore v. Roberts, 394.

DISCRETION. See COSTS AND DISBURSEMENTS, 445; CRIMINAL LAW, 495.

1. Granting or refusing a decree of specific performance is in the sound discretion of the court. Hunter v. Coe, 505.
2. Granting or denying a new trial is in the discretion of the court. State v. Howser, 495.
3. A court has power to require a party to submit to a physical examination, when in the exercise of a sound discretion it appears necessary. Brown v. Chicago, M. & St. P. Ry. Co., 61.
4. To permit the physician and surgeon of an injured plaintiff, after a physical examination of her person, to testify that her injuries were permanent, and refuse to allow defendant's physician to examine such injuries and testify after such examination, were an abuse of discretion, and reversible error. Brown v. Chicago, M. &. St. P. Ry. Co., 61.
5. The allowance of a substitution of parties in an action is in the discretion of the court. Sykes v. Beck, 242.

DISMISSAL. See PARTIES, 354.

DUE PROCESS OF LAW. See CONSTITUTIONAL LAW, 600.

1. Administering the estate of a living person and disposing of his personal property deprive him of it without due process of law. Clapp v. Houg, 600.

EMINENT DOMAIN.

1. A city may lay out and open streets and exercise the right of eminent domain. City of Lidgerwood v. Michalek, 348.
2. The essential allegations of the complaint in eminent domain proceedings are prescribed by statute, and the complaint need not allege a provision to pay the award, either by taxation or special assessment. City of Lidgerwood v. Michalek, 348.

ENABLING ACT. See CONSTITUTIONAL LAW, 280.

EJECTMENT. See TENANT IN COMMON, 435; FORFEITURE, 435.

EQUITY.

1. Where the execution of a judgment in ejectment against a railroad company will operate harshly, and seriously affect public interests, a court of equity has power to suspend its execution for a period of time sufficient to enable it to prosecute condemnation proceedings. Griswold v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 435.
2. In an action for specific performance of a contract for the sale of land, equity will not grant such relief, where the plaintiff has abandoned its contract, and by parol authority directed its assignment to another, who assigns it in writing, and whose assignee pays money relying upon such assignment, and takes possession of the

EQUITY—Continued.

land with the assignor's knowledge and consent. Wadge v. Kittleson, 452.

3. Where the vendee, who has knowledge that the owner has conveyed to another, who, although chargeable with constructive notice of his contract believes that he has a good title, and improves the land, and makes no protest before suing for specific performance of his contract, is only entitled to a decree upon the condition that he reimburse for such improvements made before such action was begun. Hunter v. Coe, 505.

ESCROW. See MORTGAGES, 1.

ESTATES OF DECEDENTS. See EXECUTORS AND ADMINISTRATORS, 394, 600.

ESTOPPEL. See INSURANCE, 386; VENDOR AND PURCHASER, 505.

1. A party to a contract with a mutual insurance corporation, made in violation of the letter and policy of the statute under which the corporation is organized and authorized to do business, is not estopped to show its illegality to prevent a recovery thereon. Montgomery v. Whitbeck, 385.
2. Where a railroad company enters upon land, makes its improvements there, under a deed that provides for a forfeiture and reversion of the title in case it fails to erect and maintain a depot at a point named in the deed, upon its failure to erect and maintain such depot, its grantor is not estopped to assert and recover possession of the land in ejectment. Griswold v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 435.
3. The vendee in a land contract assigned it to M. & D. as security; subsequently such vendee and plaintiff made an oral agreement whereby the vendee sold the land to plaintiff, who agreed to pay his debt, including that to M. & D. Vendee told M. & D., in plaintiff's presence, that he had sold the land to him, and the latter would pay them, and that they should transfer the contract to plaintiff. Plaintiff paid M. & D., who assigned to him the contract. He then presented the contract, which was assigned to him, to the vendor, pursuant to contract with vendee, paid it the balance of the purchase price, received and recorded a deed for the land. The plaintiff for two years leased the land to such vendee under a written lease, wherein plaintiff was described as owner, *held*, vendee was estopped to claim ownership to the land. Wadge v. Kittleson, 452.

EVIDENCE. See VERDICT, 219; CRIMINAL LAW, 425; ATTACHMENT, 29.

1. Parol evidence is inadmissible to vary a written instrument. Sargent v. Cooley, 1.

EVIDENCE—Continued.

2. The possession of a promissory note is prima facie evidence of ownership. Brynjolfson v. Osthus, 42.
3. Parol evidence is not admissible to impeach the record of a referee in bankruptcy. Clendening v. Bank, 51.
4. A court has power to compel an injured person to submit to a physical examination by physicians or surgeons designated by defendant when, in the exercise of a sound discretion, it appears to the court that the necessities of the case require it. Brown v. Chicago, M. & St. P. Ry. Co., 61.
5. To permit the physician and surgeon of the injured party, after examination of the person, to testify that her injuries were permanent, and refuse to allow defendant's physician to examine the alleged injuries, if any, and learn their nature, extent and probable duration, were an abuse of discretion and reversible error. Brown v. Chicago, M. & St. P. Ry. Co., 61.
6. The burden of proof to establish payment is upon the party alleging it. Satterlund v. Beal, 122.
7. Under section 2978, Rev. Codes 1899, the fact of the killing of stock by a railroad train creates a prima facie presumption of negligence. Wright v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 159.
8. Parol evidence is admissible to reform a written instrument. Forester v. Van Auken, 175.
9. Evidence to reform a written instrument must be clear, specific and convincing. Forester v. Van Auken, 175.
10. The consideration expressed in a deed is not conclusive and may be inquired into. Forester v. Van Auken, 175.
11. Mere inadequacy of price is not alone ground for declaring a deed a mortgage, but a circumstance to be considered in determining the intentions of the parties. Forester v. Van Auken, 175.
12. Recitals of a tax deed are prima facie evidence under the statute. Fisher v. Betts, 197.
13. The best evidence of the absence of records, or material entries therein, is that of the official custodian of such records; and a person in no way officially connected with the office of their deposit is not competent to give such evidence. Fisher v. Betts, 197.
14. The records and files pertaining to matter under investigation in court should be produced in court by the official in charge of them. Fisher v. Betts, 197.
15. The certificate of an officer to the correctness of copies is not evidence of any other fact stated therein. Fisher v. Betts, 197; Sykes v. Beck, 242.
16. In the absence of proof it will be presumed that officers have performed their duty. Fisher v. Betts, 197; Pine Tree Lumber Co. v. Fargo, 360.

EVIDENCE—Continued.

17. Under section 5630, Rev. Codes 1899, the Supreme Court is to disregard all incompetent and irrelevant evidence properly objected to. Sykes v. Beck, 242.
18. Oral evidence as to what is shown by a written record, the original of which is available, is not the best evidence and is incompetent. Sykes v. Beck, 242.
19. Certified copies of official records are secondary evidence in character and are available as primary only by statute; to warrant their use in court, they must be certified as required by statute. Sykes v. Beck, 242.
20. When, because of their voluminous character or other sufficient reason, oral evidence is admitted to prove the absence of a record, or an entry, it must be given by the legal custodian, and then only after showing a diligent search. Testimony of any other person is incompetent. Sykes v. Beck, 242.
21. One attacking the validity of a tax has the burden of proof; the presumption that the tax is valid continues until overthrown by the party assailing it. Sykes v. Beck, 242.
22. Where the assailant of the validity of taxes fails in his attack, his action will be dismissed. Sykes v. Beck, 242.
23. An exclamation or statement of an agent made contemporaneously with the principal act, and forming a natural and material part of it, is competent as being original evidence in the nature of *res gestae,* but not an abstract or narrative statement of a past transaction. Balding v. Andrews and Gage, 267.
24. Where a writing purports to contain the whole contract, it cannot be varied by parol evidence. But if incomplete to express an entire agreement, and so shows on its face, then, upon proper allegations, the parol part may be proven. Johnson v. Kindred State Bank, 336.
25. A parol collateral promise must relate to a subject distinct from that of the writing to justify its admission in evidence. Johnson v. Kindred State Bank, 336.
26. When an official act depends upon the performance of a prior act, the latter will be presumed to have been done, although it was required of the corporation of which he is an officer. Pine Tree Lumber Co. v. Fargo, 360.
27. The evidence of a deceased witness upon a former action between the same parties, involving the same issues, in a court of competent jurisdiction, is admissible on a subsequent trial upon proof of his death. Persons v. Smith, 403.
28. Former adjudication may be proved by the parol testimony of a party on cross examination. Persons v. Smith, 403.
29. A bill of sale describing certain notes and mortgages by naming the parties thereto, their place of residence, and the county where the mortgages are recorded, and which is in the possession of the grantee, is prima facie sufficient to identify such notes and mort-

EVIDENCE—Continued.

gages, and conveys title thereto, and is evidence of such grantee's ownership. Persons v. Smith, 403.

