REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

MARCH, 1905, TO DECEMBER, 1905.

F. W. AMES
REPORTER

VOLUME 14

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By F. W. AMES

OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

HON. D. E. MORGAN, Chief Justice.
HON. N. C. YOUNG, Judge.
HON. EDWARD ENGERUD, Judge.

F. W. AMES, Reporter.
R. D. HOSKINS, Clerk.

Section 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 therefore 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

JOSEPH MILTON BARTHOLOMEW

Joseph Milton Bartholomew, late of the Supreme Court of North Dakota, was one of the first selections by the people of that state for that position. This fact will always be an honorable distinction. He was born in McLean county, Illinois, in 1843, and came from old American historical lineage. His grandfather was General Joseph Bartholomew, an associate and warm personal friend of President William Henry Harrison, being second in command under General Harrison at the celebrated battle of Tippecanoe. Judge Bartholomew's father was a farmer and civil engineer in moderate circumstances. He was an early pioneer of Wisconsin, settling in Columbia county, territory of Wisconsin—as the region was then called—in 1845. He was a member of the legislature of the young state, and held various county offices and positions of honor and trust. He was first a whig and then a republican in politics, and died at Lodi, Wisconsin, in 1886. His mother's maiden name was Catherine Heffner, a native of Virginia. She was married in Illinois and died in Wisconsin in 1890. His grandfather, General Joseph Bartholomew, already mentioned, had a career as illustrious in military affairs as that which his worthy grandson won in civil life. He was born in New Jersey in 1766, and although only a lad, carried a musket in the last years of the revolutionary war. He was by nature and training an Indian fighter, and served as a soldier under General Anthony Wayne in the Indian wars subsequent to the revolution. He settled in Indiana in 1800 and served under General Harrison. At the battle of Tippecanoe his sword arm was shattered by a bullett. For his intrepid conduct on that occasion he was promoted to brigadier general. He was also prominent in civil life and held various minor offices. He was one of the commissioners who located the capitol of Indiana where it now stands. He always retained his warm friendship for Gen-

eral Harrison. During the campaign of 1840, although 75 years old, he rode on horseback over 200 miles to be present and to preside at the Great Harrison mass meeting held on the Tippecanoe battlefield. This effort was too much for him. He became broken in health and died on the day Harrison was elected president.

Judge Bartholomew was educated in the public schools, and prepared for college under a private tutor. But military blood coursed in his veins, and when the civil war broke out he enlisted in the army as a private soldier at Lodi, Wisconsin, in July, 1862. He was first under fire in the attack on Vicksburg, by the way of Chickasaw Bluffs, in the last week of December, 1862. He was in all the battles of the Vicksburg campaign, including the capture of the city. He participated in the siege and capture of Jackson, Mississippi, and in several minor engagements in western Louisiana, in 1863, where at one time he was one of seven in his company who remained for duty at the end of the fight. He also took part in all the battles of the disastrous Red river campaign. He likewise participated in the operations against the forts at the mouth of Mobile bay, and was finally mustered out of service November 14, 1865, with the rank of captain. The judge was never wounded nor taken prisoner, and only lost ten days through illness during his entire service. He did not draw a pension, in fact, he never applied. A few days before his death he had remarked that it was much easier for the widow to obtain pension if the husband applied during life, and that he intended to make application upon his return from California. The judge, no doubt, realized to some extent his true physical condition.

After the war he took up the study of law, concluding with two years of office study under Senator Allison of Iowa and a course of lectures. He was admitted to the bar in 1869, and immediately commenced practice in the courts of Wisconsin and Iowa, until he went to Dakota in 1883, where he continued in the profession, settling at LaMoure, LaMoure county. His practice covered all branches of law and in several states, thus giving him a very thorough preparation for the duties which later devolved upon him as chief justice of the Supreme Court, to which he was elected in 1889, when the state was organized and admitted to the Union. This was twenty years after his admission to the bar.

Judge Bartholomew cast his first vote for the Lincoln electors at Helena, Ark., in 1864. By a law in Wisconsin the soldiers in the army were allowed to vote on the field. On this occasion, very

appropriately, the ballot box was the bullet box or ordinary cartridge box. Judge Bartholomew passed away on March 24, 1901, at his pleasant home in Bismarck, where still his loving wife mourns the loss of a truly noble character.

He was a member of the Grand Army of the Republic and of the Masonic order, being a thirty-second degree Scottish Rite Mason.

He was married in 1878.

HON. SANFORD A. HUDSON

On Sunday, August 27, 1905, at his home in Fargo, Judge Sanford A. Hudson passed quietly to his rest, at the age of 88. Judge Hudson was born in Oxford, Mass., May 16, 1817. His early education was acquired in the common schools, supplemented by a course at the Union academy, Belleville, Jefferson county, New York, and in 1846 he commenced the study of law in that county and was admitted to the bar at Utica, N. Y., in 1848. The same year he removed to Janesville, Wis., in company with John R. Bennett, and was afterwards circuit judge of that state, and there he successfully practiced for thirty-two years acting as city attorney for some time.

In 1881 he came to Fargo, as judge of the Third Judicial District, having United States jurisdiction comprising the entire territory now composing North Dakota. He was also by virtue of this position associate justice of the territorial Supreme Court. He was appointed to that position by President Garfield and most creditably filled the position for four years. He then engaged in private practice until 1892, since which time he lived retired. He was an honored citizen and an upright judge. He was a member of the Episcopal church and served many years as vestryman or warden of the Gethsemane church of Fargo.

RODERICK ROSE

Roderick Rose was born May 15, 1838, at Smiths Falls, Canada. From there he moved with his parents to Woodstock, Canada,

where he received his education. In 1858 he moved to Iowa and was principal of the Montezuma and Davenport schools. While principal of the Montezuma schools he was married to Miss Anna E. Ferneau on June 2, 1864. After serving as principal of the Davenport schools for twelve years, he was admitted to the bar in Davenport in 1871, and practiced law in that city until he came to Jamestown, in what is now the state of North Dakota, in 1882, where he continued to practice law until 1888, when he was appointed Associate Justice of the Supreme Court of the territory of Dakota by President Cleveland. After statehood he was twice elected judge of the Fifth judicial district, and all together served eight years and five months on the bench. He was mayor of Davenport in 1875, 1876 and 1880. He served one term as Grand Master of the A. O. U. W. in Iowa, and in 1880 was Supreme Master Workman of the United States. He served two years as mayor of Jamestown. In 1900 he was elected state's attorney of Stutsman county and served in that capacity until his death, which occurred on Sepember 10, 1903. He left to mourn his loss his widow and two children, Nellie A. Rose and Edwin S. Rose, who died on October 5, 1904. He was a good lawyer, an able judge and a good citizen.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

BENJAMIN F. BERRY v. ADOLPHUS EVENDON.

Opinion filed September 10, 1904; on rehearing, June 9, 1905.

Trust — Creation by Parol.

1. A trust of personal property is not within the statute of frauds, and may be created by spoken words and proved by parol.

Conversion by Trustee.

2. Where a trustee of personal property converts it into real estate, the trust attaches to the real estate in the hands of the trustee.

Suit for Accounting — Judgment.

3. The defendant foreclosed a real estate mortgage which was held by him in trust for the plaintiff, and thus secured title to the land in his own name. In the trial of an action to compel him to convey the same to the cestui que trust and to account for the rents and profits, it was found that he had sold the land to an innocent purchaser. The trial court entered judgment for the value of the land, and for the value of its use, less certain sums due to the defendant. *Held*, upon a review of the entire case, that the facts found by the trial court are fully supported by the evidence, and that the judgment was proper.

ON REHEARING.

Trustee's Liability for the Use of Land.

4. The mere fact that the defendant had title to the land for three years did not make him liable for the value of the use for that period. He is liable only for the year he actually used it for cropping purposes.

Appeal from District Court, Towner county; *Fisk*, J.

Action by B. F. Berry against Adolphus Evendon. Judgment for plaintiff, and defendant appeals.

Modified.

Brennan & Gray, for appellant.

Purchase of property, upon an oral agreement to convey to another upon repayment of the purchase price, does not create a trust. 15 Am. & Eng. Enc. Law (2d Ed.) 1148; Story Eq. Jur., section 1201A; Morton v. Nelson, 32 N. E. 916; Furber v. Page, 32 N. E. 444; Perry v. McHenry, 13 Ill. 227; Levy v. Brush, 45 N. Y. 589; Burden v. Sheridan, 36 Iowa, 125, 14 Am. Rep. 505; Jackson v. Stevens, 108 Mass. 94.

Evidence to establish a resulting trust must be clear, satisfactory and convincing and beyond a reasonable doubt. Corder v. Corder, 16 N. E. 107; Mahoney v. Mahoney, 65 Ill. 406; Koster v. Miller, 37 N. E. 46; Burkhardt v. Burkhardt, 77 N. W. 1069; Richardson v. Haney, 40 N. W. 115; Durfee v. Pavitt, 14 Minn. 424; Furber v. Page, supra; Murphy v. Hanscome, 40 N. W. 717; Little v. Braun, 11 N. D. 410, 92 N. W. 800; McGuin v. Lee, 10 N. D. 160, 86 N. W. 714; Sargent v. Cooley, 12 N. D. 1, 94 N. W. 576; Jasper v. Hazen, 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58.

Where an alleged loan from an alleged trustee to the beneficiary is relied on, proof must be beyond a reasonable doubt. 15 Am. & Eng. Enc. Law (2d Ed.) 1149; Jacksonville Nat'l Bank v. Beesley, 42 N. E. 164; Van Bruskirk v. Van Bruskirk, 35 N. E. 383; Green v. Dietrich (Ill.) 3 N. E. 800; Ficket v. Durham, 109 Mass. 419; Towle v. Wadsworth, 30 N. E. 602; Furber v. Page, supra; Bourke v. Callanan, 35 N. E. 460; McGowan v. McGowan, 14 Gray, 119.

Purchase price of the alleged trust property must be paid at time of or prior to the passing of the title. Keith v. Miller (Ill.) 51 N. E. 151; Barger v. Barger (Ore.) 47 Pac. 702; Taylor v. Miles (Ore.) 25 Pac. 143; Burkhardt v. Burkhardt, supra; Jones v. Storms, 57 N. W. 892; Toney v. Wendling, 37 N. E. 598; Ducie v. Ford, 138 U. S. 587, 11 Sup. Ct. Rep. 417.

A contract payable "when party can pay," is a nullity. 3 Am. & Eng. Enc. of Law (1st Ed.) 844; Davie v. Lumberman's Min. Co., 53 N. W. 625; Cummer v. Butts, 40 Mich. 322; Nelson v. Bounhorst, 29 Pa. St. 352; Hall v. First Nat'l Bank, 173 Mass. 16, 53 N. E. 154, 44 L. R. A. 319, 73 Am. St. Rep. 255.

There is a difference in the declarations of a grantee that he holds title for another, and to the effect that another's money was paid for the land. Van Bruskirk v. Van Bruskirk, supra; Donlin v. Bradley, 10 N. E. 11; 1 Perry on Trusts, section 134; Stevenson v. McClintock, 31 N. E. 310.

The admissions of a purchaser are competent to prove the consideration, but are received with great caution and entitled to but little weight. Van Bruskirk v. Van Bruskirk, supra; 1 Perry on Trusts, section 138; 10 Am. & Eng. Enc. of Law (1st Ed.) 30; Lewin on Trusts, section 168; Corder v. Corder, supra; Bragg v. Geddes, 93 Ill. 40.

Where the pleadings are based on the theory of a resulting trust, and express, voluntary or constructive trust is not alleged, the only relief possible is to decree a resulting trust. Davis v. McCullough, 61 N. E. 377; 22 Enc. Pl. & Pr. 127; Gunter v. Janes, 9 Cal. 643; Dunn v. Zwilling, 94 Iowa, 233; Manchester v. Mathewson, 3 R. I. 237; Coleman v. Perran, 43 W. Va. 737.

Burke & Middaugh, for respondent.

The payment of the consideration of the trust property by another than the legal grantee may be proven by parol evidence. Tiffany on Real Property, section 230; 1 Perry on Trusts, sections 137, 138; Hoxey v. Carr, 1 Sunn. 173 Fed. Case No. 6802; Osborne v. Endicott, 6 Cal. 149, 65 Am. Dec. 498; Strong v. Messinger, 148 Ill. 431, 36 N. E. 617; Irwin v. Ivers, 7 Ind. 308, 63 Am. Dec. 420; Baker v. Vining, 30 Me. 121, 50 Am. Dec. 617; Dryden v. Hanway, 31 Md. 254, 100 Am. Dec. 61; Depeyster v. Gould, 3 N. J. Eq. 474; Pritchard v. Brown, 4 N. H. 397, 17 Am. Dec. 431; McGinty v. McGinty, 63 Pa. St. 38; James v. Fulcrod, 5 Texas, 512, 55 Am. Dec. 743; Barker v. Logan, 82 Va. 276; Deck v. Tablar, 41 W. Va. 332, 56 Am. St. Rep. 837.

Even where the conveyance recites that it was paid by the grantee. 1 Perry on Trusts, section 137; 2 Pom. Eq. Jur., section 1040; Lewin on Trusts (9th Ed.) 176; Millard v. Hathaway, 27 Cal. 119; Irwin v. Ivers, supra; Boyd v. McLean, 1 Johns. Ch. (N. Y.) 582; Cooper v. Skeel, 14 Iowa, 578; Livermore v. Aldrich, 5 Cush. (Mass.) 481; Depeyster v. Gould, supra; Neil v. Keese, 5 Texas, 23, 51 Am. Dec. 746.

An agreement identical with that implied by law does not cause the trust to be express rather than a resulting one, and excludes

parol evidence. Smithsonian Institution v. Meech, 169 U. S. 398, 18 Sup. Ct. Rep. 396; Corr's Appeal, 62 Conn. 403; Cotton v. Wood, 25 Iowa, 43; Robinson v. Leflore, 59 Miss. 148.

If the purchase price is paid by the legal grantee, or merely on behalf of a third person or actual purchaser, and is a loan to the latter, the legal title being taken by the lender as security, a trust results in favor of such third person, and the grantee has at most merely a lien for the same advanced by him. 1 Perry on Trusts, section 133; Rothwell v. Dewees, 2 Black (U. S.) 1613; Jordan v. Gardner, 101 Ala. 411; Low v. Graff, 80 Ill. 360; Dryden v. Hanway, 31 Md. 254; Kendall v. Mann, 11 Allen (Mass.) 15; Hall v. Congdon, 56 N. H. 279; Baroilhet v. Anspacher, 8 Pac. 804; Walton v. Karnes, 7 Pac. 676; Millard v. Hathaway, supra; Sanfoss v. Jones, 35 Cal. 481; Somers v. Overhulser, 67 Cal. 237, 7 Pac. 645; Hellman v. Messmer, 16 Pac, 766; Hidden v. Jordan, 21 Cal. 93.

All trusts arising by operation of law, whether implied, resulting or constructive, are subject to the statute of limitations. Bobinson v. Stone, 45 L. R. A. 66; Hughes v. Brown, 8 L. R. A. 480; Elmendorf v. Taylor, 23 U. S. 10, 6 L. Ed. 152; Smith v. Clay, 3 Bro. Ch. 640; Houts v. Hoyne, 84 N. W. 773.

ON REHEARING.

Brennan & Gray, for appellant.

Plaintiff must elect whether he will take the profits or the value of the use of the land. Section 4273, Rev. Codes 1899; Leavenworth, etc., R. R. Co. v. Curtan, 51 Kan. 432; Scott v. Nevada, 56 Mo. App. 189; Wright v. Sanderson, 20 Mo. 534; Horton v. Dominguez, 60 Cal. 642.

The agreement involved was either a contract in regard to realty, or involving both realty and personalty, and void unless in writing. Pond v. Sheean, 23 N. E. 1018; 8 L. R. A. 414; Becker v. Mason, 30 Kan. 697, 2 Pac. 850; Fuller v. Reed, 38 Cal. 99; Mather v. Scoles, 35 Ind. 1; Cox v. Peel, 2 Bro. C. C. 334; Carlisle v. Brennan, 67 Ind. 12; Green v. Groves, 109 Ind. 519.

An agreement with the debtor to purchase his land at an execution sale and convey it to him is within the statute. Harrison v. Bailey, 14 S. C. 334; Johnson v. Plotner, 87 N. W. 926; Williams v. Stewart, 25 Minn. 516; Huff v. Shepard, 58 Mo. 242; Schmeling v. Kriesel, 45 Wis. 325; Hollenbeck v. Prior, 5 Dak. 298, 40 N. W. 347; Phillips v. Swenson, 92 N. W. 1065; Veazie v. Morse, 69 N.

W. 637; Cox v. Roberts, 57 N. E. 937; Whiting v. Butler, 29 Mich. 122; Grover v. Buck, 34 Mich. 519; Daniels v. Bailey, 43 Wis. 566.

Burke & Middaugh, for respondent.

The defendant is a trustee, and has violated section 4226, Rev. Codes 1899. He is liable under section 4273 of the Comp. Laws for the value of the use of the trust property.

YOUNG, C. J. The plaintiff brought this action to compel the defendant to convey to him 160 acres of land situated in Towner county, and to account for the rents and profits of the same for the years 1898, 1899, 1900 and 1901. The trial court held that, as to the defendant, the plaintiff was entitled to a conveyance, but that this particular relief could not be granted, for the reason that the defendant had conveyed the land to an innocent purchaser. Judgment was entered in the plaintiff's favor for the value of the land, and for the value of the use and occupancy thereof for the years 1898, 1899 and 1900, after deducting certain sums which were found to be due to the defendant. Defendant has appealed from the judgment, and demands a review of the entire case in this court, under the provisions of section 5630, Rev. Codes 1899.

The questions at issue and the grounds upon which plaintiff bases his right to relief will appear from a statement of the substance of the allegations of the complaint. It is alleged that on the 19th day of November, 1896, the plaintiff and defendant entered into an agreement by the terms of which the defendant loaned to the plaintiff the sum of $450, at the rate of 12 per cent per annum, for the purpose of buying from one Julia V. Tucker a mortgage upon the premises in question, which was executed by Michael Rock, mortgagor, to Edmund Kimball, and duly assigned to said Julia V. Tucker; that, to secure the payment of said loan, it was agreed that the assignment of said mortgage was to be made in the name of defendant, Evendon, and that he was to hold the same in trust for the plaintiff, and handle the same for plaintiff, and, if it was redeemed or paid, the proceeds were to be paid to this plaintiff, less the amount due upon his debt to defendant, and, in case the defendant foreclosed the mortgage, it was to be for the plaintiff, and the title to said land was to be held in trust for the plaintiff by the defendant, and upon the payment of the money loaned, with interest, the defendant was to deed the land to the plaintiff; that on August 28, 1897, the mortgage was foreclosed and the land bid in by the

defendant, and he took a sheriff's certificate and subsequently a deed therefor; that plaintiff has tendered the full amount of the money borrowed, with interest, and demanded a deed; that defendant refuses to accept the same, and refuses to deed the land; that the amount tendered was more than the amount due, and that the same was thereupon deposited in the State Bank of Cando to the credit of the defendant, and the defendant notified of said deposit; that the defendant farmed the land in the years 1898, 1899, 1900 and 1901, and raised grain thereon to the value of $4,500; that, under the custom in that vicinity, the plaintiff is entitled to one-third of the crop, amounting to the sum of $1,500. The prayer for relief, in addition to asking for a decree of specific performance, and for an accounting for the rents and profits, asks for general equitable relief. The defendant, in his answer, admits the foreclosure of the mortgage, but places in issue every other allegation of the complaint, and, in an amendment filed during the progress of the trial, alleges that he had sold the land to one C. J. Lord, and that by reason thereof he is unable to specifically perform any such contract as is claimed by plaintiff in his complaint, and that for this reason the plaintiff cannot maintain this action, and that his only action, if there was a valid contract, is for damages, triable to a jury; and he further alleges that plaintiff should not be permitted to recover, for the reason that the defendant did not make or sign any contract or agreement in writing, or any memorandum in writing, binding him to make a conveyance of the premises.

The trial court found the facts to be substantially as alleged in the complaint, and, as to the foreclosure, that in July, 1897, the plaintiff and defendant had engaged the firm of Cowan & McClory to foreclose the mortgage upon an agreement that the land should be bid in at the sale in the name of the defendant, and held in trust by him for the benefit of the plaintiff, and as security for the payment of the $450 loan; that said firm, acting in behalf of both plaintiff and defendant, foreclosed the mortgage and bid in the land in the name of the defendant, but for and on behalf of the plaintiff, and in trust and as security for said loan; that after the expiration of the redemption period the defendant made an affidavit stating that the sheriff's certificate of sale was lost, and, upon such affidavit, obtained a sheriff's deed; that he well knew such certificate was not lost, but was in the office of the said Cowan & McClory; that the affidavit was fraudulently made for the purpose of defeating the rights of this plaintiff. As conclusions of law, the court found that the assignment

of the mortgage to the defendant was made for and on behalf of the plaintiff, and in trust for him, and was held by the defendant as security for said loan; that the certificate of sale on the foreclosure was in fact a mortgage for the payment of said loan; that both as to the assignment of the mortgage and the certificate of sale the defendant was a voluntary trustee for the plaintiff; that as to the sheriff's deed the defendant is a voluntary and constructive trustee for the benefit of the plaintiff; that the plaintiff is entitled to a decree of specific performance upon payment of the amount loaned, with interest, and costs and expenses of the foreclosure, and to rents and profits; that C. J. Lord is an innocent purchaser of the property, and therefore the defendant cannot perform his contract; that plaintiff is entitled to recover the value of the land, together with the rents and profits, and an accounting to ascertain the value of the land and the amount of such rents and profits, and, when ascertained, to judgment therefor. In pursuance of the foregoing conclusions, a stipulation was entered into between the parties that the testimony in reference to the value of the land, and "the value of the use and rents and profits of the same," might be taken by a referee, from whose report the court found the value of the land to be $3,000; that the value of the use and occupancy for the years 1898, 1899 and 1900 was $2.50 per acre—making a total amount of $1,200, which, with 7 per cent interest on said sums to the date of the judgment, amounted to $4,641. The court further found that there was due to defendant from the plaintiff upon the loan hereinbefore referred to, and for costs and expenses incurred in the foreclosure and taxes paid, with 12 per cent interest thereon, the sum of $1,230.29; that after deducting the amount due the defendant, to wit, $1,230.29, from the amount due plaintiff, to wit, $4,641, there is due to plaintiff the sum of $3,410.71, for which sum judgment was rendered.

The defendant contends upon this appeal that the evidence fails to establish the crucial facts which lie at the foundation of plaintiff's cause of action, namely: (1) That plaintiff made a loan from defendant to buy the note and mortgage in question; (2) that the purchase from Mrs. Tucker was for plaintiff; and (3) that the note was delivered and the mortgage assigned to defendant in trust for plaintiff, as well as security for the $450 loan. In our opinion, the evidence not only sustains the findings of the trial court in the above particulars, but is of such convincing character that it leaves no doubt as to the fact. The plaintiff's testimony is consistent, and is corroborated by credible and disinterested witnesses and by docu-

mentary evidence, and by the facts and circumstances surrounding the transaction. That of defendant is without corroboration, and in material particulars is so flatly contradicted by impartial witnesses, and by his own written declaration when the money was sent to Mrs. Tucker, that the district court was fully justified in utterly discrediting his testimony, under the familiar maxim, "Falsus in uno, falsus in omnibus."

The question as to whether the agreement was sufficiently incorporated in a writing to constitute a valid declaration of an express trust in relation to real estate, and, if not, whether a trust in the land resulted by operation of law, is discussed at length by counsel for both parties. In our opinion, the question is immaterial. If the agreement in fact related to a trust in real property, its validity would depend upon section 3385, Rev. Codes 1899, which requires a writing, save in cases where the relation arises by operation of law. But we have no such case. The agreement and declaration of trust in this case related to personal property; i. e., a promissory note secured by real estate mortgage, which was a mere incident of the note. It was not necessary, therefore, to the validity of the trust relation, that it be declared in writing, for it is well settled—and on this there is no difference of opinion—that a trust of personal property is not within the statute of frauds, and may be created merely by spoken words, and proved by parol. Cobb v. Knight, 74 Me. 253; Danser v. Warwick, 33 N. J. Eq. 133; Sturtevant v. Jacques, 14 Allen, 523; Thacher v. Churchill, 118 Mass. 108; Gerrish v. New Bedford, 128 Mass. 159, 35 Am. Rep. 370; Davis v. Coburn, 128 Mass. 377; 1 Perry on Trusts, section 86. "Money secured by mortgages and other charge on real estate is not included in the statute, and may be the subject of a parol trust." 1 Beach on Trusts & Trustees, section 51, and cases cited. So, too, it is well settled that when a trustee of personal property converts it into real estate, as was done in this case, the original trust attaches to the real estate in the hands of the trustee. Cobb v. Knight, supra; 2 Story on Eq. Jur., sections 1258, 1259, and cases cited; also Bank v. Kimball Milling Co., 1 S. D. 388, 47 N. W. 402, 36 Am. St. Rep. 739, and cases cited.

Under the facts of this case, the defendant is obliged to respond as trustee to the demands of the cestui que trust by virtue of the original trust relation. His liability as trustee does not necessarily depend upon the agreement made at the time of the foreclosure sale, or upon the circumstances under which he procured the sheriff's

deed, but exists entirely independent of the facts, for it will be noted that this is not a case of a mere pledge; it is more. Under the original agreement the defendant not only received the note and mortgage as security for the money which he advanced for the purchase, but obligated himself to handle the mortgage for the plaintiff's benefit. The land in question joined plaintiff's farm. The original amount of the mortgage debt was $900, and with delinquent interest amounted to $1,100 at the time of the purchase. Aside from securing the margin of profit in case of a redemption, the plaintiff's primary purpose was to secure the land through the medium of a foreclosure. This was the object of the trust accepted by the defendant when the note and mortgage were placed in his hands. Having accepted the trust, he must respond to the obligations which arise from that relation.

The contention that compensation in money in lieu of specific performance was not authorized in this action, and that plaintiff was confined to an action at law triable to a jury, cannot be sustained. As to the defendant, the plaintiff was entitled to a conveyance. It developed during the trial that the defendant had conveyed the land to an innocent purchaser, and for that reason alone specific performance could not be made effective; but the court had properly assumed jurisdiction of the action, and it was entirely proper to give relief by way of compensation under the prayer for general relief. Whether, in any event, an action at law could have been maintained upon the facts of this case, we do not determine. See Davis v. Coburn, 128 Mass. 377, 382; Johnson v. Johnson, 120 Mass. 465.

The award for the value of the use of the land while the title was in the trustee was proper, under section 4273. The plaintiff had the option to recover the profits which the defendant obtained from the land, or the value of its use. The trial court awarded the latter, and the evidence, in our opinion, supports the award. The defendant retained the title for more than three years before consummating the sale and transferring title to Lord. The fact that defendant did not crop the land each year is not material, for the basis of the award is not profit obtained, but the value of the use.

In our opinion, the facts found by the trial court are fully sustained by the evidence. The judgment was proper, and will be affirmed. All concur.

ON REHEARING.

YOUNG, J. A rehearing was ordered as to the amount awarded to the plaintiff for the value of the use of the premises. The trial court found, from the testimony taken before the referee, "that the value of the use and occupancy of the land for the years 1898, 1899 and 1900 was $2.50 per acre, making a total value for all of said years of the sum of $1,200;" and we approved the finding upon the theory that the defendant was liable for the value of the use of the land after he had obtained the sheriff's deed, and until he sold it to Lord, whether he farmed it or not. We are convinced that in this we were in error. The defendant had title for approximately three years, but he used the land for cropping purposes only one year. The fact that he had acquired title, and held it in trust, did not obligate him to farm the land. He could not use the property for his own benefit, and, if he did, he was liable for its use. But he could refrain from using it without incurring any liability. The estimate of $2.50 per acre is for a cropping season, the land having no other value than for cropping purposes. Defendant did not crop it in 1898. In fact, he did not get the sheriff's deed until the cropping season had closed. He summer-fallowed the land in 1899, and did not crop it, but did crop it in 1900. The sale to Lord was made early in the next year.

The judgment must therefore be reduced to the extent of the amount allowed for the years 1898 and 1899, to wit, $800, and as thus modified it will be affirmed. Appellant will recover his costs in this court. All concur.

(103 N. W. 748.)

E. TORGRINSON v. NORWICH SCHOOL DISTRICT NO. 31 ET AL.

Opinion filed October 25, 1904.

Taxation — Tax Levy — Injunction.

Where the only injury which a taxpayer will suffer through a proposed tax levy, which is claimed to be in part to provide funds for the payment of an illegal claim, is the imposition of a tax upon his property, a court of equity will not interfere at his suit to restrain the levy and suspend the regular course of tax proceedings upon the ground that his injury will be irreparable. When his property rights are invaded by the unlawful imposition of the tax, his remedies at law or in equity, as the case may be, are adequate.

Appeal from District Court, McHenry county; *Palda, Jr.*, J.

Action by E. Torgrinson against the Norwich School District No. 31 and others. Judgment for defendants, and plaintiff appeals. Modified.

Christiansen & Weber and *A. M. Christiansen, Morrill & Engerud*, of counsel, for appellant.

An obligation incurred without a levy or appropriation is void. City of Fargo v. Keeney, 11 N. D. 484, 92 N. W. 836; Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292.

The constitution forbids taxation except for legally authorized purposes, and the object of every tax must be stated; this forbids using the funds raised by taxation for a purpose different from that for which the levy was made. Smith v. Broderick, 40 Pac. 1033; Schwartz v. Wilson, 17 Pac. 449; City of Indianapolis v. Wann, 42 N. E. 901.

The general fund resulting from tax levies cannot be diverted into a special fund for free text books. The proceedings were void because no bids were advertised for. Under the statute bids must be advertised for and contracts let to the lowest bidder. Tiedeman on Municipal Corporations, section 173; Commissioners v. Templeton, 51 Ind. 226; Follmer v. Michalls Co., 6 Neb. 204; Schum v. Sevmour, 24 N. J. Eq. 143; Winn v. Shaw, 25 Pac. 968; McCloud et al. v. City of Columbus, 44 N. E. 95; Frame v. Felix, 27 L. R. A. 802; Fones Bros. Hdw. Co. v. Erb, 13 L. R. A. 353; Colorado Paving Co. v. Murphy, 37 L. R. A. 630; Dillon on Mun. Corp. (4th Ed.) 466.