30. In an action on an accident policy containing a proviso that in case of loss of life from injury intentionally inflicted by insured or another, the liability should be one-tenth of the amount otherwise payable, the burden is upon the insurer to show that the injury was intentional and not accidental. Stevens v. Continental Casualty Co., 463.
31. In a suit upon an accident policy, in the absence of proof as to how a gunshot wound was inflicted, it will be presumed accidental and not intentional. Stevens v. Continental Casualty Co., 463.
32. Statements of a guardian, in preliminary proofs of a claim under an accident policy, are not binding upon his wards to their prejudice. Stevens v. Continental Casualty Co., 463.
33. The infliction of an injury raises no presumption of intent, such intent is a matter of proof, in an action on an accident policy. Stevens v. Continental Casualty Co., 463.
34. Where the burden of proof in an action on an accident policy is upon a party to show that a shooting was done with intent to kill or injure, the court cannot direct the jury to find an intentional killing or injury, if the facts proven can be reconciled with an accidental or unintentional injury. Stevens v. Continental Casualty Co., 463.
35. Parol evidence is inadmissible to vary the terms of a written lease. Bank v. Ruettell, 519.
36. Evidence taken upon a preliminary examination will not be reviewed on habeas corpus further than to see that there was competent evidence before the court tending to show that an offense was committed, and that there was cause to believe that the accused committed it. State v. Beaverstad, 527.
37. Parol evidence of agreements between the mortgagor and mortgagee at the time of delivery cannot affect the mortgage, and is inadmissible. Sargent v. Cooley, 1.
38. Parol evidence is admissible to show nondelivery of a mortgage, but when a delivery is shown, such evidence cannot vary the terms of the mortgage. Sargent v. Cooley, 1.
39. The holder of city warrants need only prove that a fund was created, that his warrants were drawn, and there was credited to the fund an amount sufficient to pay it, that they were presented for payment and not paid; it is then for the city issuing such warrants to show that such credits were improperly made. Pine Tree Lumber Co. v. Fargo, 360.

EXCEPTIONS.

1. The action of the court in directing a verdict, and the ruling and exception thereto, must be brought into the statement of the case to be available for error upon appeal. McNab v. Northern Pacific Ry. Co., 568.

EXECUTION. See EQUITY, 435.

EXECUTORS AND ADMINISTRATORS. See CONSTITUTIONAL LAW, 600.

1. An executor or administrator may sue to quiet title to the decedent's real estate. Blakemore v. Roberts, 394.
2. The appointment of a special administrator upon the estate of a living person is invalid. Clapp v. Houg, 600.
3. The taking possession of the personal property of a living person by a special administrator appointed upon his supposed death, is not such notice to the owner as to validate the proceedings. Clapp v. Houg, 600.
4. The taking possession of the personal property of a living person by a special administrator appointed upon the supposition of such owner's death, cannot be upheld as a proper exercise of the police power. Clapp v. Houg, 600.

EXHIBITS.

1. Where an exhibit is contradictory to a complaint to which it is attached and made a part, the exhibit controls. Johnson v. Kindred State Bank, 336.

EX POST FACTO LAW. See CONSTITUTIONAL LAW, 144.

FIDELITY BOND COMPANIES. See PRINCIPAL AND SURETY, 110, 595.

FINDINGS.

1. Under section 5630, Rev. Codes 1899, a refusal of the trial court to find upon all issues is not ground for a new trial or reversal of the judgment; but the remedy is an appeal from such judgment and a trial *de novo* upon the evidence. Chaffee-Miller Land Co. v. Barber, 478.
2. Under section 5630, Rev. Codes 1899, in an action to determine adverse claims to real estate, a finding that the plaintiff is the owner and entitled to possession, and that the defendant has no claim or right of possession, is a finding of the ultimate facts in issue, and will support a judgment confirming the plaintiff's title and for possession. Chaffee-Miller Land Co. v. Barber, 478.

FORECLOSURE. See MORTGAGES, 122.

FOREIGN CORPORATIONS. See CORPORATIONS, 61.

FORFEITURE.

1. Where a railroad company enters upon land and makes improvements thereon, under a deed providing for a forfeiture and reversion of title if it fails to erect a depot at a certain point, upon its failure to erect and maintain such depot, the grantor is not estopped to maintain ejectment for its possession. Griswold v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 435.

FRAUD. See MORTGAGES, 403.

FRAUD, STATUTE OF. See LEASE, 519.

GUARANTY. See PRINCIPAL AND SURETY, 595.

GUARDIAN AND WARD.

1. The statements of a guardian, in preliminary proofs under an accident insurance policy, wherein his wards are beneficiaries, are not binding upon such minor wards to their prejudice. Stevens v. Continental Casualty Co., 463.

HABEAS CORPUS.

1. On habeas corpus, jurisdictional matters only are inquired into. State v. Beaverstad, 527.
2. One committed upon a criminal charge without a reasonable or probable cause can secure his release upon habeas corpus, but the court will explore the evidence taken upon the preliminary examination only to see that there was competent evidence tending to show that an offense was committed and that there was cause to believe that the accused committed it. State v. Beaverstad, 527.
3. The court will not weigh conflicting testimony, measure the credibility of witnesses, or reverse the findings of the magistrate, when there is evidence to sustain them. Such findings, when the magistrate acts within his jurisdiction, are not open to collateral attack by habeas corpus. State v. Beaverstad, 527.
4. When the court has jurisdiction of the subject matter and the person of the defendant, and to render the particular judgment in question, such judgment is immune from attack on habeas corpus. State v. Beaverstad, 527.

HIGHWAYS. See MUNICIPAL CORPORATIONS, 348.

HOMICIDE. See CONSTITUTIONAL LAW, 144.

HOMESTEAD.

1. Where a lessor had not selected his homestead from a body of 300 acres contiguous to the family residence from which such selection could be made, failure of wife to join in a lease of a part of the 160 on which the dwelling house was situated, did not render such lease invalid. Wegner v. Lubenow, *et al.*, 95.

HOUSE MOVING. See TELEPHONE COMPANIES, 585..

INDICTMENT AND INFORMATION. See CRIMINAL LAW, 33, 425.

INFANTS. See MINORS, 548.

INSTRUCTIONS. See CRIMINAL LAW, 425.

1. An instruction which is defective when considered alone, is not erroneous when the charge as a whole states the law correctly. Gagnier v. Fargo, 219.
2. Where the accused was charged with breaking and entering a railroad car, in which property was kept, with intent to steal therein, under section 7406, Rev. Codes 1899, and in defense testified that he entered the car to obtain coal in reliance upon statements made to him by the person who accompanied him and assisted in taking the coal, that such person had a license to take such coal from the car, the accused was entitled to an instruction as to the statutory definition of larceny, so that the jury would be informed that to convict they should find that he intended all that was essential to constitute larceny. State v. Tough, 425.
3. A defendant has a right to have an instruction based on his own testimony, and to testify as to his intent. State v. Tough, 425.
4. It is error to refuse instructions based on the defendant's theory when warranted by the evidence. State v. Tough, 425.

INSURANCE.

1. The promoters of a mutual insurance company have no authority to bind it before its organization. Montgomery v. Whitbeck, 385.
2. A policy issued by a mutual insurance company before its organization does not bind it, and is not enforceable against it after it is organized and authorized to do business. Montgomery v. Whitbeck, 385.
3. The disregard of statutory requirements in the issuance of a policy by a mutual insurance company renders such policy void, and no assessment for losses thereunder can be made or collected. Montgomery v. Whitbeck, 385.
4. The statute under which a mutual insurance company is organized and authorized to do business, its by-laws, applications for insurance and the policies, are parts of the contract of insurance and binding upon a member. Montgomery v. Whitbeck, 385.
5. Where all policy holders in a mutual insurance company are on the same footing, none with equities superior to his associates growing out of the business done in defiance of law, a member is not estopped from asserting the *ultra vires* nature of the business done. Montgomery v. Whitbeck, 385.
6. A party to a contract of insurance in a mutual company made in violation of the letter and policy of the statute, under which such company is formed and empowered to do business, is not estopped to show its illegality to preclude a recovery on such contract. Montgomery v. Whitbeck, 385.
7. In an action on an accident policy containing a proviso that in case of loss of life from injury intentionally inflicted by insured or another, liability should be one-tenth of the amount otherwise payable, bur-

INSURANCE—Continued.

den is upon insurer to show that the injury was intentional and not accidental. Stevens v. Continental Casualty Co., 463.

8. Statements of a guardian in preliminary proofs, upon a loss under an accident policy, are the admissions of the guardian and not the wards, and are not binding upon the latter. Stevens v. Continental Casualty Co., 463.

INTOXICATING LIQUORS.

1. In an action for the abatement of a liquor nuisance, an affidavit upon information and belief, and not otherwise corroborated, does not state or show the facts required, and confers no jurisdiction to issue a search warrant. State v. McGahey, 535.

JUDGMENTS. See MORTGAGES, 445; PRACTICE, 74, 111, 130; VERDICT, 360.

1. A judgment entered against a nonresident, who was not served with summons, and does not voluntarily appear, and whose property is not attached, is void for want of jurisdiction in the court to enter it. Ireland v. Adair, 29.
2. A judgment must be warranted by the pleadings of the party in whose favor it is rendered, or it is fatally defective. Satterlund v. Beal, 122.
3. A court of equity may suspend the execution of a judgment where such execution would operate harshly and seriously affect public interests, to enable the railroad company to prosecute condemnation proceedings. Griswold v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 435.
4. To render a judgment immune from attack on habeas corpus, the court must have had jurisdiction of the person, the subject matter, and to render the particular judgment in question. State v. Beaverstad, 527.
5. The adjudications of a referee in bankruptcy cannot be contradicted by parol evidence. Clendening v. Bank, 51.

JUDGMENTS NON OBSTANTE. See PRACTICE, 74, 111, 130; VERDICT, 360.

JURISDICTION. See JUSTICE OF THE PEACE, 88, 106.

1. Where defendant is a nonresident, does not voluntarily appear in the action, is not served with summons and no property is attached, judgment entered in such action is void for want of jurisdiction. Ireland v. Adair, 29.
2. In habeas corpus inquiry is confined to jurisdictional matters, and irregularities and errors that do not render the proceedings a nullity are not considered. State v. Beaverstad, 527.

JURISDICTION—Continued.

3. In an action for the abatement of a liquor nuisance, an affidavit upon information and belief and not otherwise corroborated, confers no jurisdiction to issue a search warrant. State v. McGahey, 535.
4. Orders of a referee in bankruptcy allowing claims are reviewable only in bankruptcy courts; and state courts are without jurisdiction to review, revise or reverse such orders. Clendening v. Bank, 51.
5. On appeal from a judgment of a justice of the peace, alleged to have been rendered without jurisdiction on account of the insufficiency of an affidavit for a postponement, unless such insufficiency was pointed out to the justice in an objection to the postponement, a party cannot avail himself of such loss of jurisdiction. Lyman-Eliel Drug Co. v. Cooke, 88.

JURY.

1. When the evidence in an action upon an accident policy was consistent with an intentional and not inconsistent with an accidental or unintentional shooting, case was rightfully submitted to the jury. Stevens v. Continental Casualty Co., 463.

JUSTICE OF THE PEACE. See HABEAS CORPUS, 577; COMMITTING MAGISTRATE, 527.

1. On appeal form a judgment of a justice of the peace, alleged to have been rendered without jurisdiction on account of insufficiency of an affidavit for a postponement, unless such insufficiency was pointed out to the justice in an objection to the postponement, a party cannot avail himself of such loss of jurisdiction. Lyman-Eliel Drug Co. v. Cooke, 88.
2. Error cannot be based upon a failure to furnish a bond upon postponement in the justice court, when the point is raised for the first time in the district court, and was in no way brought to the attention of the justice. Lyman-Eliel Drug Co. v. Cooke, 88.
3. A postponement may be granted after the commencement of the trial for causes arising after such commencement. Lyman-Eliel Drug Co. v. Cooke, 88.
4. Justice courts are of limited jurisdiction, and authority to grant continuance exists only by statute. Lyman-Eliel Drug. Co. v. Cooke, 88.
5. Appeals to the district court from a justice of the peace upon law alone, when regularly taken, are not dismissed for irregularities in proceedings before such justice, that do not affect the jurisdiction of the district court over the appeal. Olson v. Shirley, 106.
6. When, upon an appeal from a justice court upon questions of law alone, and the decision of the district court reopens the case for trial, such trial shall be had in the district court under section 6771a, Rev. Codes 1899. Olson v. Shirley, 106.

JUSTICE OF THE PEACE—Continued.

7. In appealing from a justice to the district court, it is not necessary that the undertaking on appeal be approved and filed in the office of the clerk of the district court before it is served. Wilson v. Atlantic Elevator Co., 402.

LAND GRANTS. See CONSTITUTIONAL LAW, 280.

LANDLORD AND TENANT.

1. A gross sum paid for a life lease of agricultural land is not "rent" within the meaning of section 3310, Rev. Codes 1899, but is a consideration for the conveyance of a life estate, and such lease is not invalid under said section. Wegner v. Lubenow, 95.
2. A lease of agricultural land "for a full term of forty years or during the full term of the natural life" of the lessees for a cash consideration of $200, conveys a life estate, and not one for years, and is not invalid under section 3310, Rev. Codes. Wegner v. Lubenow, 95.

LEASE. See LANDLORD AND TENANT, 95.

1. Parol evidence not admissible to vary the terms of a written lease. Bank v. Ruettell, 519.
2. Parol agreement for lease of land for a period exceeding one year does not become an executed contract, and therefore valid, when no possession is taken and the year's rent is paid by indorsement of the amount thereof on a note. Bank v. Ruettell, 519.
3. Without possession given of the premises, and a partial performance, an oral lease will not supersede one in writing. Bank v. Ruettell, 519.
4. The owner of land leased it to defendant for one year for $200 as rent, with privilege of extension for another year if he was in possession. In October of the year owner and defendant made a new oral lease, but possession was not given, and an indorsement on a note of the owner was made for the year under the oral lease. In January following, the owner assigned the written lease to plaintiff, and in writing gave plaintiff possession, and defendant was notified thereof. Defendant claimed that his written lease was still in force and cropped the land; *held*, that the plaintiff was entitled to the rent specified in the written lease; *held, further*, that plaintiff could treat defendant as a trespasser or tenant, and having treated him as a tenant could recover the rent under the written lease. Bank v. Ruettell, 519.

LEVY. See ATTACHMENT, 29, 38; TAXATION, 197.

LIENS. See THRESHER'S LIEN, 71; MECHANIC'S LIEN, 554.

1. Strict compliance with statue requisite to thresher's lien. Moher v. Rasmusson, 71.

LICENSE.

1. A person licensed to move buildings by a city is liable for damages done to the property of a telephone company, authorized to maintain a telephone system in the streets of such city. Northwestern Tel. Ex. Co. v. Anderson, 585.

LIFE ESTATE. See LANDLORD AND TENANT, 95.

1. A lease of agricultural land, "for the full term of forty years, or during the full term of the natural life" of the lessees, for a cash consideration, is a life lease, not one for years. Wegner v. Lubenow, 95.

LIMITATION OF ACTIONS. See PLEADING, 122.

1. When a debt secured by a mortgage is barred by the statute of limitations, it does not follow that the right to foreclose the mortgage securing it is barred. Satterlund v. Beal, 122.
2. The defense of the statute of limitations is waived, if not pleaded. Satterlund v. Beal, 122.
3. The facts constituting the bar must be set out and not the pleader's conclusions of law. Satterlund v Beal, 122.

MAINTENANCE.

1. The common law doctrine of maintenance is not abolished, but perpetuated in this state. Galbraith v. Payne, 164.
2. A deed in violation of section 7002, Rev. Codes 1899, is void as to the party in adverse possession claiming title, but between all others valid. Galbraith v. Payne, 164.
3. The grantee in a deed void for maintenance, cannot sue the adverse claimant, because as to the latter his deed is void; but an action may be maintained in the name of such grantor for the grantee's use. Galbraith v. Payne, 164.
4. Conveyance of real estate held adversely by another under color of title, by one who has not been in possession or taken rent for a year prior thereto, is void against such adverse possessor. Schneller v. Plankinton, 561.

MEASURE OF DAMAGES. See DAMAGES, 585.

MECHANIC'S LIEN.

1. A corporation organized under a law which authorizes three or more members or ex-members of the national guard to incorporate for the purpose of erecting an armory building, is a private, not a public corporation, and its property is subject to the mechanic's lien laws. Arrison v. Company D, N. D. N. G., 554.

MINORS. See GUARDIAN AND WARD, 463.

1. A minor over the age of eighteen, under the statutes of this state, may contract the same as an adult, subject to his right to disaffirm his contract within one year after his majority, by restoring the consideration or paying its equivalent with interest. Luce v. Jestrab, 548.
2. The contracts of a minor over eighteen are not void, but voidable, and are enforceable unless disaffirmd as provided by law. His affirmance may be had by expiration of the period within which he may disaffirm, or by an affirmance within that period; and when he has once affirmed, he cannot disaffirm, and his liability is upon his contract and not upon *quantum meruit*. Luce v. Jestrab, 548.
3. In an action upon a minor's note given for a team of horses, in which his minority was pleaded, where the minor had retained and used the team for nine months after reaching his majority, and had twice promised to pay the note, and thereafter refused to pay, offered to return the horses and demanded his note; and the team when tendered had become practically worthless, *held*, that the court did not err in refusing to direct a verdict for the defendant. Luce v. Jestrab, 548.

MISTAKE. See DEEDS, 175.

1. A deed is declared a mortgage on account of mistake, only when such mistake is mutual. Forester v. Van Auken, 175.

MONEY HAD AND RECEIVED. See PLEADING, 576.

MORTGAGES. See LIMITATION OF ACTIONS, 122; ASSIGNMENT, 403.

1. A mortgage is a grant. Parol agreements between mortgagor and mortgagee at time of delivery cannot affect the mortgage, and evidence thereof is inadmissible. Sargent v. Cooley. 1.
2. Under sections 3517 and 3890, Rev. Codes, a mortgage is discharged of all conditions not found therein when delivered to the mortgagee. Sargent v. Cooley, 1.
3. A previously given note is a good consideration to sustain a mortgage, and where the defense to the mortgage is failure of consideration, parol evidence is inadmissible to vary or add to its terms. Sargent v. Cooley, 1.
4. Parol evidence is always admissible to show non-delivery of mortgage, and such evidence does not controvert its terms; but when delivery is shown, parol evidence is inadmissible to vary such terms. Sargent v. Cooley, 1.
5. In this state the transfer of a promissory note carries with it the mortgage securing it; and want of formal written assignment of such mortgage will not defeat a foreclosure action. Brynjolfson v. Osthus, 42.

MORTGAGES—Continued.