The resolution to adopt free text books was merely executory and could be rescinded. Waukesha Hygeia M. S. Co. v. Village of Waukesha, 53 N. W. 675; Tilden v. Board of Supervisors, 41 Cal. 68.

Where the contract was put into execution the board could not rescind or repudiate it. State of Louisiana v. Pillsbury, 105 U. S. 278, 26 L. Ed. 1090; Hanna v. Putnam Co., 29 Ind. 170; Nelson v. Milford, 7 Pick. 18; Hall v. Holden, 116 Mass. 172; Northampton Co.'s Appeal, 57 Pa. St. 452; Indianapolis v. Gas Co., 66 Ind. 396; State v. Board, 35 Ohio St. 368; State v. Hastings, 15 Wis. 75.

A contract for copyrighted books selected before advertising for bids is against public policy and void. Fishburn v. Chicago, 39 L. R. A. 482; Nicholson Pavement Co. v. Painter, 35 Cal. 699; Dean v. Carlton, 23 Wis. 590, 99 Am. Dec. 205; 1 Dillon on Mun. Corp. (4th Ed.) section 467.

The plaintiff as a taxpayer has the inherent right to enjoin any unlawful expenditure of public money and to prevent by injunction the making of any contract or the taking of any action that will result in the unlawful expenditure of public money or the unlawful issuance of warrants or other evidence of debt. Fones Bros. Hdw. Co. v. Erb, 13 L. R. A. 353; Honaker v. Board of Education, 32 L. R. A. 413; Colorado Paving Co. v. Murphy, 37 L. R. A. 630; 2 Dillon Mun. Corp. (4th Ed.) sections 914, 915, 1106; Furrer v. Ferris, 145 U. S. 132, 12 Sup. Ct. Rep. 821; Grannis v. Board of Commissioners, 83 N. W. 495; Americus v. Perry, 57 L. R. A. 230; Rushville v. Rushville Natural Gas Co., 15 L. R. A. 321; Sanford v. Poe, 60 L. R. A. 641; McLain v. Maricle, 83 N. W. 85; Barry v. Goad, 26 Pac. 785; Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292; Storey v. Murphy, 9 N. D. 115, 81 N. W. 23; Roberts v. City of Fargo, 10 N. D. 230, 86 N. W. 726.

If an unlawful contract has been executed the remedy is not barred if the contract is intrinsically ultra vires. Such a contract cannot be ratified nor be barred by laches. Storey v. Murphy, supra; Engstad v. Dinnie, supra; Beach Pub. Corp., section 248; Northern Bank of Toledo v. Poster Twp. Trustees, 110 U. S. 608, 28 L. Ed. 258.

Where the facts are undisputed upon which the plaintiff is entitled to the relief sought, it is an abuse of discretion to deny it. Donovan v. Allert, 11 N. D. 289, 95 Am. St. Rep. 720; Sharpe v. Kennedy, 51 Ga. 257; Summerville v. Reid, 35 Ga. 47; Byrd v. Johnson, 38 Ga. 113; Hinman v. Paper Co., 10 N. W. 160; Martin v. Luger Furniture Co., 8 N. D. 220, 77 N. W. 1003.

The court erred in allowing $50 motion costs. The statute limits such costs to $25. Rev. Codes 1899, section 5589. Costs are entirely under legislative control. 5 Enc. Pl. & Pr. 110, 111.

Benton, Lovell & Holt, for respondents.

The constitutional restriction upon indebtedness contained in section 184 applies only to interest-bearing obligations extending over a period of years. Carter v. Thorson, 5 S. D. 474, 59 N. W. 469; Herman v. City of Oconto, 86 N. W. 681; Tatham et al., Appeal, 80 Pa. St. 465; Appeal of Lehigh Coal & Nav. Co., 5 Atl. 231.

In view of the size of Deep River school district, the purchase of the books in question was a trifling and ordinary expenditure incident to carrying on the schools of the district. Such expenditures

are not within the constitutional prohibition. Dwyer v. City, 65 Tex. 526; Corpus v. Woessner, 58 Tex. 462; Leonard v. Long Island City, 20 N. Y. Supp. 26; Tucker v. Raleigh, 75 N. C. 267; Appeal of Lehigh Coal & Nav. Co., 5 Atl. 231; Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292.

It has not been pleaded nor proved that there were not enough funds on hand or available from anticipated revenues, not otherwise appropriated, to meet the purchase of the books; if this is true the constitutional restriction cannot have been violated. Brashear v. City of Madison, 142 Ind. 685, 36 N. E. 252, 42 N. E. 349, 33 L. R. A. 474; South Bend v. Reynolds, 49 L. R. A. 795; Winston v. City of Fort Worth, 47 S. W. 741.

If the district had the power to make the purchase of the text books in question by making a levy for the purpose, it must be held to have ratified the purchase by accepting and using the text books and it is liable for the purchase price. Stevens v. District, 35 Iowa, 462; Bellows v. District Twp. of West Fork, 30 N. W. 582; Union School Furniture Co. v. School District No. 60, Elk County, 32 Pac. 368; Jones v. School District No. 3 of Iosco, 68 N. W. 222; Andrews v. School District No. 4, 33 N. W. 217.

The constitutional provision relied on does not apply to a purchase such as is sought to be defeated by this action. City of Denver v. Webber, 63 Pac. 804; Carlton v. City of Washington, 17 Pac. 656; Hanna v. Wright, 89 N. W. 1108.

YOUNG, C. J. The plaintiff has appealed from an order vacating a temporary injunction. The action in which the restraining order was issued was instituted by the plaintiff as a taxpayer of Deep River school district, in McHenry county, to enjoin a tax levy to pay for certain school books which had theretofore been sold and delivered to said district by Rand, McNally & Co., and were in use for more than a year when the action was instituted. The order dissolving the temporary injunction was made upon an order to show cause, and was based upon the complaint and answer and a number of affidavits and after a full hearing.

The complaint consists of sixty-three paragraphs. Among other things it alleges, in substance, that the plaintiff is a resident and taxpayer in Deep River school district; that on July 8, 1903, said district was divided into a number of new districts created from the same territory; that in September, 1903, pursuant to the provisions of sections 731, 732, 733, Rev. Codes 1899, each of said

districts so created appointed an arbitrator, and that said arbitrators met "as required by law, and proceeded to take an account of the assets, funds on hand, and the debts belonging to or chargeable against and to each of said school corporations;" that in making said equalization said arbitrators took into account and allowed as a debt against Deep River school district certain bills for books alleged to have been purchased from Rand, McNally & Co.; that said board is about to levy and apportion the amount so allowed upon the several school corporations into which said original school district was divided, and "threatens to and is about to levy against" said school districts "a large portion of said indebtedness so apportioned," and intends to include therein the alleged debt claimed to be due said Rand, McNally & Co., and threatens to certify the same to the county auditor of McHenry county in the manner prescribed by law, and the county auditor "is about to accept the said statement and levy, and threatens to extend the same against the taxable property of the said respective school corporations;" that the plaintiff "will be irreparably injured unless the acts complained of are enjoined, and that his burdens of taxation will be increased, and the public funds and assets of said school districts wasted, unless the relief prayed for is granted." The complaint sets out the written contract under which the books were furnished, and alleges in great detail the ground upon which it is claimed that the purchase of books from Rand, McNally & Co. was without authority of law; and also alleges that the school board entered into another contract to purchase its books from a rival book concern, namely, the American Book Company, which contract plaintiff alleges is legal and binding upon the district. The real controversy is between the two rival book concerns. The plaintiff champions the cause of the American Book Company, which thus far has not succeeded in having its books accepted and used by the district, and as a taxpayer seeks to enjoin a tax levy to pay for the books which were accepted from Rand, McNally & Co. His prayer is that the board of arbitrators be enjoined and restrained from taking into account any part of the alleged debt to Rand, McNally & Co., and that the county auditor be enjoined from accepting or receiving from the arbitrators any statement or levy, and from extending against the taxable property of said school corporations any part or portion of said levy based upon and including the Rand, McNally & Co. debt; that the contracts with Rand, McNally & Co. be set aside, and that a temporary restraining order be issued.

The directors of Deep River school district, and of the several school districts created therefrom, the board of arbitrators, the county auditor, superintendent of schools, and Rand, McNally & Co. were made defendants. The temporary injunction restrained the defendants from taking into account the purchase of books from Rand, McNally & Co., and from issuing orders on the several school boards, and from "certifying such alleged indebtedness to the county auditor."

The duty and authority of the board of arbitrators is set out in section 732, Rev. Codes 1899, and is as follows: "Such board shall take an account of the assets, funds on hand, the debts properly and justly belonging to or chargeable to each corporation or part of a corporation affected by such change, and levy such a tax against each as will in its judgment justly and fairly equalize their several interests."

Section 733, Rev. Codes, provides that the levy of the board of arbitrators upon the several school corporations shall be certified to the county auditor, and that "such levy shall be deemed legal and valid upon the taxable property of each corporation."

From the foregoing it will be seen that the real purpose of the action was to enjoin a tax levy, and upon the ground that the board of arbitrators, which was clothed with authority to pass upon the obligations of the original district and to make the levy, was about to allow an item which plaintiff claims is illegal and should not be allowed, and to levy a tax therefor. The question presents itself at the outset whether, upon the facts stated in the complaint, a court of equity will enjoin the levy, and whether the complaint states facts entitling the plaintiff to the remedy which he seeks. We are of the opinion, for reasons hereinafter stated, that it does not, and we reach this conclusion without regard to the merits of the controversy as to the legality of the contract in question. It follows from this conclusion, necessarily, that the temporary injunction was properly vacated, and that the order appealed from must be affirmed.

The plaintiff does not rest his right to equitable relief upon the ground that a multiplicity of suits will result if it is not granted, neither does the complaint present a case of threatened diversion of school funds. The orders which it is alleged the board of arbitrators is about to issue are without authority in the statute, and will create no liability against the school districts. It is not alleged that any officers having control of the school funds are about to pay the debt in question or that there are funds in existence from which it

could be paid. On the contrary, the plaintiff's position is that the board of arbitrators intends to allow this claim and to provide for its future payment by a tax levy, and that his property will have to bear its share of the illegal exaction unless the levy is enjoined. The only ground for the interference of equity which can be urged upon these facts is that the plaintiff will be irreparably injured unless the levy is enjoined, and that is the real contention. This ground cannot be sustained. Assuming, for the purpose of this case, merely that the item in question is illegal, what of it? There is a mere threat by the board of arbitrators to levy a tax which, in due course, may become a charge upon the plaintiff's property. But will the levy which he seeks to enjoin invade his property rights? Will his property be taken or destroyed by the levy so that it may be said that he is irreparably injured? We think not. The threatened levy is upon the entire district. It is only when his share of the levy shall be ultimately apportioned and made a charge upon his property that it can be said that his rights have been invaded, and as against such invasion he will have adequate remedies, either at law or in equity, as the case may be, without interrupting the acts of the officers charged with the duty of making the levy. In case the tax is upon his personalty, he may pay it under protest and sue to recover it back. Schaffner v. Young, 10 N. D. 245, 86 N. W. 733; Railway Co. v. Dickey County, 11 N. D. 107, 90 N. W. 260. This remedy is deemed adequate. And he has his remedy when it clouds the title to his realty. He will then have his remedy in equity to remove the cloud, but he may not enjoin the official action of the taxing officers in advance of the actual invasion of his property rights by the imposition of a tax upon his property. The reasons for this rule are well stated in Miller v. Grandy, 13 Mich. 540. In that case the electors of a township at a regular meeting had voted to refund moneys advanced to pay bounties to volunteers in the civil war. A taxpayer filed a bill on behalf of himself and all other taxpayers against the members of the board to restrain them from allowing any accounts for moneys advanced for bounty, and to restrain the clerk from issuing orders on said accounts if allowed, and the supervisors from inserting any amounts on the assessment roll. The complainant sought to sustain his bill upon the grounds: First, a special interest in protecting his taxable property; and, second, his interest in common with all taxpayers. Both grounds were denied. In that case it was said: "Before the extraordinary relief of an injunction against the action of municipal boards in their

public capacity can be granted, where it will at all interfere with their strictly public functions, a court of equity must have full allegations of the precise rights which will be injured, and must see that without its aid an injury will result which cannot be adequately remedied otherwise. When such a case arises, public consideration may impose serious obstacles, which may even then prevent interference. * * * We feel confident that no case can be found which recognizes any propriety in enjoining the preliminary proceedings, in advance of the actual levy of a tax, on either personalty or realty. Apart from the palpable difficulty of determining in advance whether the complainant will be in a condition to be injured when the tax is assessed, it is always to be remembered that under our system taxes must be provided for at regular times, and by annual and somewhat rapid proceedings. They are assessed against entire districts at once, and the staying of proceedings on behalf of one person stops the revenue system of the entire community. Before a suit in chancery could be regularly brought to a hearing on proofs in the circuit court (to say nothing of the hearing on appeal), the time for action by the local officers would have gone by. No court could ever be justified in such an interference with the necessary course of government. After a tax has been assessed and becomes collectible, each man's share becomes severable from the rest, and delaying its payment will not necessarily operate upon his neighbors. When his land is in danger of being affected by a cloud upon its title, a sufficiently clear case will then enable him to be relieved. Palmer v. Rich, 12 Mich. 414. But until that danger arises he cannot ask protection, and where nothing but personalty is concerned the circumstances must be very peculiar which will warrant equitable interference. These principles are familiar, and rest on good sense and sound policy. The present case is an excellent illustration of the necessity of this rule; for, before it had been argued in this court, the town board had lost all power to proceed, and, had an injunction been granted and kept alive up to this time, a decision in favor of the authority of that body would not have aided them at all. Their whole functions, in respect to the proceedings complained of, would have been destroyed without any hearing on the merits. Such results demonstrate the impropriety of any interference, while their preliminary action has not been consummated." The reasons advanced in support of the rule laid down in the foregoing case were sustained and amplified in the opinion of Judge Cooley in Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654.

In Judd v. Town of Fox Lake, 28 Wis. 583, it was held that the mere fact that the voters of a town meeting had voted an illegal tax was not sufficient ground for enjoining the town officers from assessing or collecting the tax; and, further, that equity would not interfere with public officers at the suit of a private person until they had actually done some act in violation of his legal rights or threatening him with irreparable injury. In that case a town meeting had voted to raise $500 by taxation for a purpose alleged to be illegal, and an injunction was sought by a taxpayer. It was denied. The court said: "It is, supposing the resolution of the voters in town meeting to have been unauthorized, and the proposed tax illegal, at most a mere anticipated or threatened invasion of the legal rights of the plaintiffs, which as yet has ripened into nothing injurious or detrimental to them at all, and perchance may never do so, but which, if it ever should, would not in its nature be irreparable, but might be redressed by the ordinary processes known to courts of law and equity. Should the officers of the town attempt to carry the resolution into effect, and assess a tax wholly unauthorized and illegal, as the complaint charges, the plaintiffs will have their action at law to recover back the money if paid under protest or on levy or distress of personal property; and if the same be extended against their real estate, they will also have their suit in equity to remove the supposed lien and cloud from their title." The rule laid down in this case has been uniformly followed in Wisconsin. West v. Ballard, 32 Wis. 168; Gilkey v. City of Merrill, 67 Wis. 459, 30 N. W. 733; Sage v. Fifield, 68 Wis. 546, 32 N. W. 629; Pedrick v. City of Ripon, 73 Wis. 622, 41 N. W. 705, 3 L. R. A. 269. See, also, Brodnax v. Groom, 64 N. C. 244; Armstrong v. Taylor County Court, 41 W. Va. 602, 24 S. E. 993; Bardrick v. Dillon, 7 Okl. 535, 54 Pac. 785; Lawrence v. Traner, 136 Ill. 474, 27 N. E. 197; Truesdall's Appeal, 58 Pa. 148; 2 Cooley on Taxation (3d Ed.) 1437.

Counsel for appellant rely upon Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292; Storey v. Murphy, 9 N. D. 115, 81 N. W. 23; and Roberts v. City of Fargo, 10 N. D. 230, 86 N. W. 726. These cases, in harmony with the weight of authority, sustain the right of an individual taxpayer to maintain an action to enjoin an unlawful use of public funds. Neither one of the cases referred to involved the right of a taxpayer to enjoin a tax levy. This question has never before been presented to this court.

It is neither necessary nor proper to determine whether the complaint states sufficient grounds for other relief or whether upon the

record the plaintiff was entitled to an order restraining other acts. No such questions are involved. This appeal is from the order vacating the temporary injunction which, and in terms, among other things, restrained the tax levy. Appellant asks to have the order restored; in other words, to have the levy enjoined. This, as we have seen, may not be done.

The trial court allowed $50 motion costs. This was error. Section 5589, Rev. Codes 1899, limits the amount to $25, and the allowance will be reduced to that sum.

The order vacating the temporary injunction, but modified as to costs, must be affirmed.

MORGAN, J., concurs.

ENGERUD, J., having been of counsel, not participating.
(103 N. W. 414.)

FRANK WELCH v. THE NORTHERN PACIFIC RAILWAY COMPANY.

Opinion filed December 16, 1904.

A Contract Limiting Liability of Carrier, Drawn by Him, Is Construed Liberally in Favor of the Shipper.

1. A contract between a common carrier and a shipper of stock, drawn by the common carrier, and for his benefit, so far as limiting his liability is concerned, is to be construed liberally in favor of the shipper.

Judgment Notwithstanding Verdict — Variance — Amendment.

2. A judgment notwithstanding the verdict will not be upheld, under chapter 63, page 74, Laws 1901, on the ground merely that there was a variance between the cause of action stated and the proof adduced. It must further appear that no amendment of the complaint can properly be made.

Failure of Proof Will Not Warrant Judgment Notwithstanding Verdict Unless Defect Can Be Supplied on Another Trial.

3. A judgment notwithstanding the verdict will not be sustained, under chapter 63, page 74, Laws 1901, on the ground that there was a failure of proof as to some essential element of the cause of action. It must further reasonably appear that such defect of proof cannot be supplied on another trial.

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

Action by Frank Welch against the Northern Pacific Railway Company. Judgment for defendant and plaintiff appeals.

Reversed.

E. R. Sinkler, for appellant.

Defendant having moved for judgment notwithstanding the verdict and not in the alternative for a new trial, if the court erred in ordering judgment, the appellate court will order judgment for the amount of the verdict. Bragg v. C., M. & St. P. Ry. Co., 83 N. W. 511; Aetna Indemnity Co. v. Schroeder, 12 N. D. 110, 95 N. W. 436; Marquardt v. Hubner, 80 N. W. 617; Kreatz v. St. Cloud School Dist., 81 N. W. 533.

Judgment notwithstanding the verdict will not be granted when it appears that a person has a good cause of action, or defense, which has not been supported by reason of technical defects in the evidence, which may be supplied on another trial. Cruikshank v. Insurance Co., 77 N. W. 958; Marquardt v. Hubner, supra; Merritt v. Great Northern Ry. Co., 84 N. W. 321; Brag v. Railway Co., 83 N. W. 511; Hemstad v. Hall, 66 N. W. 366; Johns v. Ruff, 12 N. D. 74, 95 N. W. 440; Hernan v. St. P. City Ry. Co., 67 N. W. 71; Lough v. Thornton, 17 Minn. 253.

Grounds on which motion for a directed verdict is made must be specified. Tanderup v. Hansen, 66 N. W. 1073; Bowman v. Eppinger, 1 N. D. 21, 44 N. W. 1000; Sanford v. Duluth & Dak. Elevator Co., 2 N. D. 6, 48 N. W. 434.

There is nothing to show that defendant has been misled or prejudiced by variance, if there is any. Rev. Codes, sections 5293, 5294; Place v. Minister, 65 N. Y. 89; Catlin v. Gunter, 11 N. Y. 368, 62 Am. Dec. 113; Blackman v. Wheaton, 13 Minn. 326; Hermist v. Green, 75 N. W. 819; Smith v. Lippincott, 49 Barb. 398; Sussdorff v. Schmidt, 55 N. Y. 319; Farrill v. Palmer, 36 Cal. 187; Patterson v. Keystone Mining Co., 30 Cal. 360.

It cannot be said that plaintiff did not comply with his contract, when his failure to comply was caused by negligence of the defendant. Smith v. Michigan Cent. Ry. Co., 58 N. W. 651; Taylor & H. Railway Co. v. Montgomery, 16 S. W. 178; Burns v. Chicago, M. & St. P. Ry. Co., 80 N. W. 927.

In an interstate contract of carriage, under section 4386, Rev. St. U. S., it is the duty of a railway company, if the person in charge failed to feed live stock, to feed and water said stock, and its failure

is gross negligence. Burns v. Chicago, M. & St. P. Ry. Co., 80 N. W. 927; Brockway v. Amer. Express Co., 47 N. E. 87; Nashville Ry. Co. v. Higgie, 86 Ga. 210, 22 Am. St. Rep. 453; Chesapeake & Ohio Ry. Co. v. Amer. Exch. Bank, 23 S. E. 935; Taylor & H. Ry. Co. v. Montgomery, 16 S. W. 178.

The usual time to make the run from South St. Paul to Grafton is twenty-four hours. If the company tries to do too much business with one crew by putting too many cars together, and were delayed thirty-two hours, negligence is presumed from such delay. Moulton v. St. P., M. & M. Ry. Co., 16 N. W. 497; Richmond R. R. v. Tonsdals, 99 Ala. 389, 42 Am. St. Rep. 69; Kinnick v. C., R. I. & P. Ry. Co., 29 N. W. 772.

Where the shipper shows live stock in good condition when shipped and in bad condition and injured at the journey's end, a prima facie case is made, and the carrier must show that the injury accrued from no negligence on its part. Boehl v. C., M. & St. P. Ry. Co., 46 N. W. 333; Hull v. C., M. & St. P. Ry. Co., 43 N. W. 391.

Ball, Watson & Maclay, for respondent.

A party must recover upon the case made by his complaint. Ausk v. Great Northern Ry. Co., 10 N. D. 215, 86 N. W. 719; Penn. Co. v. Walker, 64 N. E. 473; Terre Haute & L. Ry. Co. v. Sherwood, 31 N. E. 781, 32 Am. St. Rep. 239; Sanders v. Hartge, 46 N. E. 604; Hall v. Railway Co., 90 Ind. 459; Kimball v. Rutland & B. Ry. Co., 26 Vt. 247, 62 Am. Dec. 567; 3 Enc. Pl. & Pr. 852; Normile v Oregon R. & Nav. Co., 69 Pac. 928.

Plaintiff pleads a common law contract. The evidence discloses a special contract, with valid exemptions. It was incumbent on him to allege and prove excuse for his failure to perform the conditions of the contract. The stipulations were valid. 5 Am. & Eng. Enc. of Law, 453; Rev. Codes, section 4231; Squire v. New York Central R. R. Co., 98 Mass. 239, 93 Am. Dec. 162; Grieve v. Illinois Cent. Ry. Co., 74 N W. 192; Morse v. Ry. Co., 53 Atl. 874.

Proof is insufficient to sustain the verdict. He gave no notice of loss prior to removing the stock from its destination. This was a lawful stipulation. Sprague v. Missouri Pac. Ry. Co., 8 Pac. 465; Wichita Ry. Co. v. Koch, 28 Pac. 1013; Selby v. Wilmington & W. Ry. Co., 18 S. E. 88, 37 Am. St. Rep. 633; 5 Am. & Eng. Enc. of Law, 454.

The complaint charges damages due to over crowding, which resulted in smothering and scalding the sheep. The proof supports the claim. Conceding that the delay in reaching the destination was due to the defendant's negligence; that under the federal statute it was bound to feed, water and rest the stock every twenty-eight hours, whether it did, or did not furnish facilities to plaintiff for doing these things, and the sheep suffered injury thereby, the negligence of the plaintiff in overloading the cars, joined to that of the defendant in the matters stated, together produced the damages sued for. Where negligence is relied upon, the party pleading it must show himself free from it, and that his own acts have not contributed to produce the results complained of.

The case was a proper one in which to enter judgment for the defendant. No amendment of his complaint could make recovery possible.

MORGAN, C. J. The complaint in this action alleges that the defendant negligently failed to comply with its duty as a common carrier on a shipment of two carloads of sheep from St. Paul, Minn., to Grafton, N. D. The negligence charged is (1) overloading the cars; (2) delay in delivering the sheep, by reason of which they were not delivered at Grafton until fifty-six hours after loading, the usual time required to transport such property between said places being from twenty-four to thirty hours; (3) failure to feed and water the sheep while on the road. The answer sets forth the following affirmative defenses in addition to a general denial: (1) That the sheeep were carried by the defendant between said places under a written contract stipulating that the defendant was not to be held liable for any damages for its failure to comply with said contract unless such damages were immediately caused by the misconduct or the actual negligence of the defendant, its agents, servants or employes; (2) that plaintiff failed to comply with a stipulation of said contract providing that plaintiff should give notice in writing to some officer or station agent of said company of any damage claimed for breach of said contract before said sheep should be removed from the place of destination or mingled with other stock; (3) that any damages to plaintiff's sheep on said shipment under said contract were caused by plaintiff's misconduct and negligence. The jury returned a verdict in plaintiff's favor for the sum of $454. Upon the rendition of such verdict, the defendant moved for judgment notwithstanding the verdict upon the grounds stated in a

motion for a directed verdict, which had been denied. These grounds were (1) insufficiency of the evidence to justify a verdict in plaintiff's favor; (2) failure to comply with the conditions imposed by the contract on plaintiff; (3) variance between the cause of action stated in the complaint and the proof relied on to sustain the cause of action.

Before the motion for judgment notwithstanding the verdict was granted, the plaintiff asked leave to amend the complaint in several particulars. Among the amendments asked was one alleging that the sheep were shipped under the written contract which had been received in evidence; that plaintiff had complied with all the conditions of the same; and another amendment was asked to the effect that the caboose on which the plaintiff was riding had been negligently separated from the cars in which the sheep were being carried, and that in consequence thereof the plaintiff was not able to care for such sheep for about twenty hours, and that they were damaged in consequence of not having been fed and watered during that time. The amendment asked further alleged that the defendant negligently refused to furnish facilities for feeding and watering said sheep during said shipment. On objection made, the court refused to allow the amendment.

The only question raised on the appeal is whether it was error to grant the motion for judgment notwithstanding the verdict. On the part of the respondent it is claimed that the evidence shows that the plaintiff is not entitled to recover under any circumstances, as a matter of law. He insists that, the plaintiff having alleged as his cause of action a common-law contract of carriage, he cannot recover under a special contract in writing, without having pleaded such special contract; that the defendant is entitled to the benefit of the conditions of such written contract limiting its liability under some circumstances, and imposing upon the plaintiff certain duties in reference to the performance of the contract that were not fulfilled by him. Defendant especially insists that the plaintiff is precluded from ever recovering judgment in the case, for the reason that he neglected to serve notice upon the defendant of damages to the sheep caused by defendant's negligence during the shipment, "before said stock had been removed from the place of destination or mingled with other stock," as provided by the contract. The evidence fails to show a violation of this requirement. It is shown that the sheep were not removed beyond the limits of Grafton before the notice in writing was served, and it is also shown that the sheep were not

mingled with other sheep until a long time after the notice was served. This provision was made a part of the contract for the benefit of the defendant, and the contract was drawn by the defendant. Such a contract limiting the liability of common carriers is construed strictly against the carriers. To construe the contract so that the word "destination" would mean the premises of the defendant where the sheep were unloaded would be too strict, and not in harmony with the rule that the shipper is entitled to a liberal construction of such contracts in his favor. Cream City Ry. Co. v. Chicago, M. & St. P. Ry. Co., 63 Wis. 93, 23 N. W. 425, 53 Am. Rep. 267; Hooper v. Wells, 27 Cal. 11, 85 Am. Dec. 211.

It is also claimed by the defendant that plaintiff can in no event recover in an action on this contract, for the reason that it provides that the shipper was to feed and water the sheep while being transported. The contract does so provide. Plaintiff offered to show, and asked to have the complaint amended to allege, that, through the negligence of the defendant, it was rendered impossible for the plaintiff to feed the sheep, as they were carried several miles from where he was left, and they so remained for twenty hours, during which time the sheep were not fed or watered. Plaintiff further offered to amend his answer, and to prove that the defendant refused to furnish facilities for watering and feeding the sheep during the fifty-six hours they were kept in the cars. We think it was error to refuse to allow the plaintiff to show these facts, and, if necessary, to amend the complaint so as to make such facts admissible. The question is only mentioned as bearing upon the right of the defendant to judgment notwithstanding the verdict. It is well settled that a common carrier must provide facilities and opportunity for feeding and watering stock during transportation, in cases where the shipper agrees in the contract to feed and water them. The carrier is only absolved by such a contract from attending to the additional work of feeding and watering, but is not excused from affording the shipper the opportunity of so doing whenever it becomes reasonably necessary. A negligent failure to do so renders the carrier liable, if damages result directly from such failure. 6 Cyc., p. 438; Am. & Eng. Enc. of Law, vol. 5, p. 440; Smith v. Michigan Central Ry. Co. (Mich.) 58 N. W. 651, 43 Am. St. Rep. 440; Burns v. Chicago, M. & St. P. Ry. Co., 104 Wis. 646, 80 N. W. 927; Grieve v. Illinois Central Ry. Co., 104 Iowa, 659, 74 N. W. 192; Taylor, B. & H. Ry. Co. v. Montgomery (Tex. App.) 16 S. W. 178; Elliott on Railroads, vol. 4, section 1549.

The omission to plead the refusal to provide facilities for feeding and watering could in no case be ground for granting a motion for judgment notwithstanding the verdict. If the complaint is susceptible of amendment to supply an insufficient statement of a cause of action, the amendment must be allowed; and a judgment notwithstanding the verdict, rendered on a defective pleading, or upon evidence that is deficient in some particular, will not be upheld. The pleading must be deficient to the extent that no amendment thereof can be made, before a party can be deprived of his right to have a jury pass upon the facts that would be admissible if the pleadings were amended. A variance between the cause of action set forth and the proof adduced under it does not justify a judgment notwithstanding the verdict in such cases. A new trial may be granted in such case, or a verdict directed, but a party cannot be deprived of a right to amend the pleadings on a new trial by a summary judgment under the provisions of chapter 63, p. 74, Laws 1901, authorizing a judgment notwithstanding a verdict. The same rule is applicable upon failure of proof in reference to a fact not proven, without which the cause of action is not established. Before a judgment can be properly ordered under that chapter, it must reasonably appear that the defect in proof cannot be remedied if a new trial be granted This is the rule established in this state by several decisions, and in Minnesota, from which state the statute was taken. Richmire v. Elevator Co., 11 N. D. 453, 92 N. W. 819; Nelson v. Grondahl, 12 N. D. 130, 96 N. W. 299; Aetna Indemnity Co. v. Schroeder, 12 N. D. 110, 95 N. W. 436; Meehan v. Great Northern Ry. Co., 13 N. D. 432, 101 N. W. 183; Marquardt v. Hubner (Minn.) 80 N. W. 617; Cruikshank v. Insurance Co. (Minn.) 77 N. W. 958; Merritt v. Railway Co. (Minn.) 84 N. W. 321.