6. An absolute deed and a contemporaneous agreement to reconvey the land sold upon repayment of a debt, constitute a mortgage. Wells v. Geyer, 316.
7. A subsequent agreement by a mortgagor in possession to surrender possession and relinquish the right to redeem, made by mistake, and without adequate consideration, is not enforceable. Wells v. Geyer, 316.
8. A mortgage and note executed under a power of attorney, which was revoked by the death of the maker therof, will be adjudged void and cancelled. Brown v. Skotland, 445.
9. Mere inadequacy of price is not alone sufficient to warrant a court of equity in declaring a deed a mortgage, but a circumstance to be considered. Forester v. Van Auken, 175.

MUNICIPAL CORPORATIONS.

1. Under subdivision 7, sections 2148 and 2454, Rev. Codes 1899, a city, through its city council, may lay out and open streets, and in so doing exercise the right of eminent domain. City of Lidgerwood v. Michalek, 348.
2. Under the general charter cities are authorized to alter, extend, grade, pave and improve streets, and to make contracts therefor; they can pay for such improvements by special assessment upon adjoining property, but are not restricted to that method alone. Pine Tree Lumber Co. v. Fargo, 360.
3. A city may render itself generally liable upon its contract for special improvements. Pine Tree Lumber Co. v. Fargo, 360.
4. A person licensed to move houses in a city is legally liable for damages done thereby to the wires and property of a telephone company authorized by ordinance to establish and maintain a telephone system in the streets of such city. Northwestern Tel. Ex. Co. v. Anderson, 585.
5. When a city by ordinance grants franchises and itself receives benefits thereunder, a contractual relation is established with the company accepting such franchise, which the city cannot impair for uses not public. Northwestern Tel. Ex. Co., v. Anderson, 585.
6. A city may make special improvements upon its streets, and reimburse itself by special assessment upon abutting property benefited thereby without general taxation. Pine Tree Lumber Co. v. Fargo, 360.
7. When a city issues a warrant on a fund to be raised by special assessment, it assumes the duty of raising such fund; and a diversion of such fund after it is raised is a breach of contract for which the city would be liable in damages. Pine Tree Lumber Co. v. Fargo, 360.
8. The plaintiff need only prove that a fund was created, that his warrants were drawn, that there was credited to the fund an amount sufficient to pay them, that they were presented for payment and

MUNICIPAL CORPORATIONS—Continued.

not paid; it is then for the city to show that such credits were improperly made. Pine Tree Lumber Co. v. Fargo, 360.

9. Section 2183, Rev. Codes, does not prevent a city from reimbursing itself from a fund for special improvements for advances made by it to such fund. Pine Tree Lumber Co. v. Fargo, 360.

MUTUAL INSURANCE. See INSURANCE, 385.

NATIONAL GUARD. See MECHANIC'S LIEN, 554.

NEGLIGENCE.

1. Under section 2978, Rev. Codes 1899, the fact of the killing of stock by a railroad company creates a *prima facie* presumption of negligence. Wright v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 159.
2. Where a shingle from a burning building, carried by a high wind, set fire to the plaintiff's property, and he sought to recover from the owner of the burned building, alleging that the fire originated through negligent use of dangerous machinery, causing friction and intense heat, communicating fire to combustible material, negligently permitted to accumulate in contact with such machinery, the burden of proof is upon the plaintiff to show both the cause of the fire and the negligence of the defendant. Balding v. Andrews and Gage, 267.
3. It is no negligence not to have on hand fire extinguishing appliances, when it appears that they would have been of no avail. Balding v. Andrews and Gage, 267.

NEGOTIABLE INSTRUMENTS. See MINORS, 458; OWNERSHIP, 42; ASSIGNMENT, 403; MORTGAGES, 445.

1. Transfer of promissory note carries with it the mortgage securing it. Brynjolfson v. Osthus, 42.
2. The consideration of a note given for the purchase price of land conveyed by warranty deed with covenants against incumbrances, is the title to the land free therefrom, and not the covenants against them. Dahl v. Stakke, 325.
3. The defense of total or partial failure of consideration may be interposed in an action on a promissory note, when given for the purchase price of land, in case of a breach of covenant against incumbrances, when the maker has paid them off. Dahl v. Stakke, 325.
4. The extent of failure of consideration of a note given for the price of land, is the amount paid in good faith in the discharge of the incumbrance covenanted against in the deed. Dahl v. Stakke, 325.
5. Defense of total or partial failure of consideration may be interposed against a note for the purchase price of land, although the maker retains possession of such land. Dahl v. Stakke, 325.

NEWMAN ACT. See APPEAL AND ERROR, 478, 497; PRACTICE, 478; NEW TRIAL, 497.

1. Although under section 5630, Rev. Codes 1899, all evidence offered shall be received, that section does not abolish rules of evidence or relieve courts from resting their findings on legal evidence. Sykes v. Beck, 243.
2. There is no provision for a new trial in cases tried under section 5630, and an appeal from an order denying it will not be entertained. Bank v. Town of Norton, 497.

NEW TRIAL. See PRACTICE, 130, 497.

1. The granting of a new trial for insufficiency of evidence, where there is a substantial conflict therein, is in the sound legal discretion of the trial court; this discretion will be disturbed only for abuse. Ross v. Robertson, 27; State v. Howser, 495.
2. Both parties moved for a directed verdict, whereupon the court without objection discharged the jury, made findings of fact and conclusions of law in favor of the plaintiff; defendant moved for a new trial, alleging errors of law as grounds therefor; *held*, that a new trial is not provided for in cases tried under section 5630, Rev. Codes, and an appeal from an order denying it will not be entertained. Bank v. Town of Norton, 497.
3. Questions of fact will not be reviewed on appeal from the judgment, in jury cases, unless a motion for a new trial is first made. McNab v. Northern Pacific Ry. Co., 568.
4. A new trial will not be awarded or errors considered which can only be remedied by a new trial, when the party moving for a judgment *non obstante* fails to request the alternative of a new trial. Pine Tree Lumber Co. v. Fargo, 360.
5. A trial court may reduce a verdict deemed excessive, and require acceptance of reduced amount or submit to a new trial. Ross v. Robertson, 765.
6. Insufficiency of the evidence to justify a verdict will not be considered, when it is not particularly specified wherein it is insufficient. Gagnier v. City of Fargo, 219.

NORMAL SCHOOLS. See CONSTITUTIONAL LAW, 280.

NOTICE. See PRINCIPAL AND AGENT, 110.

1. The purchaser of real estate with notice of outstanding contract, takes subject thereto. Hunter v. Coe, 505.
2. Where a surety, in consideration of his principal's employment as agent of a sewing machine company, and his agreement to give a bond of the tenor of the one in suit, executes such bond and leaves it with his principal to deliver, such surety is not entitled to notice of its acceptance before such bond becomes enforceable. Singer Mfg. Co. v. Freerks, 595.

NOTICE—Continued.

3. To impound a debt or demand due to the defendant, when the same is seized on attachment, or in case of a levy upon personal property incapable of manual delivery, a copy of the warrant of attachment and a notice showing the property attached must be delivered to and left with the person against whom the demand exists. Ireland v. Adair, 29.

OBJECTIONS.

1. An objection to any and all evidence under the complaint, on the ground that it does not state facts sufficient to constitute a cause of action, must point out wherein it is insufficient. Pine Tree Lumber Co. v. City of Fargo, 360.

OFFICERS.

1. In the absence of proof, it will be presumed that officers have performed their duty. Fisher v. Betts, 197; Pine Tree Lumber Co. v. City of Fargo, 360.
2. Where an official duty depends upon the performance of a prior act, the latter will be presumed to be performed. Pine Tree Lumber Co. v. City of Fargo, 360.
3. Referees in bankruptcy are judicial officers, and their orders are entitled to the respect due to acts of such officers. Clendening v. Bank, 51.
4. When an officer certifies to the correctness of a copy, his certificate is evidence of no other fact. Fisher v. Betts, 197; Sykes v. Beck, 242.
5. An officer's return on attachment is presumed to state all acts done by him toward effecting a levy. Ireland v. Adair, 29.

OVERRULED CASES. See NEW TRIAL AND APPEAL, 25; CASES CRITICIZED, MODIFIED AND OVERRULED, 325.

OWNERSHIP.

1. Possession of a negotiable promissory note is itself *prima facie* evidence of its ownership. Brynjolfson v. Osthus, 42.
2. A bill of sale describing certain notes and mortgages by naming the parties thereto, their residence, and the county where the mortgages are recorded, and which is in possession of the grantee, is *prima facie* evidence of his ownership. Persons v. Smith, *et al.*, 403.

PAROL EVIDENCE. See EVIDENCE, 175, 51.

PARTIES. See DEMURRER, 106.

1. An action may be maintained against a party claiming adversely to the grantee in a deed void for maintenance, in the name of the grantor for the grantee's benefit. Galbraith v. Payne, 165.
2. When any interest in an action is transferred, such action shall not abate, but continue in the name of the original party, or the transferee may be substituted. Sykes v. Beck, 242.

PARTIES—Continued.

3. A party may dismiss his action without the assent of his attorney. Paulson v. Lyson, 354.
4. Demurrer lies for defect of parties; not where too many are joined, Olson v. Shirley, 106.

PAYMENT.

1. Burden of proof to establish payment is on him who asserts it. Satterlund v. Beal, 132.

PERSONAL PROPERTY. See EXECUTORS AND ADMINISTRATORS, 600.

PHYSICAL EXAMINATION. See EVIDENCE, 61.

1. By the commencement of her action, plaintiff impliedly consents to the doing of the measure of justice that she exacts, and to consent to a reasonable examination of her person, when necessary to afford the best evidence that can be produced. Brown v. Chicago, M. & St. P. Ry. Co., 61.

PLEADING. See EMINENT DOMAIN, 348; RES ADJUDICATA, 403; PRACTICE, 402.

1. The defense of the statute of limitations is waived if not pleaded; and facts constituting the bar of such limitation must be stated, and not the pleader's conclusion of law. Satterlund v. Beal, 122.
2. An amended pleading must be rewritten so that all parts of the pleading shall be in one instrument; and when leave to amend is not acted upon and the pleading redrawn to embrace the desired change, the amendment will be deemed abandoned. Satterlund v. Beal, 122.
3. The court must determine at the time request to amend is made, whether a desired amendment to pleadings will be granted. Satterlund v. Beal, 122.
4. The pleadings of the party in whose favor a judgment is rendered must support such judgment, or it is fatally defective. Satterlund v. Beal, 122.
5. Damages for pain and mental suffering growing out of an injury complained of, are recoverable although not specially pleaded. Gagnier v. City of Fargo, 219.
6. Where an exhibit attached to a complaint and made a part thereof negatives the allegations of such complaint, the terms of the exhibit control. Johnson v. Kindred State Bank, 336.
7. In stating a cause of action for breach of a contract, which is ambiguous when applied to the subject of litigation, it must be pointed out in what particular it is ambiguous, and some definite construction put thereon by averment. Johnson v. Kindred State Bank, 336.

PLEADING—Continued.

8. A complaint in an action to recover damages for negligently killing stock, alleged that on or about a specified date the defendant, in operating a train of cars, negligently, carelessly and wrongfully struck and killed such stock, *held*, sufficient. Jones v. Great Northern Ry. Co., 343.
9. An objection to any and all evidence under a complaint, on the ground that it does not state facts sufficient to constitute a cause of action, must point out wherein it is insufficient. Pine Tree Lumber Co. v. City of Fargo, 360.
10. A complaint in an action to determine adverse claims, under chapter 5, page 9, Laws of 1901, setting forth several tax liens as a basis of plaintiff's interest involved in the suit, does not state more than one cause of action. Bank v. Roberts, 394.
11. Under chapter 5, page 9, Laws of 1901, complaint in the form there prescribed is not demurrable because it states other facts in addition to those embraced in the statutory form. Blakemore v. Roberts, 394.
12. A minor's liability, when he has affirmed his contract, is upon his contract, and not upon a *quantum meruit*. Luce v. Jestrab, 458.
13. On vendor's breach of contract to convey land after payment of the purchase price, vendee can recover money paid as money had and received. Kicks v. Bank, 576.

POLICE POWER. See CONSTITUTIONAL LAW, 600.

1. The appointment of a special administrator and the taking possession by him of the personal property of a living person, cannot be upheld as a proper exercise of the police power. Clapp v. Houg, 600.

POWER OF ATTORNEY.

1. A power not coupled with an interest terminates with the death of its author. Brown v. Skotland, 445.
2. Where a mortgage and note were executed by an attorney acting under a power revoked by the death of its maker, a judgment ordering them canceled was proper. Bank v. Skotland, 445.

POSSESSION.

1. The possession of real estate by the vendee under an executory contract of purchase is, in law, the possession of his vendor. Schneller v. Plankinton, 561.

PRACTICE. See VERDICT, 27, 325; FINDINGS, 478.

1. Granting a new trial, when the evidence is conflicting, is discretionary with the trial court. Ross v. Robertson, 27.
2. Under chapter 63, page 74, Laws of 1901, a judgment notwithstanding the verdict can only be ordered when preceded by a motion for a directed verdict and a denial of such motion. Johns v. Ruff, 74.

PRACTICE—Continued.

3. In a suit to enforce a contract for plaintiff's support, in consideration of the sale of real and personal property, on death of plaintiff, substitution of his heirs, without probate proceedings being first had, is without authority of law. Friese v. Friese, 82.

4. A motion for a judgment *non obstante* under chapter 63, page 74, Laws of 1901, will not be granted unless it clearly appears that the party making it is entitled to such judgment as a matter of law upon the merits. If it is probable that a different showing can be made on another trial, the motion should be denied. Aetna Indemnity Company v. Schroeder, 110.

5. An amended pleading must be rewritten so that all parts of the pleading shall be in one instrument; and when leave to amend is not acted upon, and the pleading redrawn to embrace all the desired changes, the amendment will be deemed abandoned. Satterlund v. Beal, 122.

6. Where there is an issue for the jury, judgment *non obstante* will not be sustained. Nelson v. Grondahl, 130.

7. Where a motion for a new trial is not united with one for a judgment *non obstante,* it is not waived, and may be made in the usual course. Nelson v. Grondahl, 130.

8. When an interest in an action is transferred pending the suit, the case may proceed in name of the original party, or the transferee may be substituted. Sykes v. Beck, 242.

9. The purchaser of an interest in an action may be substituted for the original party therein, or allow the case to proceed in the latter's name, in his discretion. Sykes v. Beck, 242.

10. Allowance of substitution of parties is in the discretion of the court; and where no substitution is made, case will proceed in the name of the original party. Sykes v. Beck, 242.

11. A general objection to any and all evidence under the complaint on the ground that it does not state facts sufficient to constitute a cause of action, without pointing out the particulars wherein it is insufficient, will not be considered. Pine Tree Lumber Co. v. Fargo, 360.

12. A motion for a judgment notwithstanding the verdict tests the sufficiency of the evidence, and a new trial will not be awarded or errors considered which can only be remedied by a new trial, when the moving party fails to request the alternative of a new trial. Pine Tree Lumber Co. v. City of Fargo, 360.

13. In an action for negligently starting a fire on September 12, 1902, whereby plaintiff's property was destroyed, a motion to make the pleadings more definite by stating the time of day when defendant's engine passed, is not the proper remedy. Johnson v. Great Northern Ry. Co., 420.

PRACTICE—Continued.

14. Only when the pleading is indefinite and uncertain as to the nature of the charge or defense, will the court order it to be made more definite. Johnson v. Great Northern Ry. Co., 420.
15. Where the pleadings are definite and certain as to the charge or defense, but further particulars are required for further pleading or preparation for trial, the remedy is to ask for a bill of particulars. Johnson v. Great Northern Ry. Co., 420.
16. A motion to make pleading more definite and asking for a bill of particulars are distinct remedies, and are to be applied exclusively under the circumstances pointed out in section 5282, 5284, Rev. Codes 1899. Johnson v. Great Northern Ry. Co., 420.
17. If a motion to make pleading more definite is made, when a bill of particulars should have been applied for, the motion will be denied; and *vice versa*. Johnson v. Great Northern Ry. Co., 420.
18. In a trial to the court without a jury, under section 5630, refusal or failure to find upon all the issues is no ground for new trial or reversal of judgment, but the remedy is an appeal from the judgment and trial *de novo* upon the evidence. Chaffee-Miller Land Co. v. Barber, 478.
19. Where both parties move for a directed verdict, and the court without objection discharges the jury, makes findings of fact and conclusions of law in favor of the plaintiff, trial by the court will be deemed assented to. Bank v. Town of Norton, 497.
20. Both parties moved for a directed verdict, whereupon the court, without objection, discharged the jury, made findings of fact and conclusions of law in favor of the plaintiff; defendant moved for a new trial; *held*, that new trial is not provided for under section 5630, Rev. Codes 1899, and an appeal from an order denying it will not be entertained. Bank v. Town of Norton, 497.
21. On appeals in cases tried under section 5630, Rev. Codes 1899, errors of law occurring at the trial will be reviewed only in connection with the facts on the merits. Bank v. Town of Norton, 497.

PREFERENCES. See BANKRUPTCY, 51.

PRESUMPTION—See EVIDENCE, 159, 463, 360, 242, 197: CRIMINAL LAW, 425; SHERIFFS AND CONSTABLES, 29.

PRINCIPAL AND AGENT. See RAILROADS, 61; PRINCIPAL AND SURETY, 595.

1. A surety company proposing to take an indemnity bond from an agent of the Great Western Elevator Co., upon whose bond to such elevator company it was surety, wrote the general superintendent of such elevator company concerning the matter, and asked him to have such agent execute an indemnity bond. The superintendent informed the agent, who procured the defendants as sureties on such indemnity bond, which was forwarded to such superintendent

PRINCIPAL AND AGENT—Continued.

and by him sent to the surety company. The superintendent was not under these facts agent of the surety company, so that his knowledge of the agent's acts of dishonesty or fraud as agent were imputable to the surety company. Aetna Indemnity Co. v. Schroeder, 110.

2. The knowledge of a mere nominal agent, or one acting as to ministerial matters only, or whose interests or those of another for whom he is acting, are adverse to those of his principal, is not attributable to his principal. Aetna Indemnity Co. v. Schroeder, 110.
3. Where the duty arises to disclose facts to one about to become surety for an agent, it exists only as to facts affecting the risk in respect to the subject matter of the agency; and under this rule, no duty lies to make known the personal habits of the agent. Aetna Indemnity Co. v Schroeder, 110.
4. Agent's statements as *res gestae.* Balding v. Andrews and Gage, 268.

PRINCIPAL AND SURETY. See PRINCIPAL AND AGENT, 110.