The plaintiff declared upon a cause of action based on the common-law liability of the defendant as a common carrier. It was established on the trial that, if any liability arose, it was upon a special contract of shipment, in which the defendant's liability was limited. But it does not appear that plaintiff has no cause of action upon the contract, if properly pleaded.

Inasmuch as a motion for a new trial was not joined with the motion for judgment notwithstanding the verdict, the question as to whether the defendant's right to move for a new trial still exists, or whether a new trial ought to be granted if a motion to that effect is made in time, is not before us on this appeal.

Reversed. All concur.

(103 N. W. 396.)

THOMAS BEARE v. J. A. WRIGHT AND E. C. BATES.

Opinion filed January 9, 1905.

Deceit — Measure of Damages.

1. In an action to recover damages for false and fraudulent representations, by which the plaintiff had been induced to exchange real property for stock in a corporation, and had affirmed the contract after discovering the deceit, the measure of plaintiff's recovery, in the absence of a claim for special or exemplary damages, is the difference in value between what was received or parted with, as the case may be, and what would have been received or parted with, had the representations been true.

Misrepresentation of Price Paid for Property, in the Absence of Fiduciary Relation or Contract, Not Actionable Deceit.

2. Misrepresentations of the price paid for property by the vendor or others do not constitute actionable deceit, in the absence of fiduciary relations between the parties, or other facts or circumstances giving rise to an express or implied agreement that the price paid should determine the price in the contract.

Special Verdict Insufficient to Support Judgment — New Trial.

3. Where the facts found in a special verdict are insufficient to support the judgment for plaintiff, by reason of the absence of findings on matters in dispute essential to the complete determination of the issues, a new trial must be granted.

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

Action by Thomas Beare against J. A. Wright and E. C. Bates. Judgment for plaintiff. Defendants appeal.

Reversed.

Tracy R. Bangs, for appellant.

Where one is deceived or defrauded, he can recover as damages the difference between the value of what he would have obtained had the statement been true and the value of what he received. Fargo G. & C. Co. v. Fargo G. & E. Co., 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 593. The instruction, "If you believe from the evidence that any witness has willfully sworn falsely as to any material issue in the case, then you are at liberty to disregard his entire testimony, except in so far as it has been corroborated by other credible evidence or by the facts and circumstances proved on the trial," was erroneous. Roth v. Wells, 29 N. Y. 471; Wells on Quest. Law and Fact, pp. 279 and 425; Blashfield Instr. to Jury,

p. 566; Hurlbut v. Leper, 81 N. W. 631; State v. Sexton, 72 N. W. 84; Minich v. People, 9 Pac. 4; Fraser v. Haggerty, 49 N. W. 616 (Mich.); People v. Sprague, 53 Cal. 491; Wilkins v. Earle, 44 N. Y. 172; The Sanctissima Trinidad v. The St. Ander, 7 Wheat. 283; Gillitt v. Wimer, 23 Mo. 77; People v. Strong, 30 Cal. 151.

ON REARGUMENT.

A material representation is one that relates to condition, kind and quality of the property at the time it is described, and which is believed and relied on by the persons to whom it is made, and which moves and induces them to act in a manner that they would not have acted had such representations not been made. The representation of the price paid for the stock by the parties named, standing as it does alone and not associated with any other representations of the condition, quality or kind of the property purchased, or any other matters affecting its value, is of a matter wholly collateral to the subject matter of the transaction, and will not constitute a basis for recovery for deceit in a material matter. Blair v. Buttolph, 33 N. W. 349; Palmer v. Bell, 85 Me. 352; O'Brien v. Lugues, 81 Me. 46; Hedden v. Griffin, 49 Am. Rep. 25; Fulton v. Hood, 75 Am. Dec. 664; Am. B. & L. Assn. v. Boer, 67 N. W. 500; Medbury v. Watson, 6 Met. 259; Hemmer v. Cooper, 8 Allen, 334; Way v. Ryther, 42 N. E. 1128; Cooper v. Lovering, 106 Mass. 77; Gasnett v. Glazier, 43 N. E. 193; Halbrook v. Conner, 60 Me. 578, 11 Am. Rep. 212; Bishop v. Small, 63 Me. 12; Bourn v. Davis, 76 Me. 223; Long v. Woodman, 58 Me. 49; Martin v. Jordon, 60 Me. 531; Ellis v. Andrews, 56 N. Y. 83; Banta v. Palmer, 47 Ill. 99; Noelting v. Wright, 72 Ill. 390; Tuck v. Dowing, 76 Ill. 71; Dillman v. Nadelehoffer, 7 N. E. 88; Hawk v. Brownell, 11 N. E. 416; Graffenstein v. Eppstein, 33 Am. Rep. 171; Barns v. Mahannah, 17 Pac. 319; Sowers v. Parker, 51 Pac. 888; Cole v. Smith, 58 Pac. 1086; McKenzie v. Seeberger, 76 Fed. 108.

Frank B. Feetham and *Scott Rex*, for respondents.

The actual damage sustained by the respondent in this case was the difference in value between what he got and what he parted with; therefore the rule given the jury by the court was correct. Reynolds v. Franklin, 44 Minn. 30, 46 N. W. 139; Wallace v. Hallowell, 56 Minn. 501, 58 N. W. 292; Redding v. Godwin, 44 Minn.

355, 46 N. W. 563; Tacoma v. Tacoma Light & Water Co., 50 Pac. 55; Glaspell v. Nor. Pac. R. Co., 43 Fed. 900; Zeiley v. Palliser, 80 Hun. 603; High v. Berret, 148 Pa. St. 261, 23 Atl. 1004; Connor, v. Levinson (Mich.) 73 N. W. 232; Rockerfeller v. Merritt, 76 Fed. 909; Weaver v. Shriver (Md.) 30 Atl. 189; Nashua Sav. Bank v. Burlington Elec. Co., 100 Fed. 673; Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. Rep. 39; Sigafus v. Porter, 179 U. S. 116.

ON REARGUMENT.

The true rule is: That whether a representation of value is or is not actionable, depends entirely upon the facts and circumstances of the particular case, which is simply another way of stating that such a false representation is actionable, if it be the inducing cause. The following cases sustain the contention that the misrepresentation in question was material and the basis for damages: Sanford v. Handy, 23 Wend. 260; Smith v. Countryman, 30 N. Y. 655; Miller v. Barber, 66 N. Y. 558; Coles v. Kennedy, 46 N. W. 1088 (corporate stock, subscription by others at same rate); Dorr v. Cory, 78 N. W. 682 (a "ground-floor" case); Stoney Creek Woolen Co. v. Smalley, 69 N. W. 722 (purchase of real estate); Moon v. McKinstry, 65 N. W. 546 (purchase of real estate); French v. Ryan, 62 N. W. 1016 (purchase of corporation stock; representation as to subscriptions to stock by others); Zang v. Adams, 48 Pac. 509 (purchase of corporation stock; representation as to cost of the property); Mountain v. Day, 97 N. W. 883 (sale of land); Shelton v. Healy (Conn.) 50 Atl. 744 (purchase of corporation stock; representation it was worth par); Stoll v. Wellborn (N. J.) 56 Atl. 894 (representation that whiskey had certain market value); Andrews v. Jackson, 168 Mass. 266 (that a note was as good as gold); Coulter v. Clark, 66 N. E. 739 (that the stock was as good as bank stock, and that promoter was himself a subscriber on the same terms); Coles v. Kennedy, 46 N. W. 1088; Teachout v. Van Hoesen, 40 N. W. 96; Byers v. Maxwell, 73 S. W. 437.

ENGERUD, J. This is an appeal from a judgment for plaintiff in an action to recover damages for alleged deceit in the exchange of property. The case was submitted to the jury for a special verdict, upon which judgment was ordered and entered against these appellants. A motion for new trial was made, based in part upon a statement of the case specifying as grounds for a new trial

numerous errors of law, and the insufficiency of the evidence to justify some of the findings of the jury, and the insufficiency of the verdict to support the judgment. The motion for a new trial was denied. This appeal is from the judgment.

The appellants contend that the facts found by the jury are insufficient to sustain the judgment, and we think the point is well taken. The facts upon which plaintiff must base his right to recover are those established by the admissions in the pleadings and by the special verdict. So far as material on this appeal, the pleadings disclose substantially the following facts: On or about December 28, 1901, respondent purchased and received from the appellants 750 shares of stock in a coal mining corporation in which the appellants were stockholders. The par value of the stock was $100 per share, but it was sold to the respondent at a valuation of $20 per share, or $15,000; and in exchange for said stock he sold and conveyed to the appellants a lot and business block owned by him, worth, exclusive of incumbrances, $15,000. The respondent did not avail himself of the right to rescind the transaction when he discovered the alleged fraud on the part of appellant. He retained the stock and has affirmed the contract. He seeks to recover compensation for the loss which he avers he has suffered by reason of the falsity of the representations of the appellants.

All that the jury found touching misrepresentation by these appellants appears in the following questions and answers of the special verdict: "Question 5. Did the defendant Wright represent to plaintiff, with intent to induce him to purchase said stock, that defendants Pringle and Bates, or either of them, had purchased stock of said corporation at the price of $20 per share, for which they had paid the sum of $20,000? Answer. Yes." In answer to question 6 the jury found that Bates made the same representation set forth in question 5. "Question 9. Did the defendant Wright represent to plaintiff, with intent to induce him to purchase such stock of said corporation, that said corporation then had in its treasury a large amount of money available for the development of the mine of said corporation? Answer. Yes." In response to question 10 the jury found that Bates did not make the representation embodied in question 9. In response to other questions the jury found that the representations found to have been made were known by the persons making them to be false, and that plaintiff relied thereon, and was induced thereby to purchase the stock.

The only finding as to damage was the following: "What detriment did the plaintiff suffer by reason of purchasing such stock? Answer. $9,995.75." The form of this question indicates the erroneous theory upon which the case was submitted to the jury. Bearing in mind that the plaintiff had voluntarily affirmed the trade after knowledge of the alleged deceit, it will be seen that the jury were asked to award the plaintiff compensation not solely for the deceit, but also for the plaintiff's own folly in adhering to a bad bargain. The jury were instructed that the measure of damages was the difference between the actual value of the stock purchased and the value of the property given in exchange. It was undisputed that the real property traded for the stock was worth $15,000. The method by which the jury were instructed to arrive at the answer to the question as to damages is shown by the following instruction:: "The proof shows that at this time (December 28, 1901) there were 9,100 shares of the capital stock of this corporation outstanding, and each of such shares was therefore worth and of the value of the one ninety-one hundredth part of the entire assets of the corporation. Having, then, first determined the actual market value of the entire assets and business of said company at the time, you will divide such value by 9,100, the number of shares of stock then outstanding. This will give the actual value of each of such shares of stock at that time. Plaintiff purchased 750 shares of such stock, at the price of $20 per share. If you find that said stock at said time was worth less than $20 per share, then the difference between what you find to be the actual value of each share and $20 will be the damage that plaintiff sustained on each share, and 750 times this will be the total sum at which you will assess plaintiff's damages in answer to the above question." These instructions were excepted to by the defendants, and are assigned as error.

The business of this corporation was in an undeveloped state. It owned a large quantity of land in the lignite coal belt, and that land was the principal part of its tangible assets. It was unknown as yet whether the enterprise would be a profitable one or not. In other words, it was a purely speculative venture. It was undisputed that the plaintiff knew it to be such when he bought the stock, and that one of the principal inducements for him to buy the stock was the hope of great and sudden wealth, which the investment promised to yield if the enterprise should prove to be a profitable speculation. It appears from the record of the evidence

admitted and excluded, and the instructions of the court, that in determining the value of the stock the jury were permitted to take into consideration only the actual net value of the tangible assets of the corporation. It is apparent that, if the respondent's theory of this case shall prevail, the result will be that respondent will have all the advantages of the speculative features of the enterprise, without assuming all the risk of such a speculation. His position is precisely the same as if he were to claim a right to share in the distribution of prizes at a lottery without paying for the chance. It is no answer to this proposition to say that respondent would not have engaged in the enterprise if he had not been deceived by the appellants. The unanswerable objection to that argument is that respondent voluntarily chose to adhere to the bargain, and retain all the benefits and advantages of the speculation, after he knew he had been deceived. He thereby forever estopped himself to claim any compensation for loss resulting from the making of the trade. It was an affirmance of the contract. Whether the bargain was good or bad, he must abide by it and take the consequences of his speculation. He cannot affirm the contract to the extent of the actual, present value of the tangible property received and repudiate the speculative feature of it. Upon the discovery of the deceit he had his election to rescind or affirm, but he could not rescind in part and affirm the remainder. An affirmance in part validated the entire contract. Rev. Codes 1899, section 3934; Grannis v. Hooker, 31 Wis. 474. Having thus validated the contract, the only remedy left to the respondent was to seek compensation in damages for the loss resulting from the falsity of the representations upon the faith of which he made the trade. The rule by which such damages are to be measured, where no special or exemplary damages are claimed, was announced by this court in Coke Co. v. Electric Co., 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 593, to be the difference between what the property received would have been worth if as represented, and what is was actually worth at the time of the sale. In other words, the measure of damages for deceit where the contract is affirmed is precisely the same as for a breach of warranty in a contract of sale. Respondent argues that the rule adopted and applied in that case is not a universal rule of general application, but is applicable only where the circumstances are like those in that case. Counsel cites section 4997, Rev. Codes: "For the breach of an obligation not arising from con-

tract, the measure of damages, except when otherwise expressly provided in this Code is the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not." And section 3941, Rev. Codes 1899: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damages that he thereby suffers." He further cites section 3942, Rev. Codes 1899, defining actionable deceit, and section 3848, Rev. Codes 1899, defining actual fraud, and calls attention to the fact that actionable deceit and actual fraud are defined by the statute in the same language. From these provisions of the code the conclusion is deduced that in all cases of actual fraud the defrauded party can waive rescission and recover damages, and that such damages are to be measured by the difference in value between what he received and what he parted with, regardless of the nature of the false representations. According to respondent's theory, it matters not whether the representations were such as to affect the value of the subject matter of the contract, or not. If they come within the general definition of actual fraud, and the contract was induced thereby, the victim of the deceit can recover damages measured by the rule he has stated.

The provisions of the Civil Code cited by counsel are merely declaratory of well-established common law principles. Deceit is actual fraud, and where the apparent consent of one party to a contract has been induced by the actual fraud of the other the contract is voidable. It is voidable not because of any supposed pecuniary damage done to the defrauded party, but because the consent of the latter was not free. Rev. Codes 1899, sections 3836, 3841-3844. And fraud, actual or constructive, renders a contract voidable for the same reason that mistake, undue influence, duress, etc., have the same effect. Sections 3941, 3942, Rev. Codes 1899, merely declare that actual fraud is a tort for which the guilty party is liable to the injured party if any damage has been suffered by the latter. In other words, actual fraud, with damage, is a good cause of action, and constitutes actionable deceit. These statutory declarations of general principles throw no light on the precise question in this case. It is conceded that a person guilty of deceit is liable for all damages proximately resulting from the wrong. The question to be determined is what loss, if any, has the plaintiff suffered as the proximate result of the false representations? Re-

spondent asserts that he was inveigled into the speculation by the deceit of the appellants, and therefore the false representations are the proximate cause of the loss he has suffered. The argument is more plausible than sound. While it is true that he was inveigled into the speculation under a false impression of the facts, it is also conceded that he voluntarily elected to retain his interest in the enterprise after he was aware of the defendants' misrepresentations, and notwithstanding that he could have escaped all the consequences of a bad speculation by withdrawing from it by rescission. It is therefore clear that that part of the loss which would have resulted from the making of such a trade on the same terms without deceit is due to plaintiff's own folly, and is not properly chargeable to the false representation.

An instructive case on this subject is that of Page v. Parker, 43 N. H. 363, 80 Am. Dec. 172. The plaintiff had been induced by false representations to purchase an interest in a marble quarry, and pay therefor a sum much greater than its actual value. The defendants had made many representations. Some were false, some true, and others immaterial. The plaintiff sued to recover damages for deceit. The court held that the measure of damages in such cases is the difference between the value of the property as it actually was, and its value as it would have been if it were such as it was represented to be *in those particulars in relation to which the false and fraudulent* representations were made. The qualifying clause which we have italicized was said to be advisable in order to make it clear to the jury that the damages must be confined to such items of loss as were proximately caused by the representations which were false and material. To illustrate: If there were ten material representations, and only one was false, the plaintiff was entitled to compensation only to the extent that the value of the quarry was diminished by the nonexistence of the one fact which was falsely represented to exist. In Van Epps v. Harrison, 5 Hill, 63, 40 Am. Dec. 314, a good illustration of the same proposition appears. The defendant had given his bond for an interest in certain land, which was supposed to be very valuable as a town site. The price paid for the land was far in excess of its real value, having been based upon "boom" prices of land then prevailing. The defendant, among other things, claimed that the plaintiff had been guilty of deceit in the sale by falsely representing that the land was even, level and suitable for building purposes, and required

no grading. Justice Bronson, in stating the measure of damages to be applied in that case, used this language: "As the land, whether the representations were true or false, was in reality worth only a small part of the price which the defendant agreed to pay, there may be some difficulty in answering the question. * * * We must not go back to the date of the contract for the price, and then come down to the present day for the actual value of the land, and charge the plaintiff with the difference. The defendant must bear the consequences of the prevailing delusion about prices and new towns under which the purchase was made. On the other hand, the plaintiff cannot say that his fraud has worked no injury, because everybody has now found out that the land never was worth anything for the purpose of building a town upon it. The cause must, as far as practicable, be tried just as it would have been tried the day after the contract was made, if the question had arisen at that time. The jury must assume, what the parties then believed, that the land was valuable as the site for a town, and then inquire how much less the land was worth for building purposes, taking the surface as it actually existed, than it would have been worth for those purposes had the plaintiff's representations concerning the surface been true." We believe these cases are sound and in accord with the overwhelming weight of authority. They illustrate the application of the rule announced by this court in Fargo Coke Co. v. Fargo Gas & Electric Co., 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 593, in cases where the circumstances were analogous to those presented by the case at bar. We can conceive of no reason why the circumstances of this case should call for the application of different principles in determining the rights and liabilities of the parties than are applied in other cases of deceit. There are cases which seem to make such a distinction. Among them may be mentioned Crater v. Binninger, 33 N. J. Law, 513, 97 Am. Dec. 737; Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279; Sigafus v. Porter, 179 U. S. 116, 21 Sup. Ct. 34, 45 L. Ed. 113; Reynolds v. Franklin, 44 Minn. 30, 46 N. W. 139, 20 Am. St. Rep. 540; High v. Berret, 148 Pa. 261, 23 Atl. 1004. These cases seem to hold that in such cases as this the measure of damages is that adopted by the trial court—the difference in value between what was parted with and what was received. These cases seem to proceed upon the theory advocated by the respondent in this case—that the entire loss resulting from a contract induced by false rep-

resentation is proximately caused by the deceit, because the contract would not have been made if deceit had not been practiced. For the reasons hereinbefore stated, that theory is, in our opinion, erroneous. The first case in this country which we can find in which such a theory is advanced is that of Crater v. Binninger, 33 N. J. Law, 513, 97 Am. Dec. 737, where Chief Justice Beasley confidently asserts that the rule is well established. The chancellor, however, wrote a separate opinion in that case, from which it appears that he differed from the chief justice as to the ordinary rule of damages in cases of deceit. The chancellor proceeds to show that the ordinary measure of compensation for deceit is the same as for breach of warranty, but concludes his opinion with the following remarkable proposition: "In this case Crater was willing to go in with Binninger at the cost price. Had Binninger told him truly that the cost price was eighteen thousand dollars, he would no doubt, have been willing to go in at that price, and would have paid at that rate, and, if any subsequent loss was sustained, would have had no claim against Binninger; and the true measure of damages appears to me to be the excess which he was induced to pay by the false and fraudulent representation of Binninger. If that was the difference between eighteen thousand dollars and twenty-eight thousand dollars, the one-eighth would be one thousand two hundred and fifty dollars, which, with interest, would be the real damage. And the plaintiff below would be entitled to recover these damages, although he had made double the amount out of the enterprise as clear profit. If, however, the jury would believe that Crater, if he had been told the real price, would not have entered into the transaction at that price, but would have taken a share in the lands only at the higher price, then his embarking in the transaction at all was the result of the fraud of Binninger, and the rule of the judge at the trial was the correct one, but it should have been so stated to the jury." If we understand the chancellor's language correctly, it was his opinion that in such a case the jury should be left to speculate as to the probable course of conduct which the injured party would or would not have pursued under one or the other supposed state of facts, and the measure of compensation would depend upon what the jury conjectured the plaintiff would have done if he had known the truth. As both opinions were for reversal of the trial court, it is impossible to tell which of the two opinions received the sanction of the majority of the court. In Smith v.

Bolles, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279, the opinion of Chief Justice Beasley in Crater v. Binninger is cited as authority. As an additional reason for adopting that rule, Chief Justice Fuller said that the defendant should not be held liable for "the expected fruits of an unrealized speculation." If it were true that the other rule imposed such liability, it is obvious that the argument of the chief justice would be fatal to the universal rule prevailing in case of breach of warranty. In cases of deceit or for breach of warranty, as well as in all other actions in tort or on contract for the recovery of damages, conjecture or speculation as a basis for estimating damages are excluded, for reasons familiar to the profession; and consequently the prevailing rule in breach of warranty and deceit does not in fact give the injured party "the expected fruits of an unrealized speculation." The decision in Smith v. Bolles was followed and approved in Sigafus v. Porter, 179 U. S. 116, 21 Sup. Ct. 34, 45 L. Ed. 113. The same doctrine seems to have been given root in England by the case of Peek v. Derry, 37 Ch. D. 541, decided in 1887. That case was reversed by the House of Lords (Derry v. Peek, L. R. 14 App. Cas. 357) on the ground that the facts did not constitute actionable deceit and hence there was no occasion to express any opinion as to the propriety of the measure of damages adopted in the lower court. The American cases which have adopted the rule advocated by Chief Justice Beasley in Crater v. Binninger, supra, seem to have been based upon the authority of Crater v. Binninger, Smith v. Bolles, and Peek v. Derry, supra. The weight of authority as well as the better reason is against the rule supported by these cases. See cases cited in Fargo Gas Co. v. Electric Co., 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 593; Sutherland on Damages (3d Ed.) vol. 4, p. 3401, note 1.

It is plain to be seen that the rule advocated in the cases mentioned in some instances deprives the plaintiff of full compensation for the loss of what his bargain entitled him to, and in others imposes upon the defendant liability for losses not attributable to his fault. That rule sets up an arbitrary measure of damages, which violates that cardinal principle of the law of torts that the party at fault shall be held liable only for just compensation for the detriment proximately caused by his wrongful act. That principle is expressed in our Civil Code by section 5014, Rev. Codes 1899, as follows: "Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an ob-

ligation (contract or tort) than he could have gained by the full performance thereof on both sides except in the cases specified in the subdivisions on exemplary damages and penal damages and in sections 4996, 5003 and 5004." (Breach of promise to marry, seduction and willful or grossly negligent injury to domestic animals.)

We can see no difficulty in applying to the facts of this case the same rule which was applied in Gas Co. v. Electric Co., supra. Compare what has been received with what would have been received if the facts had been as they were represented to be, or, if the deceit affected the amount of money or property parted with, compare the value of that property with what should have been given if there had been no deceit. The difference is the measure of compensation for plaintiff's loss if there are no penal or exemplary damages. It is apparent that the speculative feature of the transaction is common to both terms of the equation, and is therefore eliminated from the problem.

It follows from what has been said that the findings of the special verdict are insufficient to support the judgment. It is apparent that the representation as to what others paid for the stock did not affect its value. It has not been found that there were any fiduciary relations existing between the parties, or that there were any other facts or circumstances giving rise to an implied agreement that the price paid by the vendor or others should be the price to the plaintiff. It is not found or admitted that there was any express contract to that effect. In the absence of special circumstances of that nature, a mere false statement as to the price paid by the vendor or others is not actionable deceit. Hauk v. Brownell, 120 Ill. 161, 11 N. E. 416; Teachout v. Van Hoesen, 76 Iowa, 113, 40 N. W. 96, 1 L. R. A. 664, 14 Am. St. Rep. 206; Kilgore v. Bruce, 166 Mass. 136, 44 N. E. 108; Davenport v. Buchanan, 6 S. D. 376, 61 N. W. 47; Coulter v. Clark, 66 N. E. 739; Sanford v. Handy, 23 Wend. 260; Smith v. Countryman, 30 N. Y. 655; Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379; Fairchild v. McMahon, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701; Miller v. Barber, 66 N. Y. 558; Hubbell v. Meigs, 50 N. Y. 480; Medbury v. Watson, 6 Metc. 246, 39 Am. Dec. 726; Hemmer v. Cooper, 8 Allen, 334; and other cases cited in notes 4 and 5, p. 492, Bigelow on Fraud.

To avoid any misapprehension from the use of the term "fiduciary relation" in speaking of the special circumstances under

which a misrepresentation as to cost or value may constitute deceit, we will say that we do not use that term in its technical sense. We apply it to any situation where trust and confidence are reposed by one party in another under such circumstances as to impose on the person trusted the obligation to act in good faith.

It has been said that the courts of Massachusetts and Maine have held that a misrepresentation as to cost is not material, and that those courts are at variance with the courts of New York and others. Bigelow on Fraud, p. 492. This loose expression has led to the erroneous idea that some courts—especially those of New York—have held that a mere misrepresentation of cost may constitute actionable deceit. The language of Justice Bronson in Van Epps v. Harrison, 5 Hill, 63, 40 Am. Dec. 314, seems to give color to this idea. The learned justice seems to have entirely overlooked in that case the fact that the plaintiff had either expressly or impliedly agreed that the defendant and the other persons who contributed to the purchase price were to be let in "on the ground floor" in the speculation, on equal terms with the plaintiff, and were therefore entitled, under the contract, to receive their respective shares of the land on the basis of the price paid by the plaintiff. In other words, the terms of the contract itself made the price paid by the vendor a material fact, and hence the misrepresentation as to the price paid was clearly actionable deceit. It was doubtless for this reason that the majority of the court overruled Justice Bronson. Analysis of the other cases in New York and elsewhere, we think, will disclose that there is in fact no real difference of opinion as to when a misrepresentation as to the price paid by the vendor or others will or will not constitute actionable deceit. However inaccurately the idea may be expressed, the rule as exemplified by all the cases seems to be fairly uniform that a mere representation as to the price paid by the vendor or others is not actionable in the absence of special circumstances such as those we have mentioned. The finding that Wright willfully misrepresented the amount of funds in the treasury convicted the defendant Wright of actionable deceit, but there was no finding or admission in the pleadings or evidence from which it can be ascertained how much he falsely exaggerated the assets in this respect. There are therefore no means of determining the amount of loss by reason of this misrepresentation.

By reason of the erroneous theory as to the measure of damages upon which the case was tried, the findings neither support the judgment, nor exonerate the appellants. There must therefore be a new trial. The view we have taken of the case renders it unnecessary to discuss the other assignments of error, as the questions presented by them are not apt to arise on another trial.

The judgment is reversed and a new trial granted as to both appellants. All concur.

(103 N .W. 632.)

CHARLES L. BENESH, JR., v. THE TRAVELERS' INSURANCE COMPANY.

Opinion filed January 11, 1905.

Equity Will Reform or Rescind a Contract for Mistake as Circumstances Require.

1. The defendant, by a mortgage foreclosure, had acquired title to real property formerly owned by plaintiff's father, and the defendant agreed to let the plaintiff buy that property back, and to make a written contract to that effect, whereby the purchase price was to be paid in installments and deed to be delivered when the payments were completed. By mistake of defendant's agent, more land was described in the contract than the foreclosure covered. *Held,* that there was a mistake, for which equity would either reform or rescind the contract, as circumstances might require.

Mistake — Means of Knowledge.

2. Mere omission to resort to "means of knowledge" which would have obviated the mistake, where there is no neglect of legal duty, does not bar relief for mistake.

Modification of Contract.

3. When the defendant discovered the mistake, it proposed to plaintiff that the mistake be corrected by the acceptance of a deed for that part of the property only which the foreclosure covered. The plaintiff made no direct answer, but paid the remainder of the purchase price, and accepted the deed offered by the defendant, and his conduct, after defendant's proposal until the delivery of the deed, was calculated to induce the belief that he assented to defendant's proposal, and to cause the latter to forego resort to equitable relief. *Held,* that plaintiff will not be permitted to deny acceptance of defendant's proposal to modify the contract.

Parol Modification by Executed Agreement.

4. The parol modification of the written contract, followed by the delivery and acceptance of the deed in accordance therewith, constituted an alteration of the written contract by an executed parol agreement.

Executed Parol Agreement — Action for Breach.

5. The executed parol agreement was, in effect, a reformation of the written contract with respect to the land to be conveyed, and was a complete satisfaction of the contract as so reformed, which relieved the defendant from liability for breach of contract.

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

Action by Charles L. Benesh, Jr., against the Travelers' Insurance Company. Judgment for plaintiff and defendant appeals.

Reversed.

John E. Greene, for appellant.

Purcell & Bradley, for respondent.