1. Where an employe, as principal, and two others as sureties, in consideration of the former's employment as agent of a sewing machine company, and his agreement to furnish a bond for the faithful performance of the duties of the agency and account for all money and property received thereunder, executed the bond agreed for, left it with such principal to deliver to the sewing machine company, the bond is enforceable upon such delivery and no notice of its acceptance by the obligee is required. Singer Mfg. Co. v. Freerks, 595.

PROBATE LAW. See EXECUTORS AND ADMINISTRATORS, 394, 600.

PROCESS. See SUMMONS, 38, 61; ATTACHMENT, 29, 38, 227.

1. Resisting unlawful process is not contempt. State v. McGahey, 535.
2. Knowledge of the process resisted is necessary to render the person resisting guilty of contempt. State v. McGahey, 535.

PROMISSORY NOTES. See NEGOTIABLE INSTRUMENTS, 42, 325.

PUBLIC POLICY. See EQUITY, 435.

PURCHASER PENDENTE LITE. See ACTIONS, 442.

PURCHASER WITH NOTICE. See NOTICE, 505.

QUIETING TITLE.

1. An executor or administrator may maintain an action to quiet title to the real estate of the decedent. Blakemore v. Roberts, 394.
2. Where the plaintiff's grantor, when he conveyed land to plaintiff, had not been in possesion of, nor taken rents therefrom, for one year prior to such conveyance, and defendant was then, and for ten years prior thereto had been, in adverse possession, under color of title, it was error to quiet title in the plaintiff. Schneller v. Plankinton, 561.

RAILROADS. See SUMMONS, 61; PRINCIPAL AND AGENT, 61; PLEADING, 343; EQUITY, 435.

1. Service of summons on station agent sufficient. Brown v. Chicago, M. & St. P. Ry. Co., 61.
2. Where the owner of land deeded it to a railroad company, with the condition that the grantee should erect and maintain a depot at a point named in the deed, such provision is a condition subsequent and not a covenant, and not being restrictive as to the erection and maintenance at other points, was not against public policy, and upon failure to keep such condition the title and right to possession reverted, and plaintiff was not estopped to maintain ejectment for such possession. Griswold *et al.* v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 435.
3. Equity will restrain execution upon a judgment in ejectment to enable a railroad company to condemn the land sought to be recovered. Griswold *et al.* v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 435.

REAL ESTATE. See QUIETING TITLE, 394; TENANT IN COMMON, 435; LIENS, 519.

RECEIVERS.

1. The appointment of a receiver of an insolvent corporation suspends the exercise of its corporate functions, the authority of its officers to transfer its assets, and passes the title and right of possession of all its property to such receiver for the benefit of creditors. Brynjolfson v. Osthus, 42.
2. Order appointing receiver not subject to collateral attack. Brynjolfson v. Osthus, 42.
3. A deed executed by the president of an insolvent corporation before the appointment of a receiver, and delivered afterwards, is void, as title to the land sought to be affected had passed to the receiver by the order appointing him, and the president's authority was suspended by such order. Brynjolfson v. Osthus, 42.

RECORDS. See EVIDENCE, 243.

REFEREE. See BANKRUPTCY, 51.

REFORMATION OF INSTRUMENTS.

1. Equity will reform a written instrument to conform to the true intent of the parties. Forester v. Van Auken, 175.
2. Evidence to reform a written instrument must be clear, specific and convincing. Forester v. Van Auken, 175.

RENT. See LIENS, 519; LANDLORD AND TENANT, 95.

RES ADJUDICATA. See BANKRUPTCY, 51.

1. When it is proved by the mouth of a party on cross examination that a litigated question was the subject of another litigation, between the same parties on the same issues, in a court of competent jurisdiction of another state, where the matter in dispute was determined, judgment entered and complied with, the matter is *res adjudicata*, although the former adjudication is not pleaded, or the judgment proved. Persons v. Smith, 403.

RES GESTAE. See EVIDENCE, 267.

SEARCH WARRANT. See CONTEMPT, 535.

SCHOOL FUND. See CONSTITUTIONAL LAW, 280.

SHERIFFS AND CONSTABLES.

1. A sheriff's return upon process must show the acts done in the execution of it to enable the court to pass upon their sufficiency. Ireland v. Adair, 29.
2. In the levy of a warrant of attachment, the sheriff's return is presumed to state all acts done by him toward effecting a levy. Ireland v. Adair, 29.

SPECIAL ADMINISTRATOR. See EXECUTORS AND ADMINISTRATORS, 600.

SPECIAL ASSESSMENT. See MUNICIPAL CORPORATIONS, 360.

SPECIFIC PERFORMANCE. See EQUITY, 452.

1. The granting or refusing of a decree of specific performance is in the sound discretion of the court; and such decree may be granted upon such discretion as the equities of each case warrant. Hunter v. Coe, 505.
2. Where the plaintiff holding a contract for the purchase of real estate, has knowledge that the owner has conveyed to another, and that the latter, although chargeable with constructive notice of plaintiff's contract, honestly believes that he has perfect title, and induced by such belief makes valuable improvements without protest from plaintiff, the latter is not entitled to a decree of specific performance against the grantee of the owner except upon reimbursing such grantee for improvements. Hunter v. Coe. 505.
3. Where the vendor is obligated to convey land upon the delivery of a specified quantity of merchantable wheat, or its equivalent in money, by the vendee, and a tender of performance is made and the time for delivery of the deed had arrived, the contract is enforceable under the rule which requires, as a condition for the specific performance, that the contract shall be mutual as to obligation and remedy. Pederson v. Dibble, 572.

STATEMENT OF THE CASE.

1. The sufficiency or insufficiency of the statement of the case merely affects the power of the court to review evidence and does not warrant a dismissal of an appeal. Sykes v. Beck, 242.
2. A statement of the case will not be stricken out when good cause was shown for extending the time for its settlement; such extension is discretionary with the court, and its order for such extension will be modified only for abuse. Sykes v. Beck, 242.
3. Unless the action of the court in directing a verdict is excepted to, and the ruling and exception brought into the statement of the case, it is not available for error on an appeal from the judgment. McNab v. Northern Pacific Ry. Co., 568.

STATUTES.

1. Under sections 3517 and 3890, a parol agreement entered into between the mortgagor and the mortgagee, before delivery of the mortgage, cannot be shown in an action to foreclose the mortgage. Sargent v. Cooley, 1.
2. When divorce is granted the wife for the husband's wrong, under section 2761, Rev. Codes, the court may grant her alimony in a lump sum instead of instalments. De Roche v. De Roche, 17.
3. A levy of an attachment upon personal property, incapable of manual delivery, must be made in strict compliance with subdivision 4, section 5632, Rev. Codes 1899.
4. Upon an indictment under 7145, Rev. Codes 1899, accused may be convicted of a simple assault and battery. State v. Climie, 33.
5. An information that sets forth every ingredient of an offense in the language of the statute, with the identifying particulars indicated by sections 8039, 8040 and 8047, is sufficient. State v. Climie, 33.
6. Under section 4900, Compiled Laws 1887, service by leaving at the dwelling house of a nonresident outside of the state, is not personal service within the meaning of said section. Bank v. Holmes, 38.
7. Service upon a defendant by leaving summons at his dwelling in presence of one of his family over fourteen years of age, as provided by section 4898, Compiled Laws of 1887, applies only to a resident of the state. Bank v. Holmes, 38.
8. Under act of July 1, 1898, referees in bankruptcy are judicial officers. Clendening v. Bank. 51.
9. Under section 55b, bankruptcy act of July 1, 1898, U. S. Comp. Stat. 1901, p. 3442, referees pass upon claims against the bankrupt, and under section 57g of said act, creditors must surrender preferences, or their claims will be rejected; *held*, state courts will not review the allowance of a claim, and the remedy is in the bankruptcy court. Clendening v. Bank, 51.
10. Under section 5252, Rev. Codes 1899, service upon a station agent of a railroad company is service upon the company. Brown v. C., M. & St. P. Ry. Co., 61.

STATUTES—Continued.

11. Under section 4824, Rev. Codes 1899, the omission to set forth in the statement, required to be filed, "the amount and quantity of grain threshed," as required in said section, is fatal to the lien sought to be secured for threshing grain. Moher v. Rasmusson, 71.
12. Under chapter 63, page 74, Laws of 1901, a judgment notwithstanding the verdict cannot be ordered unless such motion is preceded by one for a directed verdict. Johns v. Ruff, 74.
13. On an appeal from a justice court, under section 6651, Rev. Codes 1899, the appellant cannot avail himself of the fact that an undertaking was not furnished as provided therein, unless he brings the fact to justice's attention in the court below. Lyman-Eliel Drug Co. v. Cooke, 88.
14. Under section 6650, Rev. Codes 1899, a postponement after trial has commenced may be granted for causes arising or coming to applicant's attention after such commencement. Lyman-Eliel Drug Co. v. Cooke, 88.
15. Under section 3310, declaring all leases of agricultural lands invalid, which are for a period exceeding ten years, a gross sum paid for a life lease, is not rent, as the term is there used. Wegner v. Lubenow, 95.
16. To recover treble damages under section 5008, Rev. Codes 1899, for forcible ejectment from real estate, the force need not be actually applied, but must be present, threatened and justly to be feared. Wegner v. Lubenow, 96.
17. A motion for a judgment, notwithstanding the verdict, under chapter 63, page 74, Laws of 1901, will not be granted unless it appears that the party seeking it is entitled to it as a matter of law upon the merits. Aetna Indemnity Co. v. Schroeder, 110.
18. The statute of limitations, section 5184, Rev. Codes 1899, is waived as a defense, unless pleaded. Satterlund v. Beal, 120.
19. In cases tried under section 5630, Rev. Codes 1899, the court is not relieved of the duty of deciding, when the request is made, whether an amendment to the pleadings will be allowed or denied. Satterlund v. Beal, 122.
20. Under subdivision 5, section 5575, Rev. Codes 1899, the same amount of costs is allowed upon reargument as upon the argument. Crane v. Odegard, 135.
21. Section 5598, Rev. Codes 1899, gives the district court power to award motion costs, in its discretion, not to exceed $25, and an allowance of $15 is not an abuse of discretion. Crane v. Odegard, 135.
21. Where drainage bonds were issued, as authorized by section 1474, Rev. Codes 1899, and such section was afterwards amended, such amendment could not affect bonds contracted for but not signed and delivered before the amendment was passed. May v. Cass County, 138.
22. Chapter 99, Laws of 1903, is not *ex post facto* as applied to one convicted before its passage. State v. Rooney, 144.

STATUTES—Continued.

23. The words "close confinement," as used in chapter 99, Laws of 1903, are not synonymous with "solitary confinement." *Id.*
24. A *prima facie* presumption of negligence is created by the fact of killing stock by a railroad train, under section 2978, Rev. Codes 1899. Wright v. M., St. P. & S. Ste. M. Ry. Co., 159.
25. Section 7002, Rev. Codes 1899, makes it a misdemeanor to convey any pretended title to land, unless the grantor has been in possession of the land conveyed or taken rent therefrom for the space of a year prior thereto. Galbraith v. Paine, 165.
26. Deeds in violation of section 7002, Rev. Codes 1899, are void as to the party in adverse possession of the land conveyed. Galbraith v. Payne, 165.
27. A tax imposed upon real estate under chapter 126, page 256, Laws of 1897, creates no personal obligation against the owner. Hertzler v. Freeman, 187.
28. A tax is not void because assessed in the name of another than the owner, construing section 81, chapter 126, laws of 1897. Hertzler v. Freeman, 187.
29. Chapter 119, Laws of 1889, provides for a penalty of 5 per cent, with accrued interest upon the amount of the tax, on June 1st; after that interest at 1 per cent a month on the total of tax, penalty and interest unpaid then, to the date of sale. Nichols v. Roberts, 193.
30. Chapter 50, page 151, Laws of 1887, did not repeal section 1417, Comp. Codes. Nichols v. Roberts, 193.
31. Section 1417, Comp. Codes Dakota, allows county treasurer 5 per cent commission on sale of land sold for taxes, and a sale including such fees is not void for excessive amount. Nichols v. Roberts, 193.
32. The revenue law of 1890 and that of 1891, relating to tax sales and the issuance of tax deeds are to be construed together. Fisher v. Betts, 197.
33. A sale under the law of 1890 for tax levied in 1889, constitutes a contract, not to be impaired by subsequent legislation. Fisher v. Betts, 197.
34. Under the law of 1891, the county auditor issues tax deeds notwithstanding its repeal. Fisher v. Betts, 197.
35. Subdivision 6, section 5352, Rev. Codes 1899, allows an attachment upon a debt incurred for property obtained under false pretenses, but does not warrant an attachment for damages for torts. Sonnesyn v. Akin, 227.
36. When an affidavit for an attachment is false, the court is required, under section 5376, Rev. Codes 1899, to set aside the attachment. Sonnesyn v. Akin, 227.
37. Section 5234, Rev. Codes 1899, abolishes the old equity rule that prohibits the prosecution of an action by the purchaser of the subject matter of an action *pendente lite*. Sykes v. Beck, 242.

STATUTES—Continued.

38. Under section 5739, Rev. Codes 1899, a purchaser after judgment and before appeal, is a purchaser *pendente lite.* Sykes v. Beck, 242.

39. Under section 5630, Rev. Codes 1899, an appeal will not be dismissed when the statement of the case fails to embody all the evidence The power to review evidence only is affected. Sykes v. Beck, 242.

40. Chapter 49, Laws of 1903, is unconstitutional. State v. McMillan, 280.

41. Under subdivision 7, sections 2148 and 2454, Rev. Codes 1899, cities can lay out and open streets and exercise the right of eminent domain, under chapter 35, Code of Civil Procedure; and the form of complaint in such procedure is prescribed by section 5962 of said codes. Lidgerwood v. Michalek, 348.

42. Executor can quiet title to deceased's real estate, and under chapter 5, page 9, Laws of 1901, a complaint setting out more than one tax lien as the basis of such title, states but one cause of action; and where the statutory form of complaint is used, it need allege nothing further than is prescribed in said chapter. Blakemore v. Roberts, 394.

43. An application for a bill of particulars under section 5282, Rev. Codes 1899, and for an order to make pleading more definite, under section 5284, are distinct remedies, and on an application for one, the other will not be granted. Johnson v. Great Northern Ry. Co., 420.

44. The statutory grounds given under section 8082, Rev. Codes 1899, for setting aside an indictment, are exclusive of all others. State v. Tough, 425.

45. The words "not admitted to bail," as used in section 8679, Rev. Codes 1899, mean that accused is in custody under commitment, and is unable or unwilling to give bail. If not brought to trial at or before the second term after commitment, he will not be released under habeas corpus, when such delay is upon his application; and when a trial is offered the accused so held, and he declines it, the delay is upon his application, under this section. State v. Larson, 474.

46. Under section 5630, Rev. Codes 1899, on a trial by the court, which refuses to find upon all the issues, the remedy is an appeal from the judgment, and a trial *de novo* in supreme court. Chaffee-Miller Land Co. v. Barber, 478.

47. A motion for a new trial does not lie in cases tried under section 5630, Rev. Codes 1899, and errors of law are only reviewed in connection with a review of the facts upon the merits in supreme court. Bank v. Norton, 497.

48. Resistance wilfully offered to a lawful order of the court is punishable under subdivision 4, Rev. Codes 1899. State v. M., St. P. & S. Ste. M. Ry. Co., 535.

STATUTES—Continued.

49. A corporation organized under chapter 101, page 159, Laws of 1897, authorizing members of the national guard to incorporate, is a private corporation, and its property subject to a mechanic's lien. Arrison v. N. D. National Guard, 554.

50. Subdivision 2, section 6325, Rev. Codes 1899, is unconstitutional, as depriving a person of his property without due process of law. Clapp v. Houg, 600.

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STATUTE OF FRAUDS. See LIENS, 519.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS, 122.

STOCK KILLING. See RAILROADS, 159, 343.

STREETS. See MUNICIPAL CORPORATIONS, 348, 360.

1. The use of streets for moving houses is an extraordinary use thereof, which may be permitted, but not so as to destroy the use of such street for travel or necessary public purposes, but cannot be legally

STREETS—Continued.

granted to the destruction and impairment of vested rights. Northwestern Tel. Ex. Co. v. Anderson, 585.

2. A city may lay out streets and exercise the right of eminent domain to acquire right of way. City of Lidgerwood v. Michalek, 348.

SUBJECT MATTER. See ASSIGNMENT, 242.

SUBSTITUTION OF PARTIES. See PRACTICE, 82, 242; PARTIES, 242.

SUMMONS.

1. Under section 4900, Comp. Laws 1887, leaving a copy of the summons at the dwelling house of a nonresident defendant, outside of the state, is not equivalent to publication and mailing, and is not personal service within the meaning of that section; leaving at dwelling applies only to service in the state. Bank of Casselton v. Holmes, 38.
2. Under section 5252, Rev. Codes 1899, the station agent of a railroad company is the managing agent of a foreign corporation upon whom summons may be legally served. Brown v. Chicago, M. & St. P. Ry. Co., 61.

SUPREME COURT. See APPEAL AND ERROR, 242.

SURETY. See PRINCIPAL AND SURETY, 595.

TAXATION. See ADVERSE CLAIMS, 294.

1. A real estate tax is a mere charge upon the land, and not a personal obligation. Hertzler v. Freeman, 187.
2. The provisions of chapter 126, page 256, Laws of 1897, requiring real estate to be assessed in the owner's name, are directory merely, and failure to so assess does not render the tax void. Hertzler v. Freeman, 187; Sykes v. Beck, 242.
3. Under chapter 119, Laws of 1889, 5 per cent penalty is added, and thereafter interest at 1 per cent per month is computed on sum total of tax, penalty and interest then unpaid up to the date of sale. Nichols v. Roberts, 193.
4. Including treasurer's 5 per cent commission on sale of lands for delinquent taxes does not make the sale for an excessive amount. Nichols v. Roberts, 193.
5. The Laws of 1890 failed to provide for the issuance of a tax deed, which law was supplemented by a law at succeeding session providing for such deed; the two acts are to be construed as one enactment. Fisher v. Betts, 197.
6. A sale of land for delinquent taxes made under the law of 1890, constitutes a contract between the state and purchaser, the terms of which are embraced in the law in force at the time of the sale. Fisher v. Betts, 197.

TAXATION—Continued.

7. No legislation subsequent to a tax sale can repeal an act in force at time of sale, so as to change the effect of a deed as evidence. Fisher v. Betts, 197.
8. Under the tax law of 1891, a county auditor executes a tax deed; and notwithstanding its repeal, such deeds should still be issued by him. Fisher v. Betts, 197.
9. Recitals in a tax deed, that the period of redemption had expired, are *prima facie* evidence that the notice of redemption was published. Fisher v. Betts, 197.
10. Levy of a tax by percentage on a fixed basis is a levy of a specific sum. Sykes v. Beck, 242; Fisher v. Betts, 197.
11. When the assailant of the validity of taxes fails in his attack, his action is dismissed. Sykes v. Beck, 242.