ENGERUD, J. This is an appeal by defendant from a judgment for plaintiff in an action to recover damages for the breach of a contract to convey real property. The complaint alleges, in substance, that on April 19, 1897, defendant made a written contract with the plaintiff to convey to the latter, for the sum of $1,500, payable in installments, the west half of lot 13, in block 17, and lots 8, 9, 10 and 11, of block 16, of the original townsite of Wahpeton, deed to be delivered on completion of the payments, but the purchaser to have possession of the premises from the date of the contract. It alleges that the purchase price had been fully paid on or about November 22, 1902, and all other terms and conditions of the contract complied with by plaintiff; but that the defendant refused to convey the lots in block 16, and had no title thereto, and demands $1,200 damages. The answer admits the execution of the written contract; the payment of the purchase price; refusal of the defendant to convey the south three-fourths of the lots in block 16, because it never had title to that part of said lots. It alleges that on December 24, 1902, the defendant delivered to the plaintiff a deed, and thereby conveyed to him a clear title to the west half of lot 13 in block 17, and the north one-fourth of the lots in block 16, and that the plaintiff accepted and retained the same. It further alleges that when the contract was made it was the in-

tention of both parties to contract for the sale and purchase of the property described in the deed, and that plaintiff knew that defendant owned only that part of the lots described in the deed and intended to convey no other part thereof; but by mistake of both parties the property was erroneously described in the written contract; that plaintiff was informed of the error before the purchase price was fully paid, and made the remaining payments and accepted the deed with the knowledge that defendant would convey only the premises described in the deed. The issues were submitted to a jury. Defendant's motion for a directed verdict was denied, and the jury found for plaintiff in the sum of $1,100. A motion for a new trial on a statement of the case was overruled.

The principal point relied upon for reversal is the insufficiency of the evidence to justify the verdict, and presents the same questions as were involved in the motion to direct a verdict. The facts disclosed by the evidence are as follows: The plaintiff's father was at one time the owner of the property described in the contract of sale. He mortgaged the lot in block 17 and the north one-fourth of the four lots in block 16 to the defendant for a loan of $800. The mortgage was recorded and contained the usual power of sale. This mortgage was foreclosed by advertisement, and the property covered by the mortgage was sold at the foreclosure sale February 17, 1894, to the defendant, for the full amount of the debt. No redemption was made, and defendant received a sheriff's deed of the premises September 9, 1895. The sheriff's deed and all the papers evidencing the foreclosure were duly recorded, and the premises sold are therein described as in the mortgage, so that the record at the time of the transaction in question showed that the defendant held title to the north one-fourth only of lots 8, 9, 10 and 11 in block 16, and the west half of lot 13 in block 17. The plaintiff's father had a house and blacksmith shop on that part of the lots covered by defendant's mortgage, and for some reason, not disclosed by the evidence, had been permitted to remain in possession of the property after the expiration of the time for redemption. The lots were otherwise unoccupied. In the spring of 1897 the father had apparently been in communication with the defendant's agent at Fargo with a view to buy back the property lost by the foreclosure. He then requested his son, the plaintiff, to purchase the same from the defendant. Pursuant to this request, the plaintiff wrote to J. B. Lockhart, who was

defendant's agent at Fargo, the following letter, dated April 14, 1897: "Send me contract of assignment and I will make payments, and what time was foreclosure made, and for what amount was it foreclosed." In reply to this letter Mr. Lockhart, on April 15th, wrote the plaintiff to the effect that he could purchase the property on the terms previously talked about between the father and Lockhart—contract for deed on payment of $1,500 and interest, payable in installments. The property is referred to as "the property in which your father lives and the shop." Among other things, the letter says: "I do not know just what you want when you say, 'Send me contract of assignment.' The title to this property in which your father lives now stands in the Travelers' Insurance Company absolutely, they having foreclosed their mortgage, the year for redemption having expired and sheriff's deed having been issued to them." On April 16th, in reply to this letter, plaintiff wrote a letter to Lockhart, offering $1,200 "for the property mentioned." On the next day, in response to this offer, Lockhart wrote the following letter: "Your favor of the 16th is received making me an offer of $1,200 for the property which was at one time owned by your father, viz., the residence on the main street of Wahpeton, together with the blacksmith shop, and I simply wish to state that when your father was in this office a short time ago, my proposition to him was as follows: That we would sell this property to you as his son, drawing the contract to you for $1,500, * * * and I simply wish to state right here that we will not sell this property for one cent less than the figure named. This is exactly the cash which the company have in this property, and the property is easily worth $800 more than this amount, and the reason I agreed to sell it to your father for this amount is owing to the fact that the company are willing to accept the actual money which they have in the property, as this is the only investment which they have in Wahpeton, * * * and if these terms are not satisfactory to you please so advise me by return mail, and I shall advise your father at once that we want immediate possession of the property." The plaintiff accepted the terms proposed by Lockhart. The latter prepared the contract and forwarded it to plaintiff for signature. The description of the property inserted in the writing was taken by Lockhart from the "real estate register" in his office, where the property was erroneously described as the whole of lots 8, 9, 10 and 11 in block 16,

and west half of lot 13, block 17. At the time of the negotiations plaintiff had employed one Matthews to examine the record title for him. He claims, however, that he never knew until 1902 that the defendant's mortgage and subsequent title covered only a part of the lots in block 16, and that the remainder of said lots were covered by another mortgage to one Rich, which was foreclosed shortly after the date of the contract. In the spring of 1902 the company discovered the error in the description of the property in the contract, and advised the Fargo agent thereof, and the latter, upon receipt of the information, wrote the following letter to plaintiff, dated May 14, 1902: "We write you concerning your contract with the Travelers' Insurance Company, dated April 19, 1897, for the purchase of a certain property owned by that company in the city of Wahpeton. In April, 1897, Mr. Lockhart sold you the property formerly owned by your father, namely, the residence on the main street of Wahpeton, together with the blacksmith shop. It was understood, at that time, by all parties concerned, that such property consisted of the north quarter of lots 8, 9, 10 and 11, in block 16, and the west half of lot 13, in block 17, in the original townsite of Wahpeton, the consideration being $1,500 with interest at 8 per cent per annum. The company is now ready to make conveyances to you of this property, upon the payment of the balance due upon the contract, and they desire to know if you are ready to settle on that basis and to accept the deed. An immediate reply will greatly oblige." The plaintiff immediately made the following reply: "Your favor of the 14th at hand. In reply state that I will be up to Fargo next week and will fix the matter up." At that time the unpaid part of the purchase price was about $560. The plaintiff did not go to Fargo to "fix up," and nothing more was said by either party as to the error in the description. The defendant's agent wrote the plaintiff repeatedly, requesting an immediate settlement, and informing him that the deed was ready for delivery, and in response to plaintiff's inquiries informed him of the amount due on the contract. The only reply plaintiff made to these repeated requests for settlement was to ask for more time and promising a speedy payment of balance due. Finally, on September 17, 1902, he sent to defendant's agent three checks, dated October 10, 25 and November 5, 1902, respectively, aggregating the amount due on the contract, less the accrued interest, and subsequently remitted the interest due. The payments were completed

November 21, 1902, and the deed, with an abstract of title, was delivered to plaintiff November 28, 1902. The deed conveyed the west half of lot 13 in block 17, and the north one-fourth of the lots in block 16. On December 17, 1902, the plaintiff returned the deed, and demanded a deed covering the whole of the lots in block 16. On December 24, 1902, the defendant's agent returned the deed to plaintiff, with the following letter: "We have your favor of the 17th instant inclosing the warranty deed from the Travelers' Insurance Company to yourself, covering the west half of lot 13, block 17, and the north quarter of lots 8, 9, 10 and 11, block 16, in the original townsite of Wahpeton. We return the deed herewith to you. This matter was all canvassed and thoroughly understood months ago, and you have held this contract and made the payments with the distinct understanding that you were to have conveyed to you only the north quarter of lots 8 to 11. If there was an error in the contract you knew it at the time it was made, because I think the correspondence with you shows that you knew that you were buying simply the property which the insurance company acquired by their foreclosure of the mortgage upon it. That being the case you have not been misled, and we shall decline to recognize any such claim as that which you now attempt to make." The plaintiff made no reply to this letter. He retained the deed, and thereupon commenced this action.

Upon these facts, which are undisputed, we have no hesitation in holding that the plaintiff is entitled to no relief. It is too clear for argument that the real agreement between the parties—the proposition upon which their minds met—was that the defendant intended to sell and the plaintiff to buy the property which the defendant had acquired by the foreclosure. The agreement was, in effect, that the son should be permitted to redeem the property which his father had lost by the foreclosure of defendant's mortgage. The writing which was intended to evidence that agreement described more land than was included in the foreclosure. It is a clear case of mistake of fact as defined by the Civil Code in section 3853, Rev. Codes 1899: "Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in: (1) An unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or (2) belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has

not existed." If we take the most charitable view of plaintiff's conduct, and assume that he erroneously supposed the foreclosure covered the whole of the lots in block 16, and that neither his father nor Matthews, who examined the title for him, had informed him of the truth, the mistake was mutual to both parties. Both mistakenly supposed the foreclosure included the whole of the lots in block 16. On the other hand, if plaintiff knew the truth, it is self-evident that he knew that the defendant had by mistake described too much land in the contract, and failed to inform them of the error. In either case equity would either revise the contract, so as to make it express the real intention of the parties (Rev. Codes 1899, sections 5034-5037), or would rescind it if the minds of the parties had not in fact met upon the same terms (Rev. Codes 1899, section 5038).

It is urged that the mistake in the description was due to defendant's own negligence, in that its agent failed to examine the foreclosure papers and get the correct description. The same criticism could be made with equal propriety of plaintiff's conduct. Mere failure to avail one's self of the "means of knowledge" does not bar relief from mistake, provided there is no "neglect of a legal duty." See note to section 762, Field's Civil Code of New York, and cases cited; also Pomeroy's Equity Jurisprudence, vol. 2, section 856, and cases cited.

It is unnecessary to determine in this case whether rescission or reformation would have been the appropriate relief to which defendant would have been entitled upon discovery of the mistake, because the evidence conclusively shows that the parties agreed in effect, upon a reformation of the contract. By the letter of May 14, 1902, the plaintiff was informed of the mistake, and that defendant would not execute the contract and deliver the deed except in accordance with what it asserted was the real intention of the parties. It was a proposition which, under the circumstances, it was the duty of plaintiff to either accept or reject. His reply to that letter and his subsequent conduct cannot be interpreted, consistently with honest dealing, to be anything but an assent to the defendant's proposal to treat the contract as if it were revised to accord with the real intention of the parties. His letters and course of conduct were calculated, and there is strong reason to think were expressly designed, to induce the defendant to believe that its proposal was accepted, and consequently to forbear resort-

ing to equitable remedies for relief from its mistake. Under such circumstances he ought not to be heard to say that he did not intend to consent.

A written contract may be altered by an executed parol agreement. Rev. Codes 1899, section 3936. For the reasons stated, we hold that the evidence conclusively establishes a proposal by defendant to alter the terms of the written contract, and an acceptance of that proposal by the plaintiff. The final payments, delivery and acceptance of the deed were a complete execution of that modification of the written contract. The executed parol agreement was, in effect, a reformation of the written contract by the act of the parties so as to make it conform to their real intentions.

For the foregoing reasons it was error to deny defendant's motion for a directed verdict, and there must be a new trial.

Judgment reversed and a new trial ordered. All concur.

(103 N. W. 405.)

BERTRAM F. B. GREEN v. OLE J. TENOLD.

Opinion filed January 11, 1905.

Mechanics' Liens — Occupant Under Federal Homestead Law.

Where materials are furnished for the erection of a building on lands held by an occupant under the homestead laws of the United States, the person furnishing such materials is not entitled to a lien upon the building nor upon the land. No lien attaches to a building unless the owner thereof has some interest in the land that can be sold to enforce the lien, except in the cases provided for under sections 4794 and 4795, Rev. Codes 1899. Gull River Lumber Co. v. Briggs, 9 N. D. 485, 84 N. W. 349, followed.

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

Action by Bertram F. B. Green against Ole J. Tenold. Judgment for plaintiff, and defendant appeals.

Reversed.

Spencer & Sinkler and *E. R. Sinkler*, for appellant.

The defendant having no interest in the land, the title being in the United States, plaintiff can enforce his lien neither against the land nor building. Gull River Lumber Co. v. Briggs, 9 N. D. 485, 84 N. W. 349.

Plaintiff's assignor took back a portion of the lumber sold under his contract and thereby violated its terms. He cannot, therefore, file a valid mechanic's lien against the building partially completed. Section 4788, Rev. Codes 1895; Marski v. Semmerling, 46 Ill. App. 531; Linn v. O'Hara, 1 Abb. Prac. 360; Cunningham v. Jones, 20 N. Y. 486; Pruesser v. Florence, 51 How. 385; Smith v. Sheltering Arms, 35 N. Y. S. 62; Malbon v. Birney, 11 Wis. 107.

Plaintiff's action is barred by the statute of limitations. A mechanic's lien is a principal obligation under section 4696, Rev. Codes 1899, and when the statute runs against the debt the principal obligation is barred. 15 Am. & Eng. Enc. Law, 115; Hills v. Halliwell, 50 Conn. 270; Watson v. Gardner, 10 N. E. 192; Borst v. Corey, 15 N. Y. 505; Prewitt v. Wortham, 79 Ky. 287.

E. Smith-Peterson, for respondent.

Appellant claims that defendant, not being the owner of the land at the time the building, upon which lien is claimed, was erected, cannot enforce his mechanic's lien, not even against the building. Gull River Lumber Co. v. Briggs, 9 N. D. 485, 84 N. W. 349.

The above case differs from the case at bar, in that the land therein sought to be affected, was the property of the state of North Dakota, and the person who contracted for the building had neither contract or lease and was a trespasser without right of occupancy. In the case at bar, defendant had no legal estate in the land, but was a rightful occupant under the homestead laws of the United States, and it being his duty to build a house thereon, such house was for his "immediate use and benefit," and he was the "owner" under the mechanic's lien law as defined in section 4798, Rev. Codes 1895, and being such owner his contract would sustain the lien. If section 5469, Comp. Laws, created a lien in favor of Mahon, as held in case of Mahon v. Surerus, 9 N. D. 57, 81 N. W. 64, then section 4788, Rev. Codes 1899, created one in favor of Green, in the case at bar. The language of the two sections is identical. If in the case cited—Surerus case—section 5483, Comp. Laws, constituted Surerus the "owner" with whom a contract for a lien could be made, then section 4798, Rev. Codes, constituted Tenold owner with whom a contract for a lien could be made. The amendment to section 5480, Comp. Laws, occurs in section 4790, Rev. Codes, and relates not to the right of lien but to its enforcement. Sections 4788 and 4789 create two separate liens, one on the land and one on the

buildings, and if the Code fails to give a remedy to enforce them, equity will supply one. 19 Am. & Eng. Enc Law (2d Ed.) 35; Cairo & Vincennes R. R. Co. v. Fackney, 78 Ill. 116; Gilchrist v. Helena Hot Springs Smelter R. R. Co., 58 Fed. 708; 13 Enc. Pl. & Pr. 944, III; Waldorf v. Scott, 46 Texas, 1.

Appellant claims that plaintiff's cause of action is barred by statute of limitations, six years having elapsed since its accrual. The lien is not barred by reason of the lapse of time since suit could be brought on original claim. Section 4696, Rev. Codes. Actions to foreclose mechanic's liens are governed by sections 5207 and 4696, Rev. Codes 1899; 19 Am. & Eng. Enc. Law (2d Ed.) 177, VIII; Spear v. Evans, 8 N. W. 20; Lamb v. Clark, 5 Pickering, 198; 19 Am. & Eng. Enc. Law (2d Ed.) 152.

MORGAN, J. This is an action to foreclose a mechanic's lien upon a building. The plaintiff's assignor furnished the lumber for such building in August, 1896. At that time the land on which the building was placed was occupied by the defendant under a homestead entry made pursuant to the laws of the United States. The defendant relies upon that fact to defeat the plaintiff's lien. After the plaintiff had rested his case he moved to amend the prayer of his complaint to the effect that he be declared entitled to a judgment against the defendant for the sum of $74.02, and that such judgment be declared a lien upon the buildings described in the complaint; that a special execution issue against said building, and that the same be sold under such execution; that the purchaser of such building at said sale be authorized to remove the same from the land on which it was placed within forty days after the sale thereof. This amendment was allowed, and at the close of the trial the court made findings of fact and conclusions of law in plaintiff's favor, and judgment was entered ordering the sale and removal of such building in accordance with the relief asked in the amended complaint. The defendant appeals from the judgment, and asks for a review of the entire case under section 5630, Rev. Codes 1889. Among other contentions, it is insisted by the appellant that the plaintiff is not entitled to a lien either upon the land or upon the building erected thereon. The basis of this contention is that the title to the land on which the building was erected was in the United States, and that such land is exempt from sale under execution for any debts created while the title remained in the United States, and that under the law of this state no lien

on buildings separate from the real estate on which the building is situated is given for materials furnished for the erection of such buildings in cases where the interest of the occupant of the land who procured the materials cannot be sold under execution to satisfy the lien.

It is well settled in this state and in others that lands held under the United States homestead laws, prior to the issuance of patent, are exempt from mechanics' liens based on contracts made while the title to such lands remained in the United States. Mahon v. Surerus, 9 N. D. 57, 81 N. W. 64; Gull River Lumber Co. v. Briggs, 9 N. D. 485, 84 N. W. 349; Kansas Lumber Co. v. Jones, 32 Kan. 195, 4 Pac. 74; Paige v. Peters, 70 Wis. 178, 35 N. W. 328, 5 Am. St. Rep. 156; Fink v. O'Neill, 106 U. S. 283, 1 Sup. Ct. 325, 27 L. Ed. 196. In Mahon v. Surerus, supra, this court held that, under the mechanic's lien law as it then existed under the Compiled Laws, a lien was given on the building separate from a lien on the land, and that where the occupant had no title to the land the lien could be enforced against the building, and the building removed from the land after sale under foreclosure of the lien. Section 5480, Comp. Laws 1887, authorized such sale and removal. Said section 5480 was repealed under the revision of the Code in 1895. In Gull River Lumber Co. v. Briggs, supra, this court held that the effect of the repeal of section 5480, Comp. Laws 1887, is to destroy the right to a lien upon a building when the lienee has no interest in the land, or the land is exempt from sale under liens, as in this case. The court said: "In all other cases the building must remain upon the land; but a lien upon a building that could in no manner be utilized would be so barren of benefits that we cannot presume the legislature ever intended to confer it." That case holds, in construing this same statute, that no lien attaches to the land or to the building unless the owner of the building has some interest or estate in the land out of which a lien can be enforced, and that a building cannot be sold separately from the land to satisfy a lien except in the cases prescribed by sections 4794 and 4795, Rev. Codes 1899; that is, in cases of leasehold interests that have been forfeited, and in cases of incumbrances on the land when the materials are furnished. We think the latter case decisive of the case at bar. This decision is assailed by counsel for respondent. In our opinion, the question of its correctness is not now open for discussion. A rule of property was announced by it,

under which many and important interests have arisen. Under these circumstances the decision should not be changed, even were it conceded to be without authority to sustain it, or a doubtful construction of the statute. Smith v. McDonald, 42 Cal. 484. It has the support of authority, however: Kellogg v. Little & Smythe Co., 1 Wash. 407, 25 Pac. 461; Coddington v. Dry Dock Co., 31 N. J. Law, 477; Babbitt v. Condon, 27 N. J. Law, 154; Ranson v. Sheehan, 78 Mo. 668. No judgment for the value of the materials furnished can be ordered, as more than six years has elapsed since the materials were furnished.

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

YOUNG, J., concurs.

ENGERUD, J. I dissent. In my opinion, the reasons assigned for the decision in Lumber Co. v. Briggs, 9 N. D. 485, 84 N. W. 349, were unsound and ought to be overruled. The only question presented in that case was the sufficiency of the complaint on demurrer. The complaint did not show that the defendant was rightfully in possession of the premises. Under the familiar rule that a pleading demurred to must be construed against the pleader, the presumption was that the defendant was a trespasser, and, as a mechanic's lien cannot be acquired on a building erected by a trespasser, the demurrer was properly sustained. No other question was presented. In my opinion, it was unnecessary in that case to consider the question as to whether a building could be sold under a mechanic's lien and be removed. I do not think that decision has become a rule of property. On the contrary, under the conditions existing in this state, I am convinced that adherence to that decision will do a great injury to a large number of meritorious claimants, who have extended credit for labor and material to the settlers on public lands in the belief that they were fully protected by the lien laws of the state. My investigations have convinced me that the decision in Lumber Co. v. Briggs is without authority to sustain it, and violates both the letter and spirit of the statute. I can find no case which sustains the views expressed in Lumber Co. v. Briggs. The case of Kellogg v. Co., 1 Wash. 407, 25 Pac. 461, is not in point. That case involved the construction of the mechanic's lien law of that state, which was construed (erroneously, I think) to create a lien on substantially the same

terms as the mechanic's lien law in New Jersey and some other states, which differ widely in language from our statute. Under such statutes a lien cannot exist upon a building unless it also attaches to the land itself. In other words, the lien attaches upon the building merely as an incident to the lien on the land. They have been so construed, not because the legislature failed to provide specifically for the separate sale of the building independently of the land, but because the language used in those sections of the act which prescribe the conditions under which a lien can be claimed did not permit a lien to attach to the building unless it also attached to some estate in the land itself. Coddington v. Dock Co., 31 N. J. Law, 477; Babbitt v. Condon, 27 N. J. Law, 154; Belding v. Cushing, 1 Gray, 576; Wagar v. Briscoe, 38 Mich. 587; Church v. Griffith, 9 Pa. 117, 49 Am. Dec. 548.

In the Washington case the lien statement did not sufficiently identify the land, but it was urged that the court should decree a lien on the building alone. It was claimed that the statute should be construed so as to permit a lien on the building independently of the land. The court held "that there can be no such lien on the building separate from the land," and the Washington statute (it was held) would not bear that construction. In support of its construction, the court calls attention, obiter, to the fact that the statute does not provide for removal of buildings in case of sale, and that obiter dictum is the only thing in the case which tends to support the decision in Lumber Co. v. Briggs. As already stated, the New Jersey cases cited in the majority opinion construe the language of a statute entirely different from our own, and have no application. There is no expression in either of the cases from New Jersey from which it can be inferred that the court considered that the absence from the statute of a provision for the removal of a building curtailed the right to a lien. On the contrary, I find this language in Coddington v. Dock Co., 31 N. J. Law, 481: "A fixture is, during the time it is so fixed, land, but liable to be separated therefrom by divers operations of law, or at the will of the tenant. But the mechanic's lien must attach to it while it is land, and by virtue of its being land. If the lien attaches to it while it is still land, the special fi. fa. sells the building, and the purchaser under it can remove it in the same manner as the owner could before the lien attached, by virtue of its being a trade fixture." This language, it seems to me, clearly recognizes and sup-

ports the proposition that where the lien attaches to any part of the real estate, whether it is part of the soil itself or a building or fixture attached to the land, that part subject to the lien may be separately sold; and the buyer succeeds, by virtue of the purchase, to all the rights of the former owner, including the right of removal, if such right existed. If the person against whom the lien is claimed had only a leasehold estate, or if there were a prior incumbrance on the property, there would generally be no right of removal in the proprietor of the building, and, consequently, the purchaser at the sale under the lien could not acquire that right. This suggests the intent and purpose of those provisions found in the mechanic's lien laws of most of the states, and which are embodied in sections 4794 and 4795 of our Code (Rev. Codes 1899), and in sections 5479 and 5480, Comp. Laws 1887, to the effect that buildings may be separately sold and removed, notwithstanding the builder has no right to remove the structure by reason of the forfeiture of his leasehold estate or the existence of prior incumbrances. The sole intent and effect of these provisions is to create a right of removal, or to secure to the creditor the proceeds of the improvements, under circumstances where such right could not exist without the aid of express statute. It clearly was not the intent to abridge the right to and impair the efficiency of mechanics' liens. The obiter remarks of the commissioner touching the question in Ranson v. Sheehan, 78 Mo. 668, were, in the subsequent case of Lumber Co. v. Clark (Mo. Sup.) 73 S. W. 137, expressly disapproved, and said to be contrary to the well established rule of that state. The case of Lumber Co. v. Clark is instructive. In that case the lien was enforced against a structure erected on land which the defendant held under an executory contract to purchase. It was neither a case of a forfeited leasehold estate nor of prior incumbrances. The Missouri statute is the same as the statute of this state before the revision. That court, however, construed the section of their law (which is identical with section 5480, Comp. Laws Dak. 1887) to be an express provision for removal in case of prior incumbrances only. The Missouri statute, therefore, as construed by the courts of that state, is in substance and effect the same as our present law in this: That it makes express provision for removal of buildings only in case of forfeited leasehold estates and prior incumbrances. Yet the courts of that state do not seem to regard these provisions as prohibitive of the right of removal of

buildings, or as preventing a lien on the building separate from the land in cases other than forfeited leasehold estates or prior incumbrances. In Alabama the statute is very similar to our law. The sections which define the lien and fix the conditions for obtaining it are the same in substance as ours (Code Ala. 1896, c. 71), but the lien on the land is limited to one acre. Section 2725 provides for a lien on structures erected by a tenant on leased lands, and for their separate sale and removal. Section 2724 fixes the relative priority of the mechanic's lien and other incumbrances on the structures and land substantially the same as section 4795, Rev. Codes N. D. 1899, and further provides: "And the person entitled to such lien may, when there is a prior lien, mortgage or incumbrance on the land, have it enforced by a sale of the building or improvement under the provisions of this article, and the purchaser may, within a reasonable time thereafter, remove the same." There are no other provisions in that statute with reference to the right to a separate sale and removal. Under that statute the courts of that state have uniformly held that a lien may exist on the structures separate and apart from any lien on the land. See cases cited in note to section 2723, Code Ala. 1896. In this respect those decisions accord with the decisions of Massachusetts, Wisconsin, New York and Missouri (Forbes v. Yacht Club, 175 Mass. 432, 56 N. E. 615; Ombony v. Jones, 19 N. Y. 234; Dean v. Pyncheon, 3 Pin. 17; Lumber Co. v. Clark (Mo. Sup.) 73 S. W. 137), based on statutes similarly worded. In Bedsole v. Peters, 79 Ala. 133, a mechanic's lien was foreclosed by the separate sale of the structure apart from the land, although the lien did not attach to the land by reason of a defective description in the claim filed for the lien. It was urged in that case that the lien on the structure failed because the land was not held. The court decided otherwise. The court said: "The declaration is clearly made, in the statute, that the lien shall be good upon these structures and upon the land on which they are situated. It is a several, and not a joint, lien; and both the letter and spirit of the law contemplate that the improvements may, in proper cases, be subjected to sale and removal from the premises by the purchaser. While special provision is made in section 3443 (2725) for the sale of improvements located on leased lands, and in section 3442 (2724) for the enforcement of the same right in preference to any prior lien, incumbrance or mortgage * * * the plain and natural meaning of

the law is that the right to subject the improvements to sale shall not be lost because by accident or negligence the plaintiff has lost his lien on the land by failure to describe it. The policy of the law is to prevent the landowner from unjustly appropriating to his own use the labor and material of the mechanic, employe or material-man by reason of the merger of these values into the freehold estate. The defendant cannot complain that the plaintiff enforces his lien only on what the plaintiff has placed on his premises, and not also on the premises in addition to the improvements."

The earlier lien laws of Massachusetts were similar in terms to those of New Jersey, and received the same construction; and this construction was adhered to even after the law had been amended. The decisions of that state construing the amended statutes were, however, expressly disapproved in Forbes v. Yacht Club, 175 Mass. 432, 56 N. E. 615, and it is there held that a lien may attach to a building and the same may be sold, even though the owner thereof has no interest in the land. A mechanic's lien under the amended statute involved in that case is given in substantially the same language as by the statutes of this state. The Massachusetts statute does not, however, make any provisions for separate sale and removal of buildings. The courts of that state seem to hold that the right to a separate lien gives the right to a separate sale. The following cases based on similar laws, where there was no express provision for a separate sale and removal, announce the same principle: Ombony v. Jones, 19 N. Y. 234; Dean v. Pyncheon, 3 Pin. 17.

Common sense, authority and the elementary rules for statutory construction alike cry out against the views expressed in Lumber Co. v. Briggs. In this case there are no rights of third persons involved. The defendant owns the land and the building, and can remove it at will. He owes the debt which it was the plain intent of the statute should be secured by a lien on the building. I know of no rule of law or principle of equity which in any way prevents the lien from being enforced by a sale of the building which will vest the purchaser with the same right to remove it as this defendant.

The proposition that there can be no separate lien on the building enforceable by the sale of the building alone and removal thereof from the land is, in my opinion, erroneous, and the statement to that effect in Mahon v. Surerus, 9 N. D. 57, 81 N. W. 64, and in

Lumber Co. v. Briggs, was unnecessary to the decision in either of those cases. The first section of the act "recognizes the lien upon the building as a distinct right, and, in addition, gives a lien upon the land." Mahon v. Surerus (page 59 of 9 N. D.; page 65 of 81 N. W.). In corroboration of this statement, the chief justice called attention to the fact that a separate sale and removal of the buildings was provided for by section 5480, Comp. Laws 1887, and, it seems to me, adopted a strained construction of that section when he held that it gave a right to a separate sale and removal in cases other than incumbered land. The propriety of the interpretation of the first section of the act in that case, it seems to me, was sufficiently obvious to stand alone, without the support of such a strained construction of section 5480.

The reason for the amendment made by the revision of 1895 is easily found. It is a well known fact that the territorial mechanic's lien law was copied verbatim from the Iowa law as it existed prior to 1876 (chapter 8, tit. 14, Code Iowa 1873). Experience had shown that the provisions of that law giving the right of removal of buildings from incumbered lands were inadequate to give relief in all cases. Getchell v. Allen, 34 Iowa, 559. The law was changed in 1876. Acts 16th Gen. Assem. c. 100; McClain's Ann. Code, tit. 14, c. 8. Among other changes so made was the adoption of a new provision in regard to incumbered lands. Section 9, subdivision 4; McLain's Code Iowa 1888, section 3317, subd. 4. This change of the Iowa law was incorporated into the laws of this state by the revision of 1895, and is found in section 4795, Rev. Codes 1899, which is, with the exception of some slight changes of phraseology, a copy of subdivision 4, section 3317, McClain's Code Iowa 1888. The change was made to render the law more effective, so as to give the mechanic or material-man the benefit of his lien on the building in cases where, by reason of the superior rights of third persons, the building could not be removed.

Even if the decision in Lumber Co. v. Briggs can be properly said to be in the nature of a rule of property, yet I am for overruling it, because the slight injury which might possibly result in a few individual instances should not, in my opinion, weigh against the certainty of mischief which will surely result from a blind adherence to so bad a precedent.

It is not the mere fact that a given decision of the Supreme Court announces a rule which relates to property rights that gives

such decision character and force as a "rule of property," and therefore calls for the application of the maxim stare decisis when the decision is questioned. If that were the meaning of the term, the rule of stare decisis, reduced to its fewest terms, would be this: Whatever the judges of the Supreme Court have announced to be their interpretation of the law in a given case is the law in all cases, however erroneous that opinion may be, or however palpably contrary to the expressed will of the legislature, or against the common law as established by general opinion and business usage throughout the state. The necessary result of such a doctrine would be that the court would become a maker of law instead of an interpreter thereof. All law, both statutory and common, would in time come to be a mere collection of judicial edicts, having no firmer foundation than the caprice of judges. I cannot subscribe to such a doctrine. It is not the doctrine established by the authorities. A decision becomes a rule of property only when it has been acquiesced in and generally acted upon throughout the commonwealth. It is not, strictly speaking, the decision which has made the law, but the decision has become the law by public consent. Such consent is evidenced when it appears that the rule announced by the decision has by long usage "been made the groundwork and substratum of practice." Lord Ellenborough said, in Isherwood v. Oldknow, 3 Maule & S. 396: "It has been sometimes said that 'communis error facit jus.' But I say, communis opinio is evidence of what the law is; not where it is an opinion merely speculative and theoretical, floating in the minds of persons, but where it has been made the groundwork and substratum of practice." "Mere precedent alone is not sufficient to establish a legal principle that is not founded on sound reason and does not tend to the purposes of justice." Leavitt v. Morrow, 6 Ohio St. 71, 67 Am. Dec. 334. "In the absence of complications resulting from property rights, it is the privilege, if not the duty, of courts to re-examine questions, and modify or overrule previous decisions shown to be wrong." State v. Hill, 47 Neb. 456, 66 N. W. 541. "Where a question involving private and public rights has been once passed upon, and cannot be said to have been acquiesced in, it is the duty of the court to re-examine such questions judicially, when properly called upon." Pratt v. Brown, 3 Wis. 603. See, also, Linn v. Minor, 4 Nev. 462, where the question is most ably discussed, and authorities cited.

I feel safe in saying, from my knowledge of conditions in this state, that the rule in Lumber Co. v. Briggs, has never become the law by common opinion and practice. I think it is extremely improbable that any person has bought land burdened with a mechanic's lien, such as the one in question, paid the purchase price, and knowingly taken his chances on its validity or invalidity in reliance on the previous decision in question. If any such case could be found, such an isolated case of individual hardship should not weigh as a feather against our duty to declare the law as it is, and thus protect and enforce the rights of the far greater number who have, in ignorance of that decision and in reliance on the plain language of the statute, extended credit for labor and material to aid in the upbuilding of this new state.

(103 N. W. 398.)

AVERY MANUFACTURING COMPANY v. C. H. CRUMB, LEO H. SMITH AND O. P. SMITH.

Opinion filed January 23, 1905.

In an Action to Foreclose a Chattel Mortgage a Jury Trial Is Not a Matter of Right.

1. Plaintiff brought an action to foreclose a chattel mortgage, and made other mortgagees and lienholders, holding mortgages and liens on part of the property described in plaintiff's mortgage, parties defendant, and asked to have defendants' liens declared inferior and subsequent to plaintiff's mortgage. Defendant Smith answered, and demanded that his liens be declared superior to that of plaintiff, and asked judgment against plaintiff for the value of the property covered by his liens which plaintiff had taken possession of for the purpose of foreclosure. Defendant also prayed for general equitable relief. Plaintiff replied by a general denial. *Held,* that the action is an equitable action, and that plaintiff was not entitled to a jury trial as a matter of right.

Same.

2. Section 5032, Comp. Laws 1887, providing that all issues of fact for the recovery of money only must be tried by a jury, did not entitle the plaintiff to a jury trial as a matter of right in such an action.

Section 5420, Rev. Codes 1899, Is Constitutional.

3. Section 5420, Rev. Codes 1899, amending section 5032, Comp. Laws 1887, and providing that all issues of fact in an action for the recovery of money only shall be tried by a jury, does not restrict or

change the right to a trial by jury, and its enactment was not a violation of section 7 of article 1 of the constitution, providing that the right to a jury trial "shall be secured to all and remain inviolate."

Evidence — Measure of Damages.

4. The evidence shows that the value of ten horses taken by plaintiff was $1,200, and the trial court found the value accordingly. The evidence further showed that plaintiff had taken only nine horses covered by defendant's mortgages. There was no evidence as to the value of any of the horses separately. *Held,* that the judgment appealed from is not sustained by the evidence, and that this court cannot definitely determine the question of the value of the property taken from such evidence, and, under such conditions, will not dispose of an appeal under section 5630, Rev. Codes 1899, but will order another trial.

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

Action by the Avery Manufacturing Company against Leo H. Smith. Judgment for defendant, and plaintiff appeals.

Reversed.

Young & Wright, for appellant.

The right of trial by jury is preserved in substance as it existed at the adoption of the constitution, and in the classes of cases to which it was then applicable. Cooley's Const. Limitations, 506; 6 Am. & Eng. Enc. Law (2d Ed.) 974; Flint River Steamboat Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248; Lake Erie, etc., Ry. Co. v. Heath, 9 Ind. 558; Byers v. Commonwealth, 42 Pa. 89; Whallon v. Bancroft, 4 Minn. 109; Mead v. Walker, 17 Wis. 189; Hawthorne v. Panama Park Co., 32 So. 812; Whitehurst v. Coleen, 53 Ill. 247; State Board v. Ray, 48 Atl. 802.

Trial of issues of fact of a legal nature in equitable suits is recognized in many jurisdictions. McNulty v. Mt. Morris Electric Light Co., 172 N. Y. 410, 65 N. E. 196; Lillienthal v. McCormick, 117 Fed. 89; Hudson v. Wood, 119 Fed. 764; Kitts v. Wilson, 5 N. E. 400; Abernathy v. Allen, 31 N. E. 534; Bradley v. Aldrich, 40 N. Y. 504, 100 Am. Dec. 528; McMartin v. Bingham, 27 Iowa, 234, 1 Am. Rep. 265; State Journal Co. v. Commonwealth Co., 43 Kan. 93, 22 Pac. 982.

Where a case exclusively of equity jurisdiction has been tried as an action at law, to a jury, verdict will be set aside and new trial granted, even if no specific objection was made by either party to

such method of trial. Prondzinski v. Garbutt, 8 N. D. 191, 77 N. W. 1012; Peckham v. Van Bergen, 8 N. D. 595, 80 N. W. 760.

The right to a jury trial upon an amended complaint in an action at law is not lost by failure to demand a jury trial under the original complaint, presenting a case for purely equitable relief. Mares v. Wormington, 8 N. D. 329, 79 N. W. 441.

The court erred in denying appellant's leave to amend its complaint; the practice is liberal in matters of amendments and they should always be allowed in furtherance of justice. Section 5297, Rev. Codes; Anderson v. First National Bank, 5 N. D. 80, 64 N. W. 114; Martin v. Luger Furniture Co., 8 N. D. 220, 77 N. W. 1003.

The judgment is indefinite, uncertain and contrary to law, not warranted by the findings nor by the evidence, nor are the findings of fact supported by the evidence. The court finds the action is to foreclose a chattel mortgage upon personal property including the bay mare Daisy, nine years old, weight 1,200 pounds. Also that the defendant Smith is the owner and holder of liens against this property including one bay mare named Daisy, which are superior to the liens of the plaintiff. Respondent testifies that all the horses and mares described in the complaint and judgment, including the bay mare named Daisy, were worth $1,200. There is no testimony as to the value of the separate animals exclusive of the mare Daisy. In none of the respondent's chattel mortgages is there a description to cover "one bay mare named Daisy, nine years old, weight about 1,200 lbs." The court could not fix the amount of the recovery as there is no proof as to the value of the horses after the elimination of Daisy.

In an action between the owner and lien holder, or two lien holders, the measure of damages, if the value of the property exceeds the sum due upon the lien, is the amount of the lien. The respondent cannot recover by showing merely the amount of his lien, he must show the value of the property alleged to have been converted, which is prima facie the correct measure of damages. Lovejoy v. Merchants State Bank, 5 N. D. 623, 67 N. W. 956; Union Bank of Oshkosh v. Moline, Milburn & Stoddard Co., 7 N. D. 201, 73 N. W. 527.

This not being shown, there is no basis for a recovery against the appellant.

Morrill & Engerud and *C. S. Shippy,* for respondent.

Trial by jury is a right in an action at law, and not in a suit in equity. Rider-Wallis Co. v. Fogo, 78 N. W. 767; Klein v. Valerius, 57 N. W. 1112; Hotaling v. Tecumseh Nat'l Bank, 75 N. W. 242; Greenleaf v. Egan, 15 N. W. 254; Marling v. Burlington, C. R. & N. R. Co., 25 N. W. 268; Wilson v. Johnson, 43 N. W. 148; McCormick v. Phillips, 4 Dak. 506, 34 N. W. 39; Gull River Lumber Co. v. Keefe, 6 Dak. 160, 41 N. W. 743; 6 Am. & Eng. Enc. Law (2d Ed.) 975.

No demand was made for a jury trial or the question raised in the trial court. It is now too late for appellant to complain. Lace v. Fixen, 38 N. W. 762; St. Paul Distilling Co. v. Pratt, 47 N. W. 789; Peterson v. Ruhnke, 48 N. W. 786; State v. Craig, 12 N. W. 301; Baird v. Mayor, 74 N. Y. 382.

Appellant asserts that the judgment is indefinite and uncertain, not warranted by the findings or the evidence, and that the findings are not supported by the evidence. Appellant seeks to foreclose a chattel mortgage executed by the defendant. Respondent, with others, are made defendants, and the complaint alleges that they claim to have some lien upon the personal property described in the mortgage superior to that of the appellant. The complaint also alleges that appellant has obtained possession of all of said property. The complaint asks that respondent set forth the nature of his respective claims and liens, and that they be adjudged inferior and subject to the appellant's mortgage. Respondent answered admitting appellant's possession of the property, and asserts that respondent's liens are all prior and superior to the appellant's, and asks for judgment that the amount due thereon be ascertained; that he have judgment against appellant for the amount. The issue was the priority of the respective liens. After ascertaining the priority the court is to determine the amount due each party on their respective liens and render a judgment according to the facts. The possession of the property is admitted to be in the appellant. Appellant at no time offered to turn over the property to respondent; neither has he abandoned possession thereof under its replevin action. The court finds that there was due appellant upon his note and mortgage the sum of $1,739.20. The court finds the value of the property taken by appellant is $1,377.61, and that there is due the respondent on the notes secured by his lien the sum of $1,600. The court finds that appellant is entitled to a decree of foreclosure and sale of the property as well as personal judgment against the

defendant, Crumb; that respondent's liens are superior to appellant's and he is entitled to have the amount of his said liens satisfied from the foreclosure sale. In case appellant fails to proceed with the foreclosure sale and therefrom satisfy the amount due respondent, or so much thereof as the proceeds will satisfy, respondent is to have judgment against appellant for the value of said property, towit: $1,377.61. The judgment is in accordance with these findings and conclusions. It specifies the rights of each party, the amount due appellant as well as respondent. The alternative judgment is not for the full amount of respondent's liens because the value of the property is not as great as the amount due the respondent on his liens. This is in accordance with the decisions of this court. Union Bank of Oshkosh v. Moline, Milburn & Stoddard Co., 7 N. D. 201, 73 N. W. 527; Lovejoy v. Merchants State Bank, 5 N. D. 623, 67 N. W. 956.

MORGAN, C. J. Plaintiff brought this action to foreclose a chattel mortgage upon stock and grain given to it by the defendant Crumb. The defendants L. H. Smith and O. P. Smith are made defendants, as owners of other chattel mortgages upon the stock, and of a seed lien on the grain. The relief prayed for is the foreclosure of the plaintiff's mortgages, and that defendants' lien and mortgages be declared inferior to plaintiff's lien upon the property. The complaint shows that the plaintiff obtained possession of the property covered by its mortgage, and had possession of the same when this action was commenced. The possession of the horses and grain on which plaintiff and defendants claim first liens was obtained by the plaintiff under an action of replevin brought by it to obtain such possession. The defendant L. H. Smith answered in this action, and specifically set forth his mortgages on the stock and lien on the grain, and asked that such mortgages and seed lien be declared superior and prior to those of plaintiff. The defendant also asked for judgment as follows: "That the amount due this defendant, Leo H. Smith, upon said notes and secured by said chattel mortgages and said seed lien upon said described personal property, may be ascertained by this court, and that the defendant, Leo H. Smith, have judgment against said plaintiff for the amount so ascertained, together with all costs and disbursements of this action. That the lien of plaintiff upon said property, if any it has, be declared and adjudged subsequent and inferior to the liens of the defendant, Leo H. Smith, upon said

property. That the defendant, Leo H. Smith, do have herein such other, further or different relief as to the court may seem just and equitable in the premises." The trial court found that the defendant Leo H. Smith has the prior liens on the property under his mortgages, and that plaintiff's lien is subject thereto. Personal judgment was ordered for the plaintiff against the mortgagor for the amount due on its notes for the sum of $1,739.20. The court found there was due on defendant's notes over the sum of $1,600. The value of the property taken by the plaintiff on which defendant held prior liens to plaintiff's mortgage was found to be $1,377.61. The mortgaged property was ordered sold by the plaintiff under special execution, and the proceeds, to the amount of $1,377.61, applied on defendant's liens; if plaintiff failed to sell the property on special execution under the foreclosure proceedings, that defendant have judgment against plaintiff for the value of the property taken by plaintiff, found to be $1,377.61. Plaintiff has appealed from the judgment, and demands a trial de novo under section 5630, Rev. Codes 1899.

The plaintiff claims that the judgment must be reversed for the reason that it was not given a trial by jury. The contention is that the constitutional provision that "the right of trial by jury shall be secured to all and remain inviolate" (section 7, art. 1) has been violated by an amendment of the law relating to issues triable by a jury, in force when the constitution was adopted. Section 5032, Comp. Laws 1887, in force when the constitution was adopted, reads as follows, so far as applicable to the point: "An issue of fact for the recovery of money only, or of specific real or personal property, must be tried by a jury unless a jury trial be waived as provided in section 5065." As amended after the constitution was adopted, this section reads as follows: "An issue of fact in an action for the recovery of money only * * * must be tried by a jury," etc. It is claimed that the addition of the words, "in an action," is a restriction of the right to a jury trial as it existed when the constitution was adopted, and that the amendment is therefore inoperative and void. The section as it stood before the amendment was, in effect, the same as it now reads. Before these words were added, the section referred to issues of fact in actions of law for the recovery of money only. Issues of fact in equity actions, tried while section 5032, Comp. Laws 1887, was in force, were not triable to a jury as a matter of right.

The practice has always been that issues of fact in equity actions were triable by the court as a matter of right, and, if submitted to a jury, the verdict had no especial force, but was advisory merely. Prondzinski v. Garbutt, 8 N. D. 191, 77 N. W. 1012; Bates v. Gage, 49 Cal. 126; Grim v. Norris, 19 Cal. 140, 79 Am. Dec. 206; La Societe Francaise v. Selheimer, 57 Cal. 623; Am. & Eng. Enc. Law (2d Ed.) vol. 6, p. 975, and cases cited. The case at bar is an action for the foreclosure of a chattel mortgage, and is purely an equitable action.

It is true defendants did not ask for a foreclosure of the mortgage. That is immaterial, as foreclosure was prayed for by plaintiff. Plaintiff had taken possession of the property for that purpose. The court ordered the plaintiff's mortgage foreclosed, and the proceeds applied on defendant's indebtedness from Crumb. The action was therefore an equitable one, tried as such, and plaintiff had no right to a jury trial as a matter of law. Section 5032, Comp. Laws 1887, if now in force, would not entitle plaintiff to a jury trial. As construed in Gull River Lumber Co. v. Keefe, 6 Dak. 160, 41 N. W. 743, no right to a jury trial could be based thereon in an equitable action. The amendment of section 5032, Comp. Laws 1887, now in force as section 5420, Rev. Codes 1899, did not abridge the right to a trial by jury, and such right remains the same as before the amendment. The only reasonable construction of section 5032 is that it referred to issues of fact in an action at law, and that it was not intended to give the right to a jury trial in an equitable action. The plaintiff, having begun an equitable action, had no right to a jury trial as a matter of law.

The trial court found that the defendant's mortgages were prior liens to that of the plaintiff. The plaintiff had taken possession of the mortgaged property, and the court found the value of the property taken possession of to be $1,377.61. The value of the ten horses taken possession of by plaintiff was found to be in the aggregate $1,200. The value was thus found in a lump sum, without any finding as to the value of any of the horses separately. In this valuation of $1,200 was one mare, "Daisy," which was not included in any of defendant's mortgages, although described in plaintiff's mortgage. The value of the mare Daisy is not found. There is no mare included in the defendant's mortgages which can possibly be held to be the mare described as "Daisy." This de-

scription is, "one bay mare named Daisy, nine yrs. old, weight about 1,200 lbs." Plaintiff is liable only for the property taken by him on which defendant held a prior lien. They had no lien or claim upon the mare Daisy. The defendant's mortgages contained no such animal either by name or similar description. There was no evidence to show that the mare Daisy was included in defendant's mortgages. We are, therefore, unable to determine the value of the property taken by plaintiff that was covered by defendant's mortgages.

It is shown that plaintiff took possession of ten horses, but there is no evidence as to what their value was. The plaintiff can be held for the value of those taken by it only. Plaintiff is not responsible to the defendant to the extent of his indebtedness unless the value of the property exceeds the indebtedness. The value of the property taken in the aggregate is less than the sum total of the indebtedness from Crumb to defendant. The value of the property taken, being less than the indebtedness, is the measure of plaintiff's liability. This court cannot, under the evidence, definitely determine the value of the property taken by plaintiff covered by defendant's mortgages. It cannot be determined what the value of the other nine horses taken is, as the value of the ten horses is shown by the evidence as an aggregate sum. There is no presumption that the horses were of equal value, or that the mare Daisy was of no value.

Respondent claims that the evidence shows that the property covered by plaintiff's mortgage is the same that is included in the defendant's mortgages. This claim is based upon the fact that defendant testified that the property in plaintiff's and defendant's mortgages is identical. Such a general statement cannot be held to overcome the written evidence of the mortgages themselves as to what is contained therein. Defendant also claims that one of his mortgages contains a description as follows: "One brown mare, 10 years old, called Nell"—that should be held to describe the mare Daisy. But, without explanation, the description cannot be held to refer to the same animal. There are other objections urged to the judgment, based upon the fact that the valuation of the horses described in the defendant's several mortgages was proven in an aggregate or lump sum. In view of the fact that a new trial must be granted based upon the fact that a part of the judgment is made

up of the value of the mare Daisy, on which defendant had no mortgage, we need not consider these other objections.

It is urged that the evidence shows that defendant's notes were fully paid by Crumb. The evidence on this question is very incomplete, and does not fully cover the issues raised by the pleadings as to payment. Defendant had other notes against Crumb than the ones pleaded, and those notes are the subject of evidence concerning payments made on them. In view of the fact that we find that a new trial should be granted in this case, we will not attempt to make an accounting between Crumb and the defendant under this evidence. O'Toole v. Omlie, 8 N. D. 444, 79 N. W. 849.

Plaintiff urges objections against the seed lien offered in evidence by defendant, and insists that such lien is of no force for several reasons. It is not necessary to consider them. We find that the grain on which the seed lien is claimed on the 1901 crop is also covered by one of defendant's chattel mortgages. Hence, if the seed lien be found defective, or if the evidence fails to show that defendants furnished any seed grain, still the defendant is shown to be entitled to the crop for that year under his chattel mortgage. Hence, the final result in this case will not be changed, whatever decision might be reached on the objections raised against the seed lien.

A question is also raised as to whether the execution of the defendant's mortgages was properly proven. As a new trial must be granted because the evidence fails to sustain the judgment for damages for the reason that the value of the horses taken by plaintiff was not shown, the objection will not be considered. If found to be valid, it would only result in finding an additional reason for granting a new trial. The question will not necessarily arise on another trial. The same may be said of the objection to the form of the judgment.

The judgment is reversed, and the cause remanded for further proceedings.

YOUNG, J., concurs. ENGERUD, J., having been of counsel, took no part in the foregoing opinion.

(103 N. W. 410.)

E. H. CARTER v. ALBERT J. CARTER.

Opinion filed January 26, 1905.

Resulting Trust — Evidence.

1. To establish a resulting trust in real property by parol testimony the evidence must be clear, convincing and satisfactory, and of such a character as to leave in the mind of the judge no hesitation or substantial doubt.

Res Judicata.

2. A judgment in a former action between the same parties is not conclusive evidence in a subsequent suit on a different cause of action, unless it is made to appear that the particular question sought to be concluded was necessarily tried and determined in the former proceeding.

Appeal from District Court, Richland county; *Fisk*, J., presiding by request.

Action by E. H. Carter against Albert J. Carter. Judgment for defendant and plaintiff appeals.

Affirmed.

C. E. Wolfe and *McCumber, Forbes & Jones*, for appellant.
Purcell, Bradley & Divet, for respondent.

ENGERUD, J. This is a suit in equity to establish title to a tract of real property by virtue of a resulting trust. The trial court found the facts against the plaintiff, and ordered judgment dismissing the action. The plaintiff appeals from the judgment under section 5630, Rev. Codes 1899, and demands a review of the whole case.

The plaintiff asserts that the land in question was bought and paid for by him, but was conveyed to the defendant pursuant to a verbal agreement between them to the effect that the defendant should hold the title in trust for the plaintiff. If any trust was created, it was an implied trust, resulting from the payment of the purchase price by plaintiff. "When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." Rev. Codes 1899, section 3386; Smith v. Security Loan & Trust Co., 8 N. D. 451, 79 N. W. 981. An express trust in relation to real property cannot be created by oral agreement. Rev. Codes 1899, section 3385. The evidence

as to the alleged oral agreement therefore was admissible only so far as it tended to throw light on the pivotal question as to whether the purchase price was paid by or for the plaintiff. On this crucial question the evidence is in irreconcilable conflict. It would serve no useful purpose to state it in detail. Suffice it to say that the plaintiff positively asserted that he furnished the money to buy the land, and that the defendant agreed to take the conveyance to himself in trust for plaintiff. The defendant just as positively denies any such arrangement, and claims that the plaintiff temporarily advanced to defendant the amount required to buy the land, and that such advancement was repaid to plaintiff from the proceeds of a loan secured by mortgage of the land given by defendant and negotiated by plaintiff. Each party introduced testimony as to alleged admissions of the other, and circumstances which tended to corroborate his own testimony and discredit that of the other. These admissions were merely casual remarks claimed to have been made to or in the hearing of witnesses, and these remarks, as well as the circumstances, even if they were undisputed, are not of such a character as to necessarily discredit the party against whom they were proven. In order to overthrow the presumption in favor of defendant's title in a case such as this, the plaintiff must have more than a preponderance of evidence. The proof must be "clear, specific, satisfactory, and of such a character as to leave in the mind of the chancellor no hesitation or substantial doubt." Jasper v. Hazen, 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58; Riley v. Riley, 9 N. D. 580, 84 N. W. 347; McGuin v. Lee, 10 N. D. 160, 86 N. W. 714; Sargent v. Cooley, 12 N. D. 1, 94 N. W. 576. This case is one which depends wholly on the credibility of witnesses. The trial judge saw and heard all the witnesses except one testify. Under such circumstances the findings of the trial court are entitled to some weight. Nichols v. Stangler, 7 N. D. 102, 108, 109, 72 N. W. 1089; State v. McKnight, 7 N. D. 444, 75 N. W. 790. In view of his opinion as to the relative credibility of the witnesses before him, the record does not convey to us proof of such a clear and convincing character as to enable us to say without hesitation or doubt that the allegations of the complaint are established.

Appellant contends, however, that the question upon which this case hinges has been decided in his favor in a former action. Before this action was tried, there was another action pending between the same parties, in which the appellant sued the respondent

to recover money alleged to have been paid out and expended for the use and benefit of the defendant for building materials, labor, etc., in the improvement of defendant's homestead which adjoined the land now in controversy. In that case it seems it was asserted by the plaintiff and denied by the defendant that the land now in question belonged to plaintiff, and that the mortgage executed thereon by defendant was in fact for plaintiff's benefit, and hence the proceeds belonged to the latter. Some of this money was used to pay for improvements on the homestead, and plaintiff claimed credit therefor. The jury returned a verdict for $500 in plaintiff's favor, and judgment was entered on the verdict before the present action was tried. Appellant argues that, inasmuch as that verdict was a finding in his favor on all the issues, the judgment in that action conclusively establishes all the facts with respect to which there was a dispute in that case. That argument is utterly untenable. "The conclusive effect of a judicial decision cannot be extended by argument, inference or implication to matters which were not actually heard and determined. * * * Collateral or incidental questions which must naturally arise in and during the litigation of every controversy do not become a part of the action by being given in evidence, or because they are brought to the notice of the court." Herman on Estoppel, section 275. A judgment in a former action between the same parties is not conclusive evidence in a subsequent action between them on a different cause of action, unless it is made to appear that the particular controversy sought to be concluded was necessarily tried and determined. Packet Co. v. Sickles, 5 Wall. 580, 18 L. Ed. 550; Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195; Dooley v. Potter, 140 Mass. 49, 2 N. E. 935; Kilander v. Hoover, 111 Ind. 10, 11 N. E. 796. There is no evidence in this case from which it can be determined whether the jury allowed or disallowed plaintiff's claim to a credit for the proceeds of the loan. The fact that the plaintiff in that case claimed expenditures, including the proceeds of the mortgage, aggregating $2,493.56, and the jury allowed only $500, seems to point strongly to the inference that they rejected plaintiff's claim to the proceeds of the mortgage.

The judgment is affirmed. All concur.

(103 N. W. 425.)

JACOB R. HARSHMAN v. NORTHERN PACIFIC RAILWAY COMPANY.

Opinion filed January 26, 1905.

Death by Wrongful Act — Recovery.

1. At common law and independent of statutory authority no right of recovery for the wrongful or negligent injury of another resulting in death exists.

Parties.

2. Where a right of recovery is given by statute, and the exercise of that right is committed to particular persons, it cannot be exercised by another person, even though he may be the sole beneficiary.

Surviving Father of Deceased Minor Not Proper Party Plaintiff.

3. Section 5976, Rev. Codes 1899, designates three classes of persons who may maintain an action for the wrongful or negligent killing of another. These do not include surviving parents. It is accordingly *held*, that a complaint by a father in an action prosecuted in his own name and right to recover for the death of his minor son does not state a cause of action.

Failure to Plead Substantial Cause of Action May Be Urged at Any Stage of Case.

4. Where a complaint wholly fails to set out a substantial cause of action, and cannot be made good by amendment, the objection to its sufficiency may be urged at any stage of the proceedings, and may be considered upon appeal by the court on its own motion.

Appeal from District Court, Barnes county; *Lauder*, J.

Action by Jacob R. Harshman against the Northern Pacific Railway Company. Judgment for plaintiff and defendant appeals.

Reversed.

Ball, Watson & Maclay, for appellant.
Young & Wright, for respondent.

YOUNG, J. The plaintiff brought this action in his individual capacity and right to recover damages from the defendant for the alleged negligent killing of his son, Walter Harshman, a boy 10 years of age. The complaint alleges, among other things, that the deceased was in good health; that the plaintiff was entitled to his services and earnings until his majority; and that said services and earnings, after deducting the cost of his maintenance, were of the value of $2,000, for which sum he demanded judgment. At the opening of the trial counsel for defendant objected to the introduc-

tion of any evidence, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The objection was overruled. At the close of the testimony defendant moved for a directed verdict upon several grounds, one of them being "that the plaintiff has not shown that he has suffered any legal damage or injury through the death of said Walter Harshman which entitles him to a verdict." This motion was also overruled. Both rulings were excepted to. The jury returned a verdict for $1,500 in plaintiff's favor. The defendant then moved in the alternative for judgment notwithstanding the verdict or for a new trial. The motion was in all respects denied, and this appeal is from the order denying the same.

The view we have taken of this case makes it necessary to consider but one question, and that is whether the complaint states a cause of action in plaintiff's favor. Counsel for defendant contend that it does not, and we fully agree with this contention. It may be said at the outset that whatever right of recovery exists for injuries caused by the negligent killing of another is created by legislative authority only. At common law no such right of recovery existed. This is well settled. "The authorities are so numerous and so uniform on the proposition that by the common law no civil action lies for an injury which results in death that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the state courts, and no deliberate, well-considered decision to the contrary is to be found." Insurance Co. v. Brame, 95 U. S. 754, 24 L. Ed. 580; Carey v. Railway Co., 55 Mass. 475, 48 Am. Dec. 616, and cases cited in note, page 633; also Am. & Eng. Enc. Law (2d Ed.) vol. 8, p. 855, and cases cited.

The statutory provisions upon which the plaintiff's right to maintain this action depends are contained in chapter 36, Code Civ. Proc. (sections 5974-5979, Rev. Codes 1899, inclusive). It is patent upon an inspection of these sections that no cause or right of action is given to a surviving father. Section 5974 declares that those who wrongfully or negligently cause an injury resulting in the death of another are liable notwithstanding the death of the person injured. Section 5975 fixes the measure of their liability by declaring that "in such actions the jury shall give such damages as they think proportionate to the injury resulting from the death to the persons entitled to the recovery." Section 5976, which

designates the persons to whom the right of action is given, reads as follows: "The action shall be brought by the following persons in the order named: 1. The surviving husband or wife, if any. 2. The surviving children, if any. 3. The personal representative. If any person entitled to bring the action refuses or neglects so to do for a period of thirty days after demand of the person next in order, such person may bring the same." Section 5977 exempts the amount recovered from liability for the debts of the decedent, and provides that "it shall inure to the exclusive benefit of his heirs at law in such shares as the judge before whom the case is tried shall fix in the order for judgment, and for the purpose of determining such shares the judge may, after the trial, make any investigation which he deems necessary." Section 5978 provides that the action shall not abate by the death of either party. Section 5979 confers the power of making settlement, either before or after suit brought, upon the persons who are entitled to bring the action, and provides that "such compromise shall be binding upon all persons authorized to bring the action or to share in the recovery." It will be observed that the right of action is given to three classes of persons, and that the plaintiff belongs to neither one of them. We are bound to know, because of the extreme youth of the decedent, that there was no surviving wife or surviving children. The only remaining person, then, who could maintain this action, under the statute, is the personal representative. Statutes similar to this are found in almost all of the states, and it is universally held that only the persons designated in the statute can maintain the action. The reason is self-evident, namely, that the right or cause of action is statutory, and is given only to those whom the statute designates. See Tiffany on Death by Wrongful Act, section 616, and cases cited; also Nash v. Tousley, 28 Minn. 5, 8 N. W. 875; Scheffler v. M. & St. L. Ry. Co. (Minn.) 19 N. W. 656; Major v. B., C. R. & N. Ry. (Iowa) 88 N. W. 815; Killian v. Southern Ry. Co. (N. C.) 38 S. E. 873; McGinnis v. M. C. & F. Ry. Co. (Mo. Sup.) 73 S. W. 586; Fabel v. C., C., C. & St. L. Ry. Co. (Ind. App.) 65 N. E. 929; Woodward v. C. &. N. W. Ry., 21 Wis. 309; Weidner v. Rankin, 26 Ohio St. 522.

It is contended by plaintiff, however, that inasmuch as he is the sole heir, and as such is entitled to any sum which may be lawfully recovered, the verdict which has been returned in his favor, even though he has no right under the statute to maintain the action,

should be sustained. We cannot agree to this contention. Aside from the absence of any legal right to the verdict, we are not permitted to assume that a verdict returned in a different action prosecuted under authority of law would be the same as that which has been returned without legal sanction or right. A similar contention was urged in Usher v. West Jersey R. R. Co., 126 Pa. 206, 17 Atl. 597, 4 L. R. A. 261, 12 Am. St. Rep. 863. In that case a widow sought to recover damages for the death of her husband. The statute of New Jersey, where he was killed, provided that the action "shall be brought by and in the name of the personal representative of such deceased person." It was contended that, inasmuch as the amount recovered in such action would be for the exclusive benefit of the widow and next of kin, the widow may be allowed to sue for it in her own name. This the court denied, and sustained a nonsuit, saying: "There is no room for latitude of construction. The meaning of the language is plain and unambiguous, and its directions mandatory. It is an established rule that statutory remedies are to be strictly pursued, and we have no right, when the legislature have commanded one form, to say that another will serve the purpose equally well. The lawmaking power has settled the remedy as well as the right, and courts are not authorized to vary or depart from either. Moreover, the distinction made in this statute between the party having the right of action and the ultimate beneficiary is familiar to all common law states, and is of settled importance. * * * In the face of this settled distinction, clearly recognized and commanded by the statute, it would be an act of judicial usurpation to say that the mandate of the statute may be disregarded." We know of no case, and none is cited, where a recovery by one having no right of action has been allowed or sustained over objection upon the ground that the plaintiff would be the beneficiary in an action prosecuted by the person having the right. This was urged in Friese v. Friese, 12 N. D. 82, 95 N. W. 446, and was overruled.

It may be, and probably is, true, as counsel for plaintiff contend, that the defendant's general objection to the introduction of evidence, as well as the ground stated for granting a directed verdict, did not definitely apprise the trial court or opposing counsel of the nature of the objection now being considered; but that does not affect our right to consider it. This is not a case where a cause of action is substantially but defectively stated, and in which the de-

fect could be cured by amendment. The complaint in this case not only does not state a cause of action, but it shows upon its face that it cannot be made to state a cause of action. It is well settled that where a complaint wholly fails to set out a substantial cause of action, and is incapable of being made good by amendment, the objection to its sufficiency may be taken at any stage of the proceedings, even upon appeal and upon the court's own motion. Porter v. Booth, 1 S. D. 558, 47 N. W. 960; Johnson v. Burnside, 3 S. D. 230, 52 N. W. 1057; De Witt v. Chander (N. Y.) 11 Abb. Prac. 459; Crosby v. Huston, 1 Tex. 203, 225; Thomas v. Franklin, 42 Neb. 311, 60 N. W. 568. See, also, cases collected, 2 Cent. Dig. Appeal & Error, section 1232.

No amendment can make the present complaint state a cause of action in plaintiff's favor. The only way it can be made to state a cause of action in favor of any one is to substitute the personal representative of the decedent as plaintiff, and that cannot be done under the guise of an amendment, for that would not continue the existing suit except in form, "but would create and institute a new suit or a new question, and in a controversy between different parties." Lower v. Segal, 60 N. J. Law, 99, 36 Atl. 777; Lowell v. Segal (N. J. Sup.) 34 Atl. 945.

This case is not one of defect of parties or of want of legal capacity to sue. It is purely a want of a cause of action. The objection that a complaint does not state a cause of action "calls in question not only the sufficiency of the facts stated in the complaint to constitute a cause of action, but also the right or authority of the particular plaintiff to institute or maintain a suit upon such a cause of action." Frazer v. State (Ind. Sup.) 7 N. E. 203; Tipton County v. Kimberlin (Ind. Sup.) 9 N. E. 407, and cases cited.

It follows that the order appealed from must be reversed, and the action dismissed; and it is so ordered. All concur.

(103 N. W. 412.)

THE COUNTY OF DICKEY v. W. E. HICKS.

Opinion filed February 4, 1905.

Schools — County Superintendents — Salaries.

1. Schools in special districts are not under the official supervision of county superintendents, and are not to be taken into account in

computing their salary, under section 652, Rev. Codes 1899, following Dickey County v. Denning, 103 N. W. 422.

Payment Under Mistake — Recovery.

2. To authorize a recovery of money paid under mistake, it must appear that the plaintiff has not received the equivalent contemplated by the payment, and that it is against conscience for the defendant to retain it.

County Superintendents — Clerk Hire.

3. The county auditor of Dickey county, in good faith, but without authority of law, included in the defendant's monthly salary warrants the amounts which were due from the county to the clerks employed in his office. It was stipulated, and the trial court found, that defendant paid said clerks amounts in excess of those received from the county; that the sums paid were the reasonable value of their services; that their services were necessary; and that such payments were accepted by the clerks "as a complete discharge and satisfaction for the work done by each." *Held*, that a recovery by the county of the money thus paid to the defendant (its obligation to the clerks having been discharged) cannot be sustained.

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

Action by the County of Dickey against William E. Hicks. Judgment for plaintiff, and defendant appeals.

Modified.

F. B. Morrill and *E. E. Cassels*, for appellant.
George T. Webb, for respondent.

YOUNG, J. This action was brought by Dickey county to recover certain alleged overpayments on defendant's salary as county superintendent of schools, also certain sums paid to him for clerk hire, all of which payments were made during his term of office and between April 27, 1897, and January 6, 1903. The defendant admits in his answer that he was paid the several amounts stated in the complaint, but alleges, in substance, that the amounts paid as salary were lawfully due, and that the amounts which he received for clerk hire were to reimburse him for moneys which he had necessarily expended in employing clerical assistance in his office. The case was tried to the court without a jury, and all of the facts were stipulated. As a conclusion of law the trial court found that the plaintiff was entitled to judgment for the full amount demanded. From the judgment entered in pursuance thereof the defendant has

appealed, and assigns as error that the facts do not warrant the conclusion and judgment.

The several items for which plaintiff was given judgment are of two kinds: (1) Alleged overpayments on salary; and (2) alleged unlawful payments for clerk hire. These we will consider in their order.

The findings show that the defendant drew a salary during his entire term of office which was based upon an enumeration of the schools in his county, which included the schools and departments of schools in the special school districts of the city of Oakes and the city of Ellendale. It is conceded that if these schools should not have been included in the computation the amount awarded for overpayment on salary is correct. Counsel for plaintiff contend that the inclusion of these schools was without authority of law, and we agree with this contention. Section 652, Rev. Codes 1899, provides a graduated salary for county superintendents corresponding to "the actual number of schools or separate departments of graded schools over which such superintendent had official supervision during the preceding year." Section 639, Rev. Codes 1899, expressly excepts schools in special districts from the general superintendence of county superintendents. This particular question was involved in Dickey County v. Denning, in which the opinion has just been handed down, and we hold that schools in special districts are not under the "official supervision" of county superintendents. It follows that the award for overpayment on salary was proper.

The findings further show that the county auditor in issuing to the defendant his monthly salary warrants included in each an additional sum for clerk hire. Counsel for the county contend that the county auditor was not authorized to pass upon claims for clerk hire and to make payments therefor either to the defendant or direct to clerks, and that the obligation of the county was to the clerks, and not to the defendant in whose office they were employed. That this is a correct statement of the auditor's authority and the county's liability is sustained by State v. Heinrich, 11 N. D. 31, 88 N. W. 734. It is upon this basis that the county claims the right to recover the various sums paid to the defendant for clerk hire as money paid under mistake. The authority for the employment of clerks is contained in section 652, Rev. Codes 1899. So far as pertinent it reads as follows: "In counties having sixty schools the board of county commissioners shall appropriate one

hundred dollars for clerical assistance in the county superintendent's office and five dollars for each additional school, to be paid monthly; provided, that not more than six hundred dollars shall be appropriated for clerical assistance in any one year." It was stipulated, and the trial court found, that Dickey county had the requisite number of schools to require an appropriation and authorize the employment of clerks under this section; that the defendant employed clerks in his office; that the clerks so employed were necessary; that the defendant paid them for their services amounts in excess of the amounts included in his salary warrants; that the sums so paid were the reasonable value of their services; that it was "understood by all the county officers who had to do therewith and by this defendant, as well as the persons employed by him for such clerical assistance," that this method and manner of making payment was in accord with the statute, and that said clerks "accepted pay for their services from the defendant as a complete discharge and satisfaction for the work done by each." Do these facts entitle the plaintiff to recover as for money paid by mistake? We are agreed that they do not. In such cases a recovery is not a matter of strict legal right. The question always is this: Has the defendant money of the plaintiff which "in equity and good conscience he ought to repay?" See Krump v. Bank, 8 N. D. 75, 76 N. W. 995, and cases cited. The rule which measures the right of recovery is well stated in Keener on Quasi Contracts, 43, as follows: "To entitle the plaintiff, who has paid money under mistake, to recover the money so paid, he must not only prove that he has paid the money without receiving the equivalent contemplated by him, but he must, in addition thereto, prove that it is against conscience for the defendant to retain the money so paid." Tested by this rule, it is apparent that the plaintiff is not entitled to recover. The money which the county seeks to recover was paid to the defendant for the purpose of discharging its liability for clerk hire in his office. That the county was liable to these clerks for the reasonable value of their services is admitted. The county has stipulated, and the trial court found, that the clerks received their pay from the defendant "as a complete discharge and satisfaction for the work done by each." It is also stipulated and found that the amounts so paid were the reasonable value of these services, and that the services were necessary. These facts do not show a right of recovery; for the county has received the equiva-

lent contemplated by the payment of this money which it seeks to recover; that is, the discharge of its obligations for clerk hire. A recovery on this state of facts would be unconscionable. It would permit the county to possess itself of the money with which it has discharged its obligation for clerk hire, and thus is relieved from its admitted obligation without the payment of any sum whatever. The case of State v. Heinrich, supra, cited by counsel for plaintiff, does not sustain a right of recovery upon the present state of facts. In that case the county's liability for clerk hire has not been discharged as in this case, and it was further denied that any liability to the clerks existed.

The district court is directed to modify its judgment by striking out the amount awarded for payments made to the defendant for clerk hire, and as thus modified the judgment will be affirmed. Appellant will recover costs in this court.

MORGAN, C. J., concurs. ENGERUD, J., having been of counsel, took no part in the decision of the case.

(103 N. W. 423.)

THE COUNTY OF DICKEY v. W. W. DENNING.

Opinion filed February 4, 1905.

Schools — County Superintendents — Salaries.

Construing section 652, Rev. Codes 1899, which provides a graduated salary for county superintendents of schools corresponding to the number of schools or departments of graded schools under their official supervision in the preceding year, it is held that schools in special districts are not under their official supervision, and are not to be included in computing their salary.

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

Action by the County of Dickey against W. W. Denning. Judgment for plaintiff and defendant appeals.

Affirmed.

McCumber, Forbes & Jones, Purcell, Bradley & Divet, and *Morrill & Engerud*, for appellant.

George T. Webb, for respondent.

YOUNG, J. This action is prosecuted by Dickey county to recover from the defendant certain sums of money which it alleges were unlawfully paid to and received by him as and for salary as superintendent of schools. The defendant interposed a general demurrer to the complaint. This was overruled, and the defendant has appealed from the order overruling the same.

The complaint shows that from January 5, 1903, when the defendant entered upon the duties of his office, up to and including the month of September of that year, he drew a salary computed upon the basis of all the schools and departments of schools in his county, including the schools and departments of schools in the special districts of the city of Oakes and the city of Ellendale, in said county. The entire controversy is as to whether the schools in these two cities should be included in computing his salary. If they should be included, it is admitted that he has been paid only the salary allowed by law. If they should not be included, it is conceded that he is liable for the amount demanded in the complaint.

It will thus be seen that the real, and indeed the only, question is as to what schools should be included in computing the defendant's salary. Our statute recognizes four kinds of public schools, each being classified according to the character of the district organization: (1) Those known as common schools; (2) schools in special school districts; (3) schools in independent school districts; and (4) schools in cities organized under a special law. The cities of Oakes and Ellendale are special school districts. The salaries of county superintendents are regulated by section 652, Rev. Codes. This section, after providing generally for a graduated salary corresponding to the number of schools which have been taught in the county at least three months during the preceding school year, declares that " the amount of his salary shall be determined each year by the actual number of schools or separate departments in graded schools over which such superintendent had official supervision during the preceding year. * * *" Counsel for the county contend, and this view was sustained by the trial court, that schools in special districts are not under the "official supervision" of county superintendents. We fully agree with this contention. The provision last quoted plainly contemplates that there are or may be schools in each county which are not to be included in the computation. The language is restrictive. It authorizes the in-

clusion of those under his "official supervision" and excludes those which are not. It assumes that there are public schools in the county over which the superintendent does not have "official supervision." The decisive question, then, is this: Are schools in special districts under his "official supervision"? In the absence of an express declaration by the legislature, the answer to this question would have to be ascertained from an extended examination of the statutory powers and duties of county superintendents in reference to special schools. This, however, is not necessary, for the legislature has expressly declared what schools shall be under his supervision. Section 639, Rev. Codes 1899, reads as follows: "The county superintendent of schools shall have the general superintendence of the public schools in his county except those in cities which are organized under special law and those in special or independent districts." The schools in Oakes and Ellendale are special districts, and by the plain language of the above section are excluded from the "general superintendence" of the county superintendent. They are not under his supervision. His duties in reference to schools "under his supervision" are prescribed by section 640, Rev. Codes 1899. He is required to visit them, to observe the condition of the schools, the character of instruction given, the methods and ability of teachers, and the progress of the pupils, and to "advise and direct the teachers in regard to the instruction, classification, government and discipline of the school and course of study," and to keep a record thereof, which shall be open to the inspection of any school director. No such duties are imposed in reference to schools not "under his supervision," i. e., those "in cities which are organized under special law and those in special or independent districts." As to such schools the supervisory power is lodged elsewhere. Section 799, Rev. Codes 1899, commits "the immediate supervision" of schools in special districts to "the board of education or the school superintendent appointed by such board;" and section 797, subdivisions 11 and 12, imposes upon the board of education the power and duty of adopting rules for the organization, grading and government of such schools and the duty of personal visitation. It is true section 799, supra, commits the "immediate supervision" of special schools to the board or the superintendent appointed by it, "subject to such directions and supervision by the county superintendent as are provided for in this chapter." The language just quoted does not, however, purport to confer super-

visory power upon the county superintendent, but apparently assumes that other provisions of the chapter do confer that power. An examination of the entire chapter will show that no such power is conferred, while, on the contrary, section 639, supra, expressly removes special schools from the supervision of county superintendents.

Counsel for defendant contend that, even though special schools are not "under the supervision" or "general superintendence" of county superintendents, they are under his "official supervision," claiming that there is a distinction between "general superintendence" and "official supervision." It is pointed out that county superintendents have the general power of granting and revoking certificates of teachers employed in public schools, including those employed in special districts; that they have duties to perform in reference to the apportionment of the state tuition fund, and are required to receive and file reports, to gather statistics, and perform various duties in reference to all of the public schools of the county, including special schools. In our opinion, these several duties are not supervisory in their nature. They affect the schools indirectly, it is true, but only indirectly. They are more properly classed as administrative duties. Other county officers are also charged with duties with affect the public schools; for example, the treasurer and auditor, in the collection and distribution of taxes, including the distribution of the state tuition fund. It would hardly be contended that because of this they have "official supervision" of public schools. The argument proves too much. If the contention of defendant's counsel is sound, the performance of the duties referred to amounts to "official supervision." In that event all public schools are under the "official supervision" of the county superintendent, and should be counted in computing his salary; for all public schools are affected by the several acts which are relied upon. That this was not the purpose of the legislature is clearly shown by the restrictive language of section 652, previously quoted, which authorizes the inclusion of schools which are "under his official supervision" and excludes those which are not. The fact that they are charged with duties relating to schools not under their supervision has no significance in construing the statute fixing the amount of the salary. The salary provided is compensation for the performance of all the duties imposed by law. The legislature may, in its discretion, impose duties upon an officer other than those

which immediately relate to his office. This is so frequently done that instances need not be cited, and the addition of such duties gives no right to added compensation.

It follows that the complaint states a cause of action, and the demurrer was properly overruled.

Order affirmed.

MORGAN, C. J., concurs. ENGERUD, J., having been of counsel, did not participate in the decision of the above case.

(103 N. W. 422.)

MATILDA BECKER v. SIDNEY C. LOUGH, THE STATE BANK OF NORTHWOOD, NORTH DAKOTA, THE FARMERS & MERCHANTS SAVINGS BANK OF MINNEAPOLIS, A CORPORATION, THE SCANDINAVIAN-AMERICAN BANK OF ST. PAUL, A CORPORATION, AND SAMUEL LOE, AS RECEIVER OF THE STATE BANK OF NORTHWOOD, A CORPORATION.

Opinion filed February 4, 1905.

Mortgage — Foreclosure — Right to Redeem — Evidence.

Evidence examined, and *held* not to sustain plaintiff's contention that the defendant, who purchased the certificate of sale under foreclosure of a real estate mortgage, agreed, before the year for redemption had expired, to permit her to redeem from such sale at any time.

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

Action by Matilda Becker against Sydney C. Lough and others.

From the judgment plaintiff and defendant George E. Becker appeal.

Affirmed.

Charles F. Templeton, for appellants.

An agreement to extend time for redemption, if made before the statutory time expires, is valid and enforceable, although based on no new consideration. Prondzinski v. Garbutt, 8 N. D. 191, 77 N. W. 1012; Butt v. Butt, 91 Ind. 305; Rector v. Shirk, 92 Ind. 31; Morrow v. Jones, 60 N. W. 369; Fisk v. Stewart, 24 Minn. 97; Steele v. Bond, 28 Minn. 267; Tice v. Russell, 44 N. W. 886;

Schroeder v. Young, 161 U. S. 334, 16 Sup. Ct. Rep. 512, 40 L. Ed. 721; Union Mutual Life Ins. Co. v. White, 106 Ill. 67; Nicolas v. Otto, 132 Ill. 91, 23 N. E. 411; Spencer v. Frendendall, 15 Wis. 666; Dodge v. Brewer, 31 Mich. 227.

Where a party agrees to hold a certificate of sale on foreclosure as security, no title passes to him under sheriff's deed. Yankton Building & Loan Ass'n. v. Dowling, 74 N. W. 436. Smith v. Smith, 21 Pac. 4; Adair v. Adair, 29 Pac. 193; Macauley v. Smith, 132 N. Y. 524, 30 N. E. 997; Brinkman v. Jones, 44 Wis. 498; First National Bank v. Ashmead, 2 So. 657; Dodge v. Brewer, 31 Mich. 227.

The Scandinavian-American Bank acquired no rights under the deed executed by Lough superior to plaintiff's rights, as the latter was in open, visible and notorious possession when deed to the bank was executed. O'Toole v. Omlie, 8 N. D. 444, 79 N. W. 849; Dickson v. Dows, 11 N. D. 407, 92 N. W. 798; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 35 L. Ed. 1063, 12 Sup. Ct. Rep. 239; Hodge's Executors v. Amerman, 2 Atl. 257; Springfield Homestead Association v. Roll, 137 Ill. 205, 27 N. E. 184, 31 Am. St. Rep. 358.

The rule stated in section 4703, Rev. Codes 1899, which includes constructive as well as actual notice, is controlling in this case. Exon v. Dancke, 32 Pac. 1045; Petrain v. Kiernan, 32 Pac. 158; Murphy v. Plankinton Bank, 83 N. W. 575; New v. Wheaton, 24 Minn. 406; Groff v. State Bank of Mnineapolis, 52 N. W. 651; Maupin v. Emmons, 47 Mo. 304; Brinkham v. Jones, 44 Wis. 498; Security Loan & Trust Co. v. Willamette Steam Mills Lbr. & Mfg. Co., 34 Pac. 321.

Where land is occupied by husband and wife, and the recorded title is in one, the possession will be referred to that title. Kirby v. Tallmadge, 160 U. S. 379, 40 L. Ed. 463, 16 Sup. Ct. Rep. 349; Iowa Loan & Trust Co. v. King, 12 N. W. 595; Hatch v. Munden, 94 N. W. 332; Leopold v. Krause, 95 Ill. 440; Gruhn v. Richardson, 128 Ill. 178; Olson v. O'Connor, 9 N. D. 504, 84 N. W. 359, 81 Am. St. Rep. 595.

The deed to the Scandinavian-American Bank being given to secure a pre-existing debt, the bank cannot claim protection as a bona fide purchaser for value. DeLancey v. Stearns, 66 N. Y. 157; Howells v. Hettrick, 160 N. Y. 308, 54 N. E. 677; Commercial National Bank v. Pirie, 82 Fed. 799; Schloss v. Feltus, 61 N. W.

797; Lillibridge v. Allen, 69 N. W. 1031; Pride v. Whitfield, 51 S. W. 1100; March v. Ramsey, 35 S. E. 433; Morse v. Godfrey, 3 Story, 389.

The mortgage from Lough to the Farmers & Merchants Savings Bank is void, as the plaintiff was in possession when it was given and is chargeable with notice of her equities. Seymour v. McKinstry, 106 N. Y. 230; Farmers & Traders Bank v. Kimball Milling Co., 47 N. W. 402; Prickett v. Muck, 42 N. W. 256; Nickerson v. Wells-Stone Mercantile Co., 74 N. W. 891; Lawton v. Gordon, 34 Cal. 36; Everdson v. Mayhew, 65 Cal. 163, 3 Pac. 641; County Bank of San Louis Obispo v. Fox, 51 Pac. 11; Richards v Snyder, 6 Pac. 186; Hyland v. Hyland, 23 Pac. 811; Lewis v. Lindley, 48 Pac. 765; Pride v. Whitfield, 50 S. W. 1100; Whitaker Iron Co. v. Preston Nat'l Bank, 59 N. W. 395; Schaible v. Ardner, 56 N. W. 1105; Letson v. Reed, 45 Mich. 27, 7 N. W. 231; Wallace v. Wilson, 30 Mo. 335; Ledbetter v. Walker, 31 Ala. 177; Nickerson v. Meacham, 14 Fed. 881; Lakin v. Sierra Buttes Gold Mining Co., 25 Fed. 337; Newman v. Schwerin, 109 Fed. 942; Boone v. Chiles, 10 Peters, 177, 9 L. Ed. 388; Smith v. Orton, 18 Law Ed. 62.

Either spouse may redeem from foreclosure sale. Armitage v. Davenport, 64 Mich. 412, 31 N. W. 408; Phelan v. Fitzpatrick, 54 N. W. 614; Rev. Codes, section 5854, sub. 1.

Alf. E. Boyesen and *H. N. Morphy,* for respondent, the Scandinavian-American Bank.

Mere breach of an oral agreement to extend period of redemption is not sufficient in itself to entitle plaintiff to equitable relief, she must in addition show facts and circumstances amounting to an estoppel in pais. Schroeder v. Young, 161 U. S. 334, 16 Sup. Ct. Rep. 512; Prondzinski v. Garbutt, 8 N. D. 191, 77 N. W. 1012; Tice v. Russell, 43 Minn. 67, 44 N. W. 886; Rector v. Shirk, 92 Ind. 31.

If the agreement to allow a redemption was made after the period of redemption had passed, it must, in order to be valid, be supported by a new consideration. Davis v. Dresback, 81 Ill. 303; Smalley v. Hickok, 12 Vt. 153; Fisher v. Shaw, 42 Me. 32; Chase v. McLellan, 49 Me. 375; Stetson v. Everett, 59 Me. 376; Brown v. Lawton, 87 Me. 83.

The Scandinavian-American Bank acquired the Becker notes before maturity, for value, without notice of plaintiff's claim, and became vested with the interest of the State Bank of Northwood in

the property free of all equities on the part of the plaintiff. Nashville Trust Co. v. Smythe, 27 L. R. A. 666; Carpenter v. Longman, 16 Wal. 273, 21 L. Ed. 313; Sweat v. Stark, 31 Fed. 859; Bales v. Neddo, 1 McCreary, U. S. 206; Sawyer v. Prickett, 19 Wal. 146, 22 L. Ed. 105; 20 Am. & Eng. Enc. Law (2d Ed.) 1043; 24 Am. & Eng. Enc. Law (1st Ed.) 240.

Where plaintiff's title had been divested by foreclosure sale and sheriff's deed to Lough, and her husband, the maker of the notes transferred to the bank, was operating the farm in his own name, executing mortgages on the crops grown thereon without the signature of his wife, and applying the crops and their proceeds to his own uses, and in all respects holding himself out to the world as owner of the property, without objection on the part of the plaintiff, her possession jointly with her husband could not constitute any notice to the defendant of any secret claim on her part to the property. Thomas v. Kennedy, 24 Iowa, 401; Townsend v. Little, 109 U. S. 504, 27 L. Ed. 1013; Schumacker v. Truman, 66 Pac. 591; Goodwynne v. Bellerby, 43 S. E. 275; Rankin v. Coar, 11 L. R. A. 661; Harris v. McIntyre, 118 Ill. 275, 8 N. E. 182; Neal v. Pickerson, 61 Ga. 345; 1 Jones on Montgages, section 600; Red River Valley Land & Inv. Co. v. Smith, 7 N. D. 236, 74 N. W. 194; 2 Devlin on Deeds, section 763; Harms v. Coryall, 53 N. E. 87; Root v. Woolworth, 150 U. S. 401, 14 Sup. Ct. Rep. 136.

MORGAN, C. J. This is an action to redeem from a mortgage foreclosure sale based upon the following facts: On March 20, 1883, George E. Becker, the plaintiff's husband, was the owner of the land in question, and on that day conveyed the same to the plaintiff. The conveyance to the wife was for the convenience of the parties, and without consideration. The mortgages subsequently placed on this land were for the purpose of raising money for Becker for use in improving the place and carrying on his farming operations for their joint benefit. They have continuously resided on the land since 1883, it being their homestead. In 1888 they gave a mortgage upon this land to the Farmers' Trust Company to secure the payment of the sum of $1,300. This mortgage was foreclosed on June 2, 1894, upon default in paying the same, and at the foreclosure sale one Joseph Gsell became the purchaser of the land for $1,576.42. On June 22, 1894, Gsell assigned his sheriff's certificate of sale to the defendant Sydney C. Lough, who was cashier of the State Bank of Northwood, whose money Lough used

in the purchase of the assignment. Lough purchased this assignment to protect his bank, as it owned a second mortgage, which had been given to it by this plaintiff and her husband upon the land on January 19, 1893, to secure the payment of $1,820. On June 11, 1895, a sheriff's deed was issued and delivered to Lough under such foreclosure proceedings. It is from this foreclosure sale that the plaintiff is seeking to redeem. Her contention is that Lough agreed with her, through her husband, acting as her agent, to permit her to redeem from this sale whenever she desired, upon payment of the sum paid by him for the assignment, with 7 per cent interest thereon. Before the trial the Scandinavian-American Bank of St. Paul, one of the defendants, asked to have George E. Becker made a party defendant, and it was stipulated that he be made a defendant in order that there might be made a complete determination of all the issues raised by the answer and counterclaim of said Scandinavian-American Bank. Becker appeared, and by a reply denied all the allegations set forth in said counterclaim except that he was indebted to the Northwood bank as set forth in said counterclaim and answer. The Scandinavian-American Bank loaned the Northwood bank $5,000 in January, 1900, and in March, 1901, Lough, as cashier of said bank, executed and delivered to said Scandinavian-American Bank a deed of the land involved in this suit as security for the indebtedness from the Northwood bank to said Scandinavian-American Bank. In 1895 Lough gave mortgages to one Birkholz to secure the payment of two notes for the total sum of $1,430. Of these the $130 mortgage was released in December, 1895, and the $1,300 mortgage in the year 1900. In May, 1900, Lough executed and delivered to the defendant the Farmers' & Mechanics' Savings Bank of Minneapolis a mortgage for the sum of $1,300. The money loaned under this mortgage was used to release the $1,300 Birkholz mortgage. On June 22, 1895, the $1,820 mortgage given by the Beckers to the Northwood bank was released by Lough. This release was filed in order that the Birkholz mortgage should be a first lien upon the property. All of these subsequent mortgagees, whose liens remain unreleased of record, are made parties defendant, and plaintiff asks that such mortgage and deeds be declared null and void as against plaintiff's title. In July, 1901, the Northwood bank became insolvent, and a receiver was appointed to take charge of it, and the receiver is also made a party to this suit.

The value of the land is found to be $4,000. The trial court found that the plaintiff had no interest in the land involved in the suit; that the Scandinavian-American Bank is the owner of the land, subject to the $1,300 mortgage owned by the Farmers' & Mechanics' Savings Bank, but that such title of said Scandinavian-American Bank is held as security for the payment of $5,000 by the Northwood bank. The trial court gave George E. Becker the right to a conveyance of said premises from the Scandinavian-American Bank upon payment of $4,160.38, such conveyance to be subject to the $1,300 mortgage held by the Farmers' & Mechanics' Savings Bank of Minneapolis. The plaintiff and defendant George E. Becker appeal from the judgment rendered on such findings and ask a review of the entire case under section 5630, Rev. Codes 1899.

The plaintiff's right to redeem depends upon the fact whether she has established the testimony that Lough agreed to allow redemption from the sale or not. No writing is claimed to have been executed as evidence of such agreement. The agreement is alleged to have been made between Lough, as cashier of the bank, and George E. Becker, acting on behalf of his wife, the plaintiff. Lough denies making any such agreement. Becker asserts that it was made, and that Lough agreed that he would give the plaintiff all the time she desired to redeem from the sale, and that he would hold the certificate of sale as security for the money he had paid for the certificate, and that he would charge her only 7 per cent interest. There are many undisputed facts in the case that strongly show the improbability of any such agreement. Such circumstances are inconsistent with any such agreement. That Lough should agree to carry the certificate indefinitely at 7 per cent interest when the Beckers were paying 12 per cent on other debts to the bank renders the fact of the extension improbable, especially in view of the fact that Lough had borrowed money from Birkholz with which to replace the bank's money used in the purchase of the certificate. By a subsequent contract between Lough and Becker a part of this $1,576.52, the principal of the amount required to redeem from the sale, was included in the sum total to be paid on a sale of the land, and Becker agreed to pay 12 per cent thereon. The remainder of such sum was included at 7 per cent for the reason that Becker assumed payment of the Birkholz mortgage, which drew interest at 7 per cent. If Becker had a contract with Lough by which he could redeem on payment of the principal and 7 per cent

interest, he would not have agreed to pay 12 per cent on only part of this sum. If Lough agreed to extend the time of redemption indefinitely, he would not have released the $1,820 mortgage, as that sum was thereafter unsecured except by chattel mortgage practically worthless. This $1,820 mortgage was well secured on the real estate. To release it, unless he had title to the real estate, and without an arrangement with Becker as to its payment in some other way, would be an act that cannot be explained on sound business principles. In May, 1896, Becker leased the land in question from Lough by a written lease in which this land was described as "the farm of said party of the second part"—Lough. This was an admission in writing, signed by Becker, that the title to this land was in Lough. Becker is utterly unable to explain, after being questioned on this precise matter, how he made such a lease and admission while claiming the title to be in his wife. If Lough made such an agreement, he placed it out of his power to obtain title to the property except through foreclosure of the $1,820 mortgage, and the release of that mortgage is inconsistent with the fact that he did not believe that his title had become absolute under the sheriff's deed. For six or seven years Lough and Becker dealt in reference to this land and the indebtedness from Becker to the bank. It is incredible that this could have been done without knowledge on the part of Becker that Lough had taken a sheriff's deed, although Becker now says that he did not know of that fact until the bank failed in 1901. During all this time the Beckers never referred to their right to redeem, and no payments were made by Becker to be expressly applied on the sum necessary to redeem. The facts convince us that no such agreement was made by or on behalf of the plaintiff. The agreement was made that Lough would convey the land to Becker when he paid all the indebtedness due the bank, the amount being shown by a note from Becker to the bank for $2,809.95, given December 10, 1895. This agreement was made with Becker after Lough received the sheriff's deed. This sum represented the total amount to be paid by Becker for the land. He was to take the land subject to the Birkholz mortgage of $1,300, and pay that sum besides. Great reliance is placed upon the fact that Lough was mistaken as to the time when this contract was made, he having testified that it was made in the fall of 1896, and the answer of the Scandinavian-American Bank having alleged that it was made in January, 1895. We do not deem such a mistake

of any controlling weight in view of the uncontradicted facts that govern our decision. The testimony was taken seven years after the occurrences. Discrepancies in dates are not sufficient to discredit Lough's testimony entirely. The other testimony in the case clearly shows that this contract was made in 1895, after the sheriff's deed was taken, and shows that plaintiff has failed to show any right to redeem. The trial court found that it was made December 10, 1895.

Stress is also laid upon the claim that the agreement to convey the land to Becker upon the payment of the indebtedness to the bank would not be enforceable, not being in writing, and being within the statute of frauds. Whether the contract was performed so as to take it out of the statute of frauds, we find it unnecessary to pass upon. The trial court ascertained the amount of such indebtedness, and gave Becker an opportunity to pay it and obtain a deed. No one is objecting to that part of the judgment. It was favorable to Becker, and whether he complies with its terms is entirely optional with him, and he has no cause to complain. The controlling question decided is that plaintiff made no contract with Lough under which she was to be allowed to redeem from the sale whenever she wanted to do so, nor had she any contract with Lough pertaining to a redemption from the foreclosure sale.

The judgment is affirmed. All concur.

(103 N. W. 417.)

Red River Valley National Bank v. The City of Fargo.

Opinion filed February 8, 1905.

Municipal Corporations — Special Assessments — Warrants Drawn on Proceeds — Violations of Constitutional and Statutory Provisions.

1. Where the city has received from the property owners the amount of taxes and special assessments levied for the specific purpose of paying for a work of local improvement, it cannot justify its refusal to redeem the warrants issued in payment for such work on the ground that the contract and the taxes and assessments for the improvement were invalid because in violation of constitutional or statutory provisions designed solely for the protection of the taxpayers.

Proceeds of Assessments Are Trust Funds — Liability of City.

2. Money derived by a city from special assessments becomes a trust fund in its custody, to be applied to the redemption of warrants drawn

upon such fund in the order in which the warrants were presented for payment, and the city is liable to any warrant holder whose rights have been infringed by a misapplication of such funds.

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

Action by the Red River Valley National Bank against the city of Fargo. Judgment for plaintiff, and defendant appeals.

Affirmed.

M. A. Hildreth, for appellant.

The plaintiff failed to establish a cause of action and did not prove the material allegations of the complaint. The action is in tort for a wrong done the plaintiff, and proof to sustain the complaint ought to be in harmony with it. Plaintiff offered certain exhibits in evidence to which objection was made by the defendant. These exhibits were certain alleged contracts out of which the plaintiff's claim grew. The objections to these were sound. The plaintiff did not plead the contracts, or base his action upon a contract, nor did he establish that they were lawfully made by the defendant. The contracts were void, as the yeas and nays were not taken upon the proposition to create the liability against the city, or for the expenditure or appropriation of money. Section 2143, Rev. Codes 1899.

The contracts were further void, as no appropriation had been previously made concerning the expense involved in the contracts. Section 2264, Rev. Codes 1899.

Another of the contracts offered in evidence was void, as it contained a provision that the Northern Pacific Railway Co. should ship material for the paving to be done and its charges for freight should be applied upon its taxes. It is the duty of the city treasurer to receive all money belonging to the city from taxes and special assessments, and that such money should be paid out by the treasurer upon a warrant by the mayor countersigned by the auditor. Section 2176-77, Rev. Codes 1899. It is the duty of the city treasurer to hold all money received on special assessment in a special fund to be applied to payment of improvements for which the assessment was made, and such sums shall be used for no other purpose. Section 2183, Rev. Codes 1899.

Under such provisions the city could not contract with the Northern Pacific Railway Co. to ship freight in payment of its taxes.

Defendant may raise the question that the contract is ultra vires and void although the paving has been done. Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292; Goose River Bank v. Willow Lake School Twp., 1 N. D. 26, 44 N. W. 1002; City of Litchfield v. Ballou, 114 U. S. 190, 29 L. Ed. 132; Roberts v. City of Fargo, 10 N. D. 230, 86 N. W. 726.

The warrants were void because at the time of the making of the contract the city had exceeded its debt limit. Const. of N. D., section 183; section 2148, subdiv. 5, Rev. Codes 1899.

Ball, Watson & Maclay, for respondent.

The entire cost of paving the streets, including street intersections, should have been assessed against abutting property. Section 2280, Rev. Codes 1895; Wright v. City of Tacoma, 19 Pac. 42; Walters v. Town of Lake, 21 N. E. 556; Wolf v. City, 48 Iowa, 129; Smith v. Buffalo, 54 N. E. 62; Cunningham v. City of Peoria, 41 N. E. 1014.

The warrants in suit were drawn upon the paving funds, and not upon the street intersecting fund, and were paid from special assessments. If the annual appropriation bills, in which were included sums covering the cost of street intersections, were void because the yea and nay vote was not recorded, this would not affect that portion of the contracts as to which the cost was to be raised by special assessments. Ft. Dodge Electric L. &. P. Co. v. City of Ft. Dodge, 89 N. W. 7.

A previous appropriation, where improvements are to be paid by special assessment, is not necessary. Pine Tree Lumber Co. v. Fargo, 12 N. D. 360, 96 N. W. 357.

The city had power to make the paving contracts in question; it permitted the contractors in good faith to spend their money for its benefit and enjoy the fruits of the contract. It is now estopped to say the contracts and the warrants issued under them are invalid because the city auditor neglected to record the yea and nay vote authorizing the making of the contracts. Moore v. N. Y., 73 N. Y. 238; Ft. Dodge Electric L. & P. Co. v. City of Ft. Dodge, 89 N. W. 7; Barber v. Denver, 72 Fed. 336; Argenti v. City of San Francisco, 16 Cal. 256; Hitchcock v. Galveston, 96 U. S. 341, 24 L. Ed. 659; Commercial Nat. Bank of Portland v. City of Portland, 33 Pac. 532; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841; Hockaday v. Board of County Commissioners, 29 Pac. 287.

The city is liable for breach of its duties as trustee. Pine Tree Lumber Co. v. Fargo, supra.

The city violated its duty to the holders of the warrants by diverting paving funds to the payment of warrants registered subsequently to those in suit. Pine Tree Lumber Co. v. Fargo, supra.

Independently of the contract, and without regard to its validity or invalidity, the appellant was liable for negligence in the execution of the trust which it voluntarily undertook to perform, and which was within the scope of its municipal powers. Pine Tree Lumber Co. v. Fargo, supra; Argenti v. City of San Francisco, 16 Cal. 256.

Contracts to be met by special assessments do not create a debt as to the city. Ft. Dodge Electric L. & P. Co. v. City of Ft. Dodge, 89 N. W. 7; Swanson v. Ottumwa, 91 N. W. 1048; Winston v. City of Spokane, 41 Pac. 888; 20 Am. & Eng. Enc. Law (2d Ed.) 1176; Pine Tree Lumber Co. v. Fargo, supra.

ENGERUD, J. The complaint sets forth three causes of action, the first of which is in substance as follows: On October 7, 1895, the defendant city issued to McDonald & O'Neil a warrant for the payment to them of $500 out of the Front street paving fund of said city, which warrant was issued in part payment of the agreed price for paving part of said street. That said paving had been done by McDonald & O'Neil under a contract with the city wherein said contractors agreed to do the paving for a fixed price, and were to be paid by the city in warrants drawn upon, and payable out of, a paving fund to be created and collected by the defendant under and pursuant to the laws of the state applicable to the paving of cities. That the warrant was presented for payment, and not paid for want of funds, and was subsequently assigned to plaintiff. That the city collected and received into its treasury money properly applicable to the payment of the warrant in question sufficient in amount to pay the same, but wrongfully applied such money to the satisfaction of other warrants subsequently presented and registered for payment. It is further alleged that, if sufficient money had not been collected to pay all such paving warrants, such failure was due to the neglect of the city to take proper steps to that end. The second and third causes are in the same form. The second is based upon a second Front street paving warrant held by plaintiff, and the third is upon a similar warrant issued under a contract for paving Eighth street, similar in terms to the Front street contract. The answer was a general denial and certain affirmative al-

legations, which will be hereinafter mentioned, to the effect that the contracts and warrants in question were invalid. There was a trial by jury, and a directed verdict for plaintiff. Defendant's motion for a new trial based upon a statement of the case was denied. The appeal is from the judgment, and the order refusing a new trial.

It is claimed in behalf of the appellant that when the city council decided to have this paving done, and made the contract therefor, the city's indebtedness exceeded the constitutional limit of 5 per cent of the assessed valuation of taxable property therein; that the contract, at least to the extent of the cost of street intersections, purported to create an indebtedness against the city payable by general taxation; that no appropriation for that purpose preceded the contract, and there was no record of the yea and nay vote of the members of the council with respect to the incurring of the debt and the disbursement of the moneys therefor. By reason of these facts, all of which did not appear in the case of Pine Tree Lumber Co. v. City, 12 N. D. 360, 96 N. W. 357, which involved this same paving contract, it is urged that that case is not decisive of this; and the correctness of that decision in some respects is also questioned. It will be unnecessary to pass upon these propositions, because we are agreed that the city is not in a position, under the undisputed facts of this case, to escape liability by urging the invalidity of the acts of its officials which preceded and resulted in the payment into its treasury of the money collected and received by it for the sole purpose of paying for that part of the value of the paving represented by plaintiff's warrants.

With respect to the Front street paving, the undisputed facts are that on July 29, 1895, pursuant to some resolution or ordinance which does not appear, the city made a contract with McDonald & O'Neil whereby the latter undertook to pave a part of Front street for an agreed price, payable in city warrants from time to time as the work progressed. The paving was completed and accepted, and warrants were issued to the contractors in payment therefor; amongst them being the two warrants in suit, Nos. 11,217 and 11,219. The total cost of the work for which warrants were issued was $23,025.22. For some reason which does not appear, the entire cost of the paving was not assessed upon the abutting property. The cost of paving the street intersections was paid for from a fund styled "Street Intersection Fund," which was created by general taxation. The remainder of the cost of the work was pro-

vided for by special assessments upon the abutting property. The cost of the intersections was $4,952.89, for which warrants were drawn upon the Front street intersection fund, and all of these warrants have been paid. The special assessments aggregated $18,025.22, and warrants aggregating that amount—amongst them being the two in question—were issued upon such special assessment fund. All of these warrants have been paid, except the two in question, and a third one, which was presented for payment, registered and marked, "Unpaid for want of funds," tenth in order after No. 11,219. All these special assessments have been paid, except one, the amount of which does not appear; and the lot subject to this unpaid assessment was sold and bid in by the county at the delinquent tax sale of 1897. There were ten special assessment warrants presented to and registered by the city treasurer on his warrant book after the two in question. Nine of these subsequently presented warrants, aggregating more than $1,500, have been paid. It was the duty of the treasurer to immediately register each warrant presented for payment, and to pay such registered warrants, or call them in for payment, in the order of presentation, as soon as he received sufficient money to pay them, belonging to the fund upon which the warrants were drawn. Rev. Codes 1899, sections 1293-1295, 2178.

The money derived from special assessments cannot be diverted to any other use than the payment of the obligation for which the assessment was made. Rev. Codes 1899, section 2183. When sufficient money had been collected from the special assessment to pay all the warrants presented and registered for payment prior to the two in question, every dollar thereafter coming to that fund, up to the amount required to redeem each of these warrants, became impressed with a trust in favor of the holder of each warrant, and the city was the trustee. If the trust funds were misapplied, the city is liable to the same extent as any other unfaithful trustee. Pine Tree Lumber Co. v. City, 12 N. D. 360, 377, 96 N. W. 357, and authorities there cited.

The limitations upon the debt-creating power, the inhibition against contracts without a prior appropriation therefor, the provisions requiring the recording of the yeas and nays upon propositions to appropriate or expend money, and other provisions of that character, whether constitutional or statutory, were designed for the protection of those upon whom, as taxpayers, the burden of the

municipal obligation rests. It is self-evident that those for whose benefit these protective provisions were designed can waive that protection. In this case such waiver is evidenced most unequivocally. The intersection fund warrants have all been paid. Those liable for assessments have paid into the city treasury, to be applied upon the special assessment warrants in the order of registration, money enough, which, if properly applied, would have paid the warrants in question and all of those which had been previously registered. The money paid for these special assessments was paid to and received by the city for the sole purpose of paying for this paving. It is too clear for argument that the city cannot be heard to say that it is under no obligation to pay the money so received to those for whose benefit it was paid because those who paid it could not have been compelled to do so. Substantially the same state of facts was shown in support of the third cause of action for the Eighth street paving warrant.

It is finally urged that the diversion of the money was the wrongful act of the city treasurer, for which he, and not the city, is liable. That argument is manifestly untenable. There is no privity between the creditors of the city and the treasurer. The latter is the agent of the muncipality, and for any violation of his duties he is answerable to his principal. The receipt of the money imposed an obligation upon the city in favor of the contractors or their assignee. The malfeasance or misfeasance of the treasurer can no more absolve the city from its obligations to third persons than could like acts by an agent of a private person relieve his principal of like obligations.

Some of the evidence which was admitted to establish some of the material facts upon which we base this decision was objected to for incompetency and immateriality. Numerous assignments of error are based upon such rulings of the trial court. The materiality of the evidence has already been shown. Counsel have not pointed out any reason to question the competency of the proof, and, where a ruling is not palpably erroneous, this court will not search for error. Supreme Court rule 14.

The judgment and order appealed from are affirmed. All concur.

(103 N. W. 390.)

LOUIS FREEMAN, JULIUS H. BURWELL AND ANDY JONES, IN BEHALF OF THEMSELVES AND ALL OTHER CREDITORS OF L. FREEMAN & COMPANY, WHO SEE FIT TO COME INTO THIS PROCEEDING AND BECOME PARTIES THERETO AND BEAR THEIR PORTION OF THE EXPENSE THEREOF, v. W. B. WOOD.

Opinion filed February 16, 1905.

Judgment — Action to Set Aside Assignment for Benefit of Creditors.

1. An independent action to set aside a judgment is not maintainable when the remedy by motion provided by section 5298, Rev. Codes 1899, is available and adequate.

Order Discharging Assignee for Benefit of Creditors Is a Final Judgment Assailable Only as Other Judgments.

2. The order of discharge of an assignee for the benefit of creditors, which the court is authorized by section 4675, Comp. Laws 1887, to make after a hearing and upon notice, is, in effect, a final judgment, and as such is binding upon assignors and creditors, and is subject to attack only upon grounds upon which other judgments are assailable.

A Party Seeking by Equitable Action to Set Aside a Judgment Must Appear Free from Fault or Negligence.

3. Where, in an action in equity to set aside a judgment, newly discovered evidence is presented as the ground therefor and for a new trial, it must appear that the failure to secure and present such evidence at the proper time was unmixed with the fault or negligence of the party asking relief.

Complaint — Demurrer.

4. The complaint in this case shows that the defendant was made assignee for the benefit of creditors September 27, 1893, and that he was regularly discharged in July, 1895; that within thirty days prior to the commencement of this action to set aside the judgment of discharge and to secure a new accounting, which was five years after such judgment was rendered, the plaintiff "accidentally" discovered that the account was not true in several particulars. It is *held* upon a general demurrer that the complaint does not state a cause of action for the following reasons: (1) It does not show that the remedy by motion is not available, or is inadequate. (2) It does not show that the evidence which plaintiffs seek to present on the new accounting could not have been secured and presented at the hearing, or within one year thereafter, when the remedy by motion was available by the exercise of reasonable diligence. (3) It does not set forth the nature and character of the newly discovered evidence. Whether equity will ever intervene to grant a new trial for newly discovered evidence under our statute is not determined.

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

Action by Louis Freeman and others against W. B. Wood. Judgment for defendant and plaintiffs appeal.

Affirmed.

Tracy R. Bangs and *Guy C. H. Corliss*, for appellants.

The fallacy of the court in its former decision in this action is in its failure to distinguish between the case at bar and the decision of this court in Kitzman v. Minnesota Thresher Mfg. Co., 10 N. D. 26, 84 N. W. 585. In the Kitzman case the ground for setting aside the judgment was *extrinsic* to the merits of the case. The plaintiffs in this case claim that the judgment they seek to set aside is fraudulent, not because they were induced to keep away from the court, but because there was a fraud in the very accounting itself working a deception on the court to induce it to render a decree which it would not otherwise have rendered.

Where there is actual litigation and parties try a controverted issue, each party must be on his guard against false swearing and false representations on the trial; where the fraud is not extrinsic, but is connected with the mere trial of the case, no redress in equity can be had as against the final judgment rendered. United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93. But where there is no actual litigation in court and no contest between parties over a settled issue, but the proceeding is merely an accounting by a trustee in a court of equity for the benefit of the beneficiaries, the law looks upon the relation of the parties as different from those engaged in an actual lawsuit. And for fraud in the accounting itself, to wit, in false swearing or presenting false vouchers or in making false entries in the account, the law will justify and compel a court of equity to set aside the judgment discharging such trustee and compel him to make an honest accounting of his trust. Ridenbaugh v. Burnes, 14 Fed. 93; Anderson v. Anderson, 52 N. E. 1038; Perry on Trusts, section 924; Griffith v. Godley, 113 U. S. 89, 28 L. Ed. 934, 5 Sup. Ct. Rep. 385; Williams v. Herrick, 25 Atl. 1100; Pratt v. Northam, 19 Fed. Cas. 1254, 5 Mason, 95; West v. Waddill, 33 Ark. 575; Wringold v. Stone, 20 Ark. 526; Adair v. Cummin, 48 Mich. 375, 12 N. E. 495; Holden v. Meadows, 31 Wis. 284; McLachlan v. Staples, 13 Wis. 448; Stetson v. Bass, 9 Pick. 27; Wiggin v. Sweet, 6 Metc. 194, 9 P. I. 166; 2 Leading Cases Eq.

208 and note; Nelson v. Rockwell, 14 Ill. 375; Bruce v. Doolittle, 81 Ill. 103; Bond v. Lockwood, 33 Ill. 212; 1 Woerner Admin. 1132, and note; Miller v. Steele, 64 Ind. 79; Greene v. Sargent, 23 Vt. 466, 56 Am. Dec. 88; 11 Am. & Eng. Enc. Law (2d Ed.) 1315 and 1316.

The amended complaint alleges that the remedy by motion would not be adequate. The fraud on which we predicate our right to set aside the order discharging the assignee relates to the very merits of the accounting, and the honesty and fairness thereof. To require a suitor to produce evidence covering the entire administration of this trust by the assignee so as to show that the accounting was not honest, on affidavits, is simply to deny him all remedy. It is only by the examination and cross-examination of the witnesses that the truth can be ascertained. It is absurd to require a party to make a motion to set aside a judgment discharging the assignee, upon which motion the entire question of the court is involved and must be investigated; and when, after such investigation on motion it must be investigated a second time in a distinct proceeding in equity. It is not adequate remedy to compel a party to resort to two proceedings when one would suffice. 11 Am. & Eng. Enc. Law (2d Ed.) 201.

Adequate remedy at law means one as practical and efficient as that which equity would afford under the same circumstances. 11 Am. & Eng. Enc. of Law, 200; Morse v. Nicholson, 38 Atl. 178; Hedlund v. Dewey, 105 Fed. 541; Springfield Milling Co. v. Barnard N. Co., 81 Fed. 261.

The limitation upon proceedings by motion to open a judgment upon some ground going to the right of plaintiff to the relief granted does not militate at all against jurisdiction in equity to protect a person from a judgment obtained against him by fraud. California Beet Sugar Co. v. Porter, 9 Pac. 313; Baker v. Riordan, 4 Pac. 232; Brennan v. Bridge Company, 47 Atl. 668; Williams v. Pyle, 56 S. W. 833; Hendron v. Kinner, 81 N. W. 783; Meyers v. Smith, 80 N. W. 273; Stong v. Gilbertson, 14 Mo. 116; Maberry v. McClurg, 51 Mo. 256; Mock v. Pleasants, 34 Ark. 63; Hackley v. Draper, 60 N. Y. 88; Wickersham v. Comerford, 31 Pac. 358; Noyes v. Willard, 18 Fed. Cas. 469; Griffith v. Godley, 113 U. S. 89, 28 L. Ed. 934; Johnson v. Coleman, 23 Wis. 452; 99 Am. Dec. 193; Connell v. Stelson, 33 Iowa, 147; Caruthers v. Hartfield, 24 Am. Dec. 580; Hernandez v. James, 23 La. Ann. 484.

The jurisdiction of a court of equity is not taken away by implication because another remedy has been afforded the suitor. The original jurisdiction of equity remains intact. Waldron v. Simmons, 28 Atl. 629; Schroeder v. Loeber, 75 Md. 195, 23 Atl. 579, 24 Atl. 226; Wells v. Pierce, 27 N. H. 503; Irick v. Black, 17 N. J. Eq. 189; King v. Baldwin, 17 Johns. 384, 8 Am. Dec. 415; Phipps v. Kelly, 6 Pac. 707; McConihay v. Wright, 121 U. S. 201, 7 Sup. Ct. 940, 30 L. Ed. 932; Putnam v. New Albany, Fed. Cas. No. 11,481; Sweeny v. Williams, 36 N. J. Eq. 627; Weslay Church v. Moore, 10 Pa. St. 273; Corrothers v. Board of Education of Clinton Dist., 16 W. Va. 527; Ladd v. Stevenson, 19 N. E. 842, 8 Am. St. Rep. 748; Jones v. Newhall, 115 Mass. 224, 15 Am. Rep. 97.

A court of equity may grant relief against the enforcement of a judgment at law, although a court of law having power to grant the relief has refused to do so. 12 Am. & Eng. Enc. Law, 139, 140; Baldwin v. Davidson, 40 S. W. 765; Stewart v. Caldwell, 54 Mo. 536; Mattern v. Gage, 15 Daly, 38; Foote v. Despain, 67 Ill. 28; How v. Mortell, 23 Ill. 478; Beams v. Denham, 2 Scam. 53; Wilday v. McConnell, 63 Ill. 278; Babcock v. McCommant, 53 Ill. 215; Brake v. Payne, 37 N. E. 140; Mosley v. Gilborn, 54 Pac. 121; Asbury v. Frisz, 47 N. E. 328; Burnett v. Milnes, 46 N. E. 464; Hayden v. Hayden, 46 Cal. 333; Ramsey v. Hicks, 53 Mo. App. 190; Link v. Link, 48 Mo. App. 345; Henderson v. Moore, 34 S. E. 446; Thompson v. Laughlin, 27 Pac. 752; Merriman v. Walton, 38 Pac. 1108.

J. A. Sorley and *Geo. A. Bangs,* for respondent.

An order discharging an assignee for the benefit of creditors is the final determination of a proceeding properly brought in a court of this state, and is a judgment. Section 4675, Compiled Laws of 1887; 17 Am. & Eng. Enc. Law (2d Ed.) 762; 1 Freeman on Judgments, sections 1 and 2; Joy v. Elton, 9 N. D. 428, 83 N. W. 875; Freeman v. Wood, 11 N. D. 1, 88 N. W. 721.

The plaintiff Jones will not be permitted to proceed in equity against a judgment to which he was not a party and which did not at its rendition affect any of his rights. 2 Freeman on Judgments, section 512; 15 Enc. Pl. & Pr. 249; Packard v. Smith, 9 Wis. 184; Bank v. Heiman, 80 Ga. 624, 5 S. E. 795; West v. Carter, 129 Ill. 249, 21 N. E. 782; Walton v. Pearson, 111 N. C. 428, 7 S. E. 566; Ward v. Clark, 6 Wis. 509; Bean v. Fisher, 14 Wis. 57; ex parte

McKenzie, 162 Ill. 48, 44 N. E. 413; Bough v. Bough, 37 Mich. 59, 26 Am. Rep. 495; Powell v. McDowell, 16 Neb. 424, 20 N. W. 271; Robinson v. Stevens, 22 Atl. 80.

The right to complain of a judgment is nonvendible, and a cause of action that sounds in deceit or fraud is nonassignable. Zabriskie v. Smith, 13 N. Y. 322; Read v. Hatch, 19 Pick. 47; Cutting v. Tower, 14 Grey. 183; Leggate v. Moulton, 115 Mass. 552; Crocker v. Bellangee, 6 Wis. 645, 70 Am. Dec. 489; Milwaukee & Minn. R. R. Co. v. Milwaukee & West. R. R. Co., 20 Wis. 174, 88 Am. Dec. 740.

A cause of action sounding in a deceit is not assignable. Dayton v. Fargo, 45 Mich. 153, 7 N. W. 758; Brush v. Sweet, 38 Mich. 574; Norton v. Tuttle, 60 Ill. 130; Holmes v. Moore, 5 Pick. (Mass.) 257; Read v. Hatch, 19 Pick. 47; Cutting v. Tower, 14 Grey, 183; Leggate v. Moulton, 115 Mass. 552; Marshall v. Means, 12 Ga. 61, 56 Am. Dec. 444; Milwaukee & Minn. R. R. Co. v. Milwaukee & West. R. R. Co., 20 Wis. 174, 88 Am. Dec. 740; Crocker v. Bellangee, 6 Wis. 645, 70 Am. Dec. 489; Murray v. Buell, 76 Wis. 657, 45 N. W. 667, 20 Am. St. Rep. 92; Sanborn v. Doe, 92 Cal. 152, 28 Pac. 105, 27 Am. St. Rep. 101; Whitney v. Kelley, 94 Cal. 146, 29 Pac. 624, 15 L. R. A. 813, 28 Am. St. Rep. 106; Little v. Hawkins, 19 Gr. (Ont. 1872) 267; Pomeroy's Eq. Jur. section 1276; 1 Perry on Trusts, section 69; 1 Bigelow on Fraud, pp. 214 and 545; Greenhood on Public Policy, p. 432.

The complaint does not state facts sufficient to constitute a cause of action and is vulnerable to four objections, to wit: (a) The fraud and deceit pleaded is intrinsic to the judgment. (b) The bill fails to negative laches. (c) The allegations of the bill are vague, indefinite and uncertain. (d) The plaintiff has an adequate and speedy remedy other than by this bill.

A court of equity will not interpose to vacate or set aside a judgment obtained by perjury or subornation of perjury. United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Greene v. Greene, 2 Gray, 361, 61, Am. Dec. 454; Hass v. Billings, 43 N. W. 797; Miller v. Morse, 23 Mich. 365; Gray v. Barton, 62 Mich. 180, 28 N. W. 813; Falson v. Falson, 55 N. H. 78; Smith v. Lowery, 1 Johns, ch. 432; Ross v. Wood, 70 N. Y. 8; Pico v. Cohn, 91 Cal. 129, 27 Pac. 357, 13 L. R. A. 336; Van Walters v. Board of Childrens' Guardian of Marion County, 132 Ind. 567, 32 N. E. 568, 18 L. R. A. 431; Hamilton v. McLean, 139 Mo. 687, 41 S. W. 226; McDougall v.

Walling, 21 Wash. 487, 58 Pac. 671; Earle v. Earle, 33 S. C. 504, 12 S. E. 165.

An action does not lie against a successful litigant or his witnesses for damages on account of his or their perjury, nor may such perjury or subornation of perjury be pleaded as a defense to an action on the judgment. Smith v. Lewis, 3 Johns. 157, 3 Am. Dec. 469; Cunningham v. Brown, 18 Vt. 123, 46 Am. Dec. 140; Dunlap v. Gilden, 31 Me. 435, 52 Am. Dec. 625; Peck v. Woodbridge, 3 Day, 30; Denerit v. Lyford, 27 N. H. 541; Lyford v. Denerit, 32 N. H. 234; Cottle v. Cole, 20 Iowa, 481.

The bill fails to negative laches. If the judgment be unjust, as the plaintiff's ignorance was without fault, laches or failure of diligence, equity may grant relief. Wales v. Bank, Har. Ch. (Mich.) 308; Hubbard v. Hobson, Breese, 190; Inglehart v. Lee, 4 Md. Ch. 514; Cape Sable Co.'s Cases, 3 Blad. 606; Blatzell v. Randolph, 9 Fla. 366.

To entitle party to relief he must be free from all fault or negligence on his part, including willful fault, want of care, diligence and prudence requisite in the ordinary business of life. Burton v. Wiley, 26 Vt. 432; Story's Equity Jr. 1574; Taylor v. Fore, 42 Tex. 256; Emerson v. Udall, 13 Vt. 477, 37 Am. Dec. 604; Pettes v. Bank of Whitehall, 17 Vt. 435; Carrington v. Holabird, 17 Conn. 530; Foster v. Wood, 6 Johns Ch. 87; Kinney v. Ogden, 2 Green Ch. 87; York v. Cloptor, 32 Ga. 362; Vilas v. Jones, 1 N. Y. 274.

A judgment may be rendered against a litigant which is clearly inequitable and unconscionable. Accident, surprise, mistake, fraud or wrongful conduct of his adversary may have contributed to the result, and the circumstances may be such that there is no relief except in equity, and his equity may be such as to render the courts anxious to afford redress; but if a party is put in an unfortunate position through his own negligence or inattention, equity will not interpose in his behalf. Foster v. Mansfield, C. & L. M. R. R. Co., 146 U. S. 88, 13 Sup. Ct. Rep. 28; Champion v. Woods, 79 Cal. 17, 21 Pac. 523, 12 Am. St. Rep. 126; Stroup v. Sullivan, 2 Ga. 275, 46 Am. Dec. 389; Bellamy v. Woodson, 4 Ga. 175, 48 Am. Dec. 221; Ames v. Snider, 55 Ill. 498; Cairo, etc., R. R. Co. v. Holbrook, 92 Ill. 297; Ratcliff v. Stretch, 130 Ind. 282, 30 N. E. 30; English v. Aldrich, 132 Ind. 500, 31 N. E. 456, 32 Am. St. Rep. 270; Hollinger v. Reeme, 138 Ind. 363, 36 N. E. 1114, 46 Am. St. Rep. 402; Casey v. Gregory, 13 B. Mon. 505, 56 Am. St. Rep. 581; Amhurst

College v. Allen, 165 Mass. 178, 42 N. E. 570; Kelleher v. Boden, 55 Mich. 295, 21 N. W. 346; Yarborough v. Thompson, 41 Am. Dec. 629; Jordon v. Thomas, 34 Miss. 72, 69 Am. Dec. 387; Norwegian Plow Co. v. Bollman, 47 Neb. 187, 66 N. W. 292; Parker v. Jones, 5 Jones Eq. 276, 75 Am. Dec. 441; Brenner v. Alexander, 16 Or. 349, 8 Am. St. Rep. 301, 19 Pac. 9; Thompkins v. Brennen, 56 Fed. Rep. 694; Hendrickson v. Hinckley, 58 U. S. 443, 17 How. 443, 15 L. Ed. 123; Crim v. Handley, 94 U. S. 652, 24 L. Ed. 216; Evers v. Watson, 156 U. S. 527, 15 Sup. Ct. Rep. 430.

The allegations of the bill are vague, indefinite and uncertain. What may seem ample to the plaintiffs as proof of fraud as a basis for their charge might if presented to the court seem entirely inadequate. Badger v. Badger, 69 U. S. 87, 17 L. Ed. 836; Foster v. Mansfield, C. &. L. M. R. R. Co., 146 U. S. 88, 13 Sup. Ct. Rep. 28; Marquez v. Frisbie, 101 U. S. 473, 25 L. Ed. 800; United States v. Atherton, 102 U. S. 372, 26 L. Ed. 213; Evers v. Watson, 156 U. S. 527, 15 Sup. Ct. Rep. 430; Smith v. Nelson, 62 N. Y. 286; Ohio & W. Mortgage & Trust Co. v. Carter, 58 Pac. 1040; Smith v. Bank, 18 R. I. 705, 30 Atl. 342; Kay v. Whittaker, 44 N. Y. 565.

There is adequate remedy in the original proceeding. Freeman v. Wood, 11 N. D. 1, 88 N. W. 721; Kitzman v. Minnesota Thresher Mfg. Co., 10 N. D. 26, 84 N. W. 585.

There is ample remedy by motion in the original proceeding. Section 5298, 3 Pom. Eq. Jur. section 1361; Headley v. Bell, 84 Ala. 346; Harding v. Hawkins, 141 Ill. 572, 31 N. E. 307, 33 Am. St. Rep. 347; Ratcliff v. Stretch, 130 Ind. 282, 30 N. E. 30; Whitaker v. Wickersham, 5 Del. Ch. 187; Lininger v. Glenn, 33 Neb. 187, 49 N. W. 1128; Proctor v. Pettit, 25 Neb. 96, 41 N. W. 131; Phillips v. Pullen, 45 N. J. Eq. 5, 16 Atl. 9.

Where a judgment may be set aside by a motion in the original action, on the grounds which would give jurisdiction to a court of equity, and the time within which such motion may be made has not expired, the remedy at law is adequate and courts of equity will not take jurisdiction. Freeman on Judgments, section 497, p. 874; Logan v. Hillegass, 16 Cal. 201; Bibend v. Kreutz, 20 Cal. 110; Sauchez v. Carriaga, 31 Cal. 170; Luco v. Brown, 73 Cal. 3, 14 Pac. 366, 2 Am. St. Rep. 772; Hart v. Lazaron, 46 Ga. 396; Morris v. Morris, 76 Ga. 733; Hollinger v. Reeme, 138 Ind. 363, 46 Am. St. Rep. 402, 36 N. E. 1114; Mason v. Miles, 63 N. C. 564; Gallop v. Allen, 103 N. C. 24; Whitehurst v. Merchants & Farmers

Transp. Co., 109 N. C. 342, 13 S. E. 937; Crocker v. Allen, 34 S. C. 452, 13 S. E. 650, 27 Am. St. Rep. 831; Ede v. Hazen, 61 Cal. 360; Ketchum v. Crippen, 37 Cal. 223; Heller v. Dyerville Mfg. Co., 47 Pac. 1016; Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095; Kitzman v. Minnnesota Thresher Mfg. Co., 10 N. D. 26, 84 N. W. 585; Crandall v. Bacon, 20 Wis. 639, 91 Am. Dec. 451; Buckley v. Helibrunner, 7 Ind. 489; Grass v. Hess, 37 Ind. 193; March, Admr. v. Best, 41 Mo. 493; Vilas v. Plattsburg & M. R. Co., 125 N. Y. 440, 25 N. E. 941; Brown v. Chapman, 90 Va. 174, 17 S. E. 855, 20 Am. St. Rep. 771.

The rules of equity are applicable to a complaint such as the one at bar. Bursinger v. Sleeper, 69 Wis. 219, 34 N. W. 149; In re Baker, 72 Wis. 395, 39 N. W. 764; Lawson v. Stacey, 51 N. W. 961; Commercial Bank v. McAuliffe, 66 N. W. 110; Kows v. Mowery, 10 N. W. 283; Carver v. Lewis, 2 N. E. 705, 2 N. E. 714; In re Hawley, 3 N. E. 68; Field v. Ridgley, 6 N. E. 156; Casttetter v. State ex rel. Bradburn, 14 N. E. 388; Braiden v. Mercer, 7 N. E. 155.

YOUNG, J. This is an action to vacate a judgment of the district court of Grand Forks county discharging the defendant, as assignee for the benefit of creditors of Freeman & Burwell, insolvents, and exonerating his bondsmen, and to secure a new accounting. The ground alleged as a basis for the relief sought is the fraud of the assignee in accounting. The action is prosecuted by the assignors and one Andy Jones, who, since the defendant was discharged, has purchased from a number of the creditors their claims against said insolvents. The case was before us upon the former appeal upon a general demurrer to the complaint, which was sustained. Freeman v. Wood, 11 N. D. 1, 88 N. W. 721. Thereafter the complaint was amended. The defendant again demurred. The demurrer was sustained, and this appeal is from the order sustaining the same.

The complaint alleges, in substance, that on September 27, 1893, Julius H. Burwell and Louis Freeman, who had theretofore been engaged in selling farm machinery in the city of Grand Forks under the firm name of L. Freeman & Co., were insolvent; that on said date they made a written assignment to the defendant, as assignee, of all their property, for the benefit of their creditors, under the provisions of sections 4660 to 4680, inclusive, Comp. Laws 1887; that the defendant duly filed his written acceptance of the

trust, gave the bond required by statute, and entered upon the discharge of his duties; that the assignors delivered to him all of their property; that, as required by statute, they made and filed with the register of deeds of Grand Forks county, the county in which the assignors resided, a true inventory, verified by their oaths, showing the names and residences of all their creditors, and the amounts due to each, and also a list of "all the assignors' property at the date of the assignment, * * * and all vouchers and securities relating thereto, and the value of such property according to the best knowledge of said assignors;" that there was transferred to the actual possession of the defendant, by the deed of assignment, notes, accounts and merchandise of the actual value of $10,362.90, and an equity in certain other notes, which had been pledged as collateral, of the value of $4,305.82; that at said date the assignors were indebted upon their promissory notes to five certain creditors, who are named, in various amounts, aggregating $15,262.97, all of which notes have, since the defendant's discharge, for a valuable consideration, been assigned and transferred to the plaintiff Andy Jones; that, in addition thereto, the assignors were indebted to various other creditors in the sum of $15,225.55; that no part of said liabilities has been paid except a payment of 19 per cent, which was made by the defendant upon his final accounting and discharge. It is alleged that in May, 1895, the defendant represented to the various creditors that all of the assets had been realized upon, and the proceeds distributed, except notes and accounts of the face value of $13,000, which were represented to be of little or no value; that the creditors, relying upon such representations, consented to a private sale thereof; that in June, 1895, the defendant represented that he had made a sale of said remaining assets for sufficient to pay a dividend of 5 per cent, which dividend was received by the creditors in reliance upon said representations; that in truth and in fact the defendant had notes and accounts of the actual value of $30,000, and that no sale was in fact made; that the defendant personally advanced the money which was paid as dividends. Further, that in July, 1895, the defendant made a report in writing to the judge of the district court, and an "alleged account of his proceedings as assignee and of the discharge of the duties of his trust, and of the moneys and property of said estate which came into his hands for distribution," in which he reported that he had realized only $13,674.18, and that the ex-

penses of administration of his said trust were $5,720.95; that at the time said final account and report was presented "to the court and plaintiffs and their predecessors in interest," all of the creditors, "because of the false representations hereinbefore set forth, and trusting and believing that said estate had been fully, fairly and honestly administered, and the assets thereof realized upon and fairly accounted for, failed to appear and make any objection to said account, and the court, by reason of such false report, was misled and deceived, and induced by the false representations of said assignee, hereinafter referred to, to make and enter an order allowing the final account of the assignee, and a final order was made and entered allowing said final account and discharging said assignee and his bondsmen from all future liability In said case; that said account was not a true and just account and report of the transactions of the defendant as assignee, and was not a true report of the amount realized from the assets of said estate or the disposition thereof, but was fraudulently made with intent to deceive both the court and creditors of said estate;" and "upon information and belief" it is alleged that the report was false in this: that the defendant had realized a much greater sum in cash than he reported, and that the notes reported to have been sold at private sale were also of greater value than represented; further, that a certain credit which was allowed to defendant for commissions should not have been allowed because of his alleged maladministration; further, that he falsely claimed and was allowed credit for moneys alleged to have been paid for attorney's fees, which it is alleged upon information and belief were not paid, and a similar allegation is made as to certain credits for moneys disbursed to pay the expenses of collection.

The foregoing allegations are the same as those contained in the original complaint, which was held insufficient upon the former appeal upon the ground that an independent action will not lie where the remedy at law by motion, provided for by section 5298, Rev. Codes 1899, is available, and that a complaint which does not show that such motion is not available, or that it is inadequate, does not state a cause of action. Section 5298 confers upon the district court the power "at any time within one year after notice thereof to relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect." Thus far in their complaint the plaintiffs

have offered no excuse for not having availed themselves of the remedy provided by the section just referred to; neither have they alleged any facts to show that such remedy is not now available or adequate. For the purpose of meeting these defects, two paragraphs have been added to the present complaint, in which it is alleged: (1) That neither of the assignors nor any of the creditors knew of any of the acts of fraud or violation of trust until March, 1900, when L. Freeman "was accidentally apprised of the fact that the defendant, Wood, claimed to be the owner of a certain claim," which prior to the assignment belonged to the assignors; that thereafter the said L. Freeman "caused certain investigations to be made," from which investigation the facts were "slowly and laboriously developed." (2) That the accounting by the defendant involves so many details and facts that they cannot be set out in the form of affidavits, and for that reason it is, and has been at all times, impracticable to present these matters to the court upon a motion for relief from the judgment. Counsel for the defendant contend that the foregoing amendments have not cured the defect in the complaint, and that it is still vulnerable to a general demurrer for the same reason as before, viz., that it does not show that the remedy by motion is not available, or that it is not adequate. In our opinion, this contention is sound, and must be sustained. The remedy given by section 5298 is available "at any time within one year after notice" of the judgment or order against which relief is sought. The complaint does not state when the defendant had notice of the judgment. It does not show, therefore, that one year has expired after notice, and thus does not negative the present availability of the remedy by motion. Neither does it show that the remedy by motion is inadequate. There is no attempt to show that the plaintiffs could not or cannot present the evidence which will excuse their default, if any they have, in the form of affidavits. The merits of the accounting are not involved on such a motion. It is the sufficiency of their excuse for their default. If the plaintiffs' excuse for their default should be found sufficient, the judgment of discharge would be set aside, and an account taken in the manner provided for by the statute, the same as though no judgment of discharge had been entered. The complaint thus failing to show that the remedy by motion is not available, or that it is inadequate, does not state a cause of action.

There is another ground, however, and one going to the merits of the present action, which requires us to hold that the complaint does not state a cause of action, and that is its failure to show that the plaintiffs have been diligent in pursuing their legal remedies. We may assume for the purposes of this question that the assignors and creditors had notice of the judgment of discharge when it was entered in July, 1895, and that the remedy by motion is therefore not now available because of the lapse of time, and that the only relief obtainable is through the aid of a court of equity. The plaintiffs are asking to be relieved from the effect of a final judgment of a court of competent jurisdiction. The statute under which the defendant assumed the duties and liabilities of assignee provides that all proceedings relative to the assignment "shall be subject to the order and supervision of the judge of the district court of the county in which the assignment is made." It also makes provision for a final accounting and discharge of the assignee and for the discharge of his bondsmen. Section 4675, Comp. Laws 1887, reads in part as follows: "Whenever an assignee has fully complied with his trust he may by order of the judge be fully discharged from all further duties, liabilities and responsibilities connected with the trust" after a hearing and upon notice. "If upon the hearing the judge shall be satisfied that the assignee is entitled to be discharged, he shall make an order accordingly. * * * Such order shall have the effect to discharge the assignee and his sureties from all further responsibility in respect to the trust." It is clear that the order of discharge which plaintiffs seek to have set aside has all the elements of a final judgment, and as such is binding upon all persons whose interests were involved in the adjudication. The assignors and creditors were parties to the proceedings. They had notice of the application, and are bound by the judgment of discharge. The fact that they did not appear at the hearing does not affect its validity or binding force. The question involved at the hearing was whether the defendant had honestly and faithfully administered the trust and satisfactorily accounted for all of the property which had been placed in his hands. The court found that he had been faithful, and had accounted fully, and thus negatived all of the charges of unfaithfulness and fraud with which the plaintiffs now accuse him. That this was the effect of the order of discharge is apparent, and it was so held by the Supreme Court of Wisconsin in Magnus v. Sleeper, 69 Wis. 219, 34 N. W.

149, under a similar statute. Upon the general proposition that judgments of this nature are binding upon parties in interest who have submitted to the jurisdiction, see Joy v. Elton, 9 N. D. 428, 83 N. W. 875; Clendening v. Bank, 12 N. D. 51, 94 N. W. 901. The judgment of discharge having been rendered by a court of competent jurisdiction is subject to attack only upon grounds upon which other judgments are assailable. What is the ground of the plaintiff's attack upon this judgment? It is (1) that the defendant did not render an honest account, and (2) that less than thirty days prior to the commencement of this action the plaintiffs accidentally discovered certain evidence which led to the discovery of certain other evidence, the nature of which is not disclosed, which, it is assumed, if known to them prior to or at the time of the hearing of defendant's application for discharge, would have defeated his discharge, and required him to account for and pay to the creditors other and larger sums of money than were distributed. The relief which plaintiffs thus seek is like that which was formerly obtained by a bill in equity for a new trial. In this case it is a new accounting upon the ground of newly discovered evidence. The equitable remedy for securing a new trial has become almost obsolete, and has seldom, if ever, been successfully invoked in recent years. Whether it is available in this state under any circumstances we are not called upon to determine, for we are agreed that the complaint in this case falls far short of showing that the plaintiffs are entitled to a new trial under familiar and well-settled rules which govern courts of equity in actions of this character. It is well settled that, "to warrant the exercise of this jurisdiction, the party seeking it must show that he was prevented by fraud, mistake or accident from maintaining his legal rights, and that the obstacle preventing him could not have been overcome or avoided by any reasonable diligence on his part. These requisites are absolutely indispensable, and the rule inflexible, and it is enforced with especial strictness where relief is sought on the ground of newly discovered evidence." Floyd v. Jayne, 6 Johns. Ch. 479; Foster v. Wood, 6 Johns. Ch. 87; Burton v. Wiley, 26 Vt. 430; Emerson v. Udall, 13 Vt. 477, 37 Am. Dec. 604; Hannon v. Maxwell, 31 N. J. Eq. 318. And where the ground for relief is newly discovered evidence, the complaint must show diligence in discovering it. The mere want of knowledge of its existence is not sufficient. In Foster v. Mansfield, 146 U. S. 88, 13 Sup. Ct. 28, 36 L. Ed. 899, which was an action

in equity by a stockholder to set aside a foreclosure sale of a railroad for fraud of which the plaintiff was ignorant until shortly before he filed his bill, the court said: "The defense of want of knowledge on the part of the one charged with laches is easily made, easy to prove by him on oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold plaintiff to a rigid compliance with the law, which demands not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of that fact. Especially is this the case where the party complaining is a resident of the neighborhood in which the fraud is alleged to have taken place. * * * If a person is ignorant of his interest in a certain transaction, no negligence is imputable to him for failing to inform himself of his rights, but if he is aware of his interest, and knows that proceedings are pending, the result of which may be prejudicial to such interest, he is bound to look into such interest so far as to see that no action is taken to his detriment." In this case the assignors and creditors were parties to the insolvency proceedings. They knew what the assets were. The assignors had listed them, and sworn to their value, and filed an inventory of the same in the office of the register of deeds. The insolvents' business was located at Grand Forks, and the assignors as well as the creditors must have known in a general way, at least, the value of the assets. The means of ascertaining whether any notes and accounts had been paid, and what had been paid, was at all times open to them. They were interested in the adjudication—the assignors in having as large a part of their debts paid as possible, and the creditors in securing from the estate, which was apparently the only means of securing payment, as large a sum as possible. They had notice of the defendant's application for discharge, and knew that the court would be asked to pass upon his final account and to enter judgment discharging him and his bondsmen from further liability. Under these circumstances it was their duty to investigate the facts, and procure all available evidence bearing upon their rights, and to attend the hearing and protect their interests, which were then being judicially passed upon. The question considered on the former appeal was whether the plaintiffs had an adequate remedy by motion, not whether the plaintiffs had lost their rights by neglect. The statement in the former opinion (page 9, 11 N. D., page 724, 88 N. W.), therefore, that "the plaintiffs had ample

reason for their nonappearance before the district court when they were cited to appear," was not pertinent to the question then under consideration, and is not sustained by the allegations of the complaint. In our opinion, the creditors were negligent in not appearing at the hearing, and the complaint does not excuse their default. It was their right and duty to appear. They did not appear, and under such circumstances a court of equity will not grant relief, even though the judgment of discharge be unjust. C. & St. L. R. R. Co. v. Holbrook, 92 Ill. 297; Stroup v. Sullivan, 2 Ga. 275, 46 Am. Dec. 389; Smith v. Lowry, 1 Johns. Ch. 320; Barker v. Elkins, 1 Johns. Ch. 465; Bellamy v. Woodson, 4 Ga. 175, 48 Am. Dec. 221; Evers v. Watson, 156 U. S. 527, 15 Sup. Ct. 430, 39 L. Ed. 520; Tillis v. Prestwood, 107 Ala. 618, 18 South. 134; Hazlett v. Burge, 22 Iowa, 531; Brenner v. Alexander, 16 Or. 349, 19 Pac. 9, 8 Am. St. Rep. 301; Hollinger v. Reeme, 138 Ind. 363, 36 N. E. 1114, 24 L. R. A. 46, 46 Am. St. Rep. 402; Hendrickson v. Hinckley, 17 How. 443, 15 L. Ed. 123; Crim v. Handley, 94 U. S. 652, 24 L. Ed. 216. It must appear that their failure to secure relief by legal remedies was unmixed with any fault or negligence on their part. That the situation in which the creditors find themselves is due to their own neglect is apparent. Had they attended the hearing, it is fair to assume that all of the facts relating to the trust would have been disclosed, and their rights fully protected. Further, if we could assume that they were excusable in not attending the hearing, and no excuse is offered, this would avail them nothing, for the reason that it appears that no effort whatever was made within the ensuing year, when they could have excused this default upon motion, to investigate the facts and ascertain whether the defendant had rendered a correct account of his stewardship. New trials are granted upon the ground of newly discovered evidence only when it appears that proper diligence has been used to secure and produce it. Proper diligence required the creditors to appear at the hearing and protect their interests. Had they done so, it is improbable that they would now have cause for complaint. It is clear that they could have discovered the facts upon which they now rely within one year thereafter without difficulty. The complaint does not show that any diligence whatever was used either before the hearing or afterwards. It alleges that the discovery of the fraud was "accidental," and this accidental discovery was five years after the defendant had been discharged. Courts of

equity do not open their doors to those who have been guilty of such indifference in protecting their own interests.

The complaint is also insufficient for another reason. It does not disclose the character of the newly discovered evidence which the defendants expect to offer upon the new accounting which they seek. In Hannon v. Maxwell, supra, which was a bill in equity for a new trial, a complaint very similar in its averments was held insufficient upon this ground. The reasons—and they are elementary—were stated in the following language: "The rule as to the character of the newly discovered evidence which can be successfully presented as a ground for a new trial is well settled. It must be material, relevant and noncumulative, and such as could not have been discovered in time for use at the first trial by the exercise of proper care and diligence. The bill should disclose the character of the evidence, so that, from the pleading, the court can determine its materiality and relevancy. The bill should further show that proper dilgence was used in the preparation for the first trial, and that the exercise of such diligence failed to discover the testimony; or that, from the character of the testimony or the manner of its subsequent discovery, no proper degree of care would have brought it to light in time for the original trial."

The order sustaining the demurrer is affirmed. All concur.

(103 N. W. 392.)

JEWETT BROTHERS, A CORPORATION, v. B. E. HUFFMAN, A. E. HUTCHINSON, AS TRUSTEE OF THE ESTATE OF B. E. HUFFMAN, BANKRUPT.

Opinion filed February 18, 1905.

Attachment — Dissolution by Bankruptcy.— Exempt Property.

1. The lien of an attachment is not dissolved by the bankruptcy of the attachment debtor, where the property attached is exempt as against the trustee in bankruptcy, but is not exempt from seizure for the debt upon which the attachment is based.

Attachment May Hold Until Decision of the Bankrupt Court as to Exemptions.

2. Where it is conceded that part and possibly all of the property attached is exempt from the bankruptcy proceedings, the property may be held under the attachment until it has been determined in the bankruptcy proceedings what part, if any, of the attached property has

passed to the trustee in bankruptcy, freed from the bankrupt's claim for exemptions.

False Pretenses as Applied to Attachment Not a Part of Cause of Action.

3. False pretenses which are relied upon solely as a basis for the provisional remedy by attachment, and to defeat the defendant's right to exemptions, do not constitute part of the cause of action, where the plaintiff sues on contract to recover the purchase price of goods sold and delivered.

Trustee in Bankruptcy Cannot Intervene to Get Possession of Attached Property.

4. The fact that the warrant of attachment has been levied upon the property of the bankrupt does not authorize the trustee in bankruptcy to intervene in the action in which the attachment issued for the purpose of obtaining possession of the attached property.

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

Action by Jewett Bros. against B. E. Huffman, and A. E. Hutchinson intervenes. Judgment for defendants, and plaintiff appeals.

Reversed.

John Knauf, for appellant.

Title to exempt property does not pass to a trustee in bankruptcy under the 1898 bankruptcy act. The state law governs as to exemptions. Section 70, U. S. Bankruptcy Act, 1898; Brandenburg on Bankruptcy, 412; Peck v. Jenness, 48 U. S. 612, 12 L. Ed. 841; Scott v. Kelley, 89 U. S. 57, 22 L. Ed. 729; Davis v. Friedlander, 104 U. S. 570, 26 L. Ed. 818, section 6, U. S. Bankruptcy Act of 1898; subdivison 2, section 17, Bankruptcy Act of 1898; section 5226, Rev. Codes N. D. 1899.

Liens against exempt property are not discharged, released or dissolved by the act or declaration in bankruptcy. Robinson v. Wilson, 22 Am. Rep. 272; In re Kaeppler, 7 N. D. 435, 75 N. W. 789; Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 88 N. W. 703, 58 L. R. A. 770.

By section 70 of the bankruptcy act, the trustee is, by operation of law, vested with the title of the bankrupt, but this section expressly excepts title to property which is exempt. The title to defendant's exempt property remained in him. Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 88 N. W. 703, 58 L. R. A. 770; In

re Durham, 104 Fed. 231; Jeffries v. Bartlett, 20 Fed. 496; Adams v. Crittenden, 17 Fed. 42.

The title to property which is exempt remains in the bankrupt, and jurisdiction to liens thereon is in the state, and not the federal, courts. Powers Dry Goods Co. v. Nelson, supra; Robinson v. Wilson, 15 Kan. 595, 22 Am. Rep. 272; Re Little, 110 Fed. 621.

Comstock & Dresser, for respondents.

All levies, judgments, attachments or other liens obtained through proceedings against an insolvent within four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void, in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same and passed to the trustee as a part of the bankrupt's estate. U. S. Bankrupt Act, 1898, section 67f; In re Tune, 115 Fed. 906, 93 Fed. 953; 94 Fed. 793; 96 Fed. 936.

Liens against exempt property acquired within four months prior to the filing of a petition in bankruptcy are released or discharged by the act or declaration in bankruptcy. U. S. Bankruptcy Act 1898, section 67f; In re Tune, supra.

Where the statute provides that property sold shall not be exempt from claims for the purchase money, the vendor has not a lien at the time of sale, and protected under section 67d of the bankrupt act, but only the right to obtain the lien of attachment, such lien falling under section 67f of said act. 112 Fed. 975.

The law is the same in regard to property obtained under false pretenses. The state court lost jurisdiction, which was transferred by law to the federal court having exclusive jurisdiction of the subject matter. The bankrupt court can compel an officer of the state court to deliver attached property to the trustee. 93 Fed. 953; 94 Fed. 793; In re Tune, supra.

Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 88 N. W. 703, 58 L. R. A. 770, is distinguishable from the case at bar. There the attachment and levy were made after the goods had been set apart and turned over to the bankrupt as exempt property, and had passed out of the hands of the trustee. In this case the attachment was prior to the adjudication of bankruptcy, but within the four months period, and before the property passed into the trustee's hands. The earlier cases hold that when property is set apart and delivered to the

bankrupt by the bankrupt court, the court will not concern itself further with adverse liens, that may or may not be extinguished by the bankruptcy. 20 Fed. 498; 12 Kan. 98.

The contrary rule is supported by the weight of authority. 1 N. B. R. 555, 2 N. B. R. 498, 5 N. B. R. 298; In re Tune, supra.

ENGERUD, J. Plaintiff commenced an action to recover $493, claimed to be due on account of merchandise sold to defendant. Allegations were incorporated in the complaint to the effect that the sale upon credit was induced by deceit. The complaint concludes with a demand for judgment for the debt, and "for a writ of attachment herein against all the property of the said defendants; for an order of court directing the sale of property herein attached under a judgment granted against the defendant for having obtained goods, wares and merchandise and general groceries under false and fraudulent pretenses, and that the judgment rendered herein be for having obtained property from the plaintiff under and by virtue of false pretenses." A warrant of attachment was procured on the ground that the debt sued for was incurred for goods obtained by false pretenses. By virtue of the warrant the sheriff of Benson county levied upon and seized the defendant's stock of merchandise. The attachment levy was made December 18, 1902. On January 16, 1903, the defendant was adjudged a bankrupt in voluntary bankruptcy proceedings instituted in the United States district court for the district of North Dakota. The defendant thereupon served an answer to the complaint, which contained neither a denial, affirmative defense, nor counterclaim, but alleges that the defendant has been adjudged a bankrupt, and demands a dismissal of the action with costs. The plaintiff then served a document styled a "reply" to this answer. This reply admits the adjudication of bankruptcy, and avers that the property seized under the warrant of attachment in said action had been claimed by the bankrupt as a part of his exemptions, and the same was exempt as against bankruptcy proceedings, but that said property was not exempt from seizure for plaintiff's debt, by reason of the false pretenses set forth in the complaint. Subsequently the trustee in bankruptcy was permitted to intervene in the action. The intervener's complaint,, in substance, sets forth that the sheriff had seized and was holding possession, by virtue of the writ of attachment in said action, of the defendant's entire stock of merchandise; that said defendant had been adjudged a bankrupt within

a month after the attachment, and the intervener had been appointed trustee, and qualified as such; that the referee had made an ex parte order directing the sheriff to deliver the attached property to the trustee; that the sheriff had refused, on demand, to obey said order. The intervener prays judgment that the attachment be discharged and released; that the sheriff be required to surrender the attached property to the trustee; that the intervener recover his costs, and have such other and further relief as may seem to the court just and equitable. To this intervener's complaint the plaintiff made answer, which, in effect, contains the same allegations as the reply to the defendant's answer. The record shows that when the action came on for trial the intervener moved for judgment in his favor on all the pleadings in the case, supplemented by certain admissions made in open court, which it is unnecessary to recite for the purposes of this opinion. The motion was granted, and an order was made directing a judgment to be entered to the effect that the attachment be wholly discharged and released; that the attached property be surrendered to the trustee in bankruptcy, and that the intervener recover from the plaintiff the costs and disbursements of the action. A