TAX DEED. See EVIDENCE, 197.

TELEPHONE COMPANIES.

1. A person licensed to move houses in a city is liable for damages to the wires and property of a telephone company authorized to establish and maintain a telephone system in said city. Northwestern Tel. Ex. Co. v. Anderson, 585.
2. By the passage of an ordinance which gave the city benefits, and its acceptance and the expenditures of money thereunder by a telephone company, a contractual relation was established, which became a vested right, that could not be impaired by the subsequent action of the city, directly or indirectly annulling it for purposes not public. Northwestern Tel. Ex. Co. v. Anderson, 585.

TENANT IN COMMON.

1. A tenant in common of real estate is entitled to possession against all the world but his co-tenant, and may recover in ejectment the entire tract as against strangers to the title. Griswold v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 435.

TENDER.

1. If a vendee in a contract to convey land has fully complied with the terms thereof on his part, and is not in default, in turning over the prescribed share of the annual crop, a tender of the unpaid purchase price, after default of vendor, is not necessary, before suing to recover the money paid. Kicks v. Bank, 576.

THRESHER'S LIEN.

1. Strict compliance with the statute requisite to a lien. Moher v. Rasmusson, 71.

TRESPASSER.

1. A trespasser on the lands of another, going thereon and seeding the same against the protest of the owner, who thereafter sues for its possession and secures an injuction restraining the trespasser from harvesting the crop, is not entitled to a share of the crops. Wadge v. Kittleson, 452.
2. The owner of land leased it to defendant for one year for $200 as rent, with the privilege of extending the lease for another year if the owner was in possession. In October of the same year, owner and defendant made a new oral lease; possession was not given, but an indorsement on a note of owner was made for the rent for the year under the oral lease. In January the owner assigned the written lease to plaintiff, and in writing gave plaintiff possession, and defendant was notified thereof. Defendant claimed that his written lease was still in force, and cropped the land; *held,* that the plaintiff was entitled to the rent as specified in the written lease; *held further,* that plaintiff could treat defendant as a trespasser or tenant, and having treated him as a tenant, could recover the rent under the written lease. Bank v. Ruettell, 519.

TRIAL. See PLEADING, 122; PRACTICE, 360, 420.

1. When in the course of a trial leave is asked to amend the pleading, the court must deny or allow the request when the application is made. Sykes v. Beck, 122.
2. When both parties move for a directed verdict, decision by the court will be deemed assented to. Bank v. Town of Norton, 497.
3. When a motion for judgment *non obstante* has been granted for insufficiency of the evidence, without motion for a directed verdict, the judgment on appeal will not be sustained on grounds independent of, and not included in, such motion. Johns v. Ruff, 74.
4. Insufficiency of evidence to justify the verdict will not be considered, when it is not particularly specified wherein such evidence is insufficient. Gagnier v. City of Fargo, 219.
5. A postponement of a trial in a justice court may be had for causes arising after the commencement of such trial. Lyman-Eliel Drug Co. v. Cooke, 88.
6. When the evidence in an action upon an accident policy was consistent with an intentional and not inconsistent with an accidental or unintentional shooting, case was rightfully submitted to the jury. Stevens v. Continental Casualty Co., 463.
7. An objection to any and all evidence under the complaint on the ground that it does not state facts sufficient to constitute a cause of action, must point out wherein it is insufficient. Pine Tree Lumber Co. v. City of Fargo, 360.
8. Where there is an issue for the jury, judgment *non obstante* will not be sustained. Nelson v. Grondahl, 130.

TRIAL—Continued.

9. When a motion for a new trial is not united with one for a judgment *non obstante*, it is not waived and may be made in the usual course. Nelson v. Grondahl, 130.
10. A general objection to the insufficiency of the complaint without pointing out particularly such insufficiency, will not be considered. Pine Tree Lumber Co. v. City of Fargo, 360.

ULTRA VIRES. See INSURANCE, 385.

UNDERTAKING. See PRINCIPAL AND SURETY, 110, 595.

UNIVERSITY AND SCHOOL LANDS. See CONSTITUTIONAL LAW, 280.

USURY.

1. The finding of a trial court that a certain alleged agreement for a loan was usurious, examined and found correct. Brown v. Skotland, 445.

VENDOR AND PURCHASER. See ESTOPPEL, 452; SPECIFIC PERFORMANCE, 507.

1. In an action for specific performance of a contract for the sale of land, equity will not grant such relief, where plaintiff has abandoned the contract, and by parol authority has directed its assignment by another, who assigns it in writing, and whose assignee pays money relying upon such assignment and takes possession of the land, with the assignee's knowledge and consent. Wadge v. Kittleson, 452.
2. A written contract for the sale and purchase of land may be annulled or extinguished by parol. Wadge v. Kittleson, 453.
3. A purchaser of real estate with knowledge of an outstanding title may be compelled, in an action for specific performance, to convey the land according to such contract. Hunter v. Coe, 505.
4. A purchaser of real estate with knowledge of an outstanding contract, when compelled to convey according to such contract, will be required to pay the vendee from the unpaid purchase price enough to reimburse the latter for payments made to the vendor. Hunter v. Coe, 505.
5. Where the plaintiff holding a contract for the purchase of real estate, has knowledge that the owner has conveyed to another, and that the latter, although chargeable with constructive notice of plaintiff's contract, honestly believes that he has perfect title, and induced by such belief, makes valuable improvements without protest from the plaintiff, the latter is not entitled to a decree of specific performance against the grantee of the owner except upon reimbursing such grantee for improvements. Hunter v. Coe, 505.

VENDOR AND PURCHASER—Continued.

6. The possession of real estate under an executory contract of purchase is, in law, the possession of the vendor. Schneller v. Plankinton, 561.
7. Where a contract bound the vendor to convey land upon the delivery of a specified quantity of wheat, or its equivalent in money, the vendee to make such delivery or payment, and tender of performance is made, and time for the delivery of the deed arrived, the contract is enforceable under the rule, that it shall be mutual, both as to obligation and remedy. Pederson v. Dibble, 572.
8. On a vendor's breach of a contract to convey land after payment therefor out of the crops raised thereon, the vendee can recover the money paid on such contract as money had and received. Kicks v. Bank, 576.
9. On abandonment of contract to convey land after payment therefor, the measure of recovery is the money paid on the contract with interest if the vendor retains possession, and without interest if the vendee is in possession. Kicks v. Bank, 576.

VERDICT. See CRIMINAL LAW, 426.

1. The trial court may reduce a verdict deemed excesive, and require acceptance of the reduced amount or submission to new trial. Ross v. Robertson, 27.
2. Insufficiency of the evidence to justify the verdict will not be considered, when it is not particularly specified wherein it is insufficient. Gagnier v. City of Fargo, 219.
3. Sufficiency of the evidence to justify a verdict, upon appeal from an order denying a motion for a new trial, will be reviewed, although no exception was taken to the direction of a verdict. Dahl v. Stakke, 325.
4. On a motion for a judgment notwithstanding the verdict, a new trial will not be awarded unless a request therefor in the alternative is united with the motion. Pine Tree Lumber Co. v. City of Fargo, 360.
5. New trial on the ground of insufficiency of the evidence to sustain the verdict is in the sound discretion of the trial court. And its order granting or refusing it will be disturbed only for abuse. State v. Howser, 495.
6. Where both parties ask for a directed verdict, a trial by the court and discharge of the jury will be deemed assented to. Bank v. Town of Norton, 197.
7. The action of the court in directing a verdict, unless excepted to, and the ruling and exception brought into the statement of the case, and made a part of the judgment roll, will not be available for error on appeal from the judgment. McNab v. Northern Pacific Ry. Co., 568.

VESTED RIGHTS. See CONSTITUTIONAL LAW, 137, 585.

WAIVER.

1. Nonpayment of taxes by the vendee as required by a contract to convey land, is no defense to an action by the vendee against the vendor for the money paid on such contract, where the vendor has waived such default by not promptly cancelling on that ground. Kicks v. Bank, 576.

WARRANT OF ATTACHMENT. See ATTACHMENT, 29.

WITNESS.

1. The evidence of a witness in a former action between the same parties, involving the same issues, in a court of competent jurisdiction, is admissible on a subsequent trial upon proof of his death. Persons v. Smith, 403.

WORDS AND PHRASES.

1. "Rent," as the word is used in section 3310, Rev. Codes 1899, means "profit arising out of the land." A gross sum paid for a life lease of agricultural land is not "rent," within the meaning of this section. Wegner v. Lubenow, 95.
2. The words "close confinement," as used in chapter 99, Laws of 1903, are not synonymous with "solitary confinement." State v. Rooney, 144.
3. "School corporations." The State Normal School at Valley City is not a "school corporation," nor a legal entity. State v. McMillan, 280.
4. "Bond of the State of North Dakota." Such bonds are only such as are valid and constitutional, within the state debt limit, so certified by the state auditor and secretary of state, and secured by an irrepealable tax levy. State v. McMillan, 280.
5. The words "not admitted to bail," as used in section 8679, mean that the accused is under commitment because unwilling or unable to furnish bail. State v. Larson. 474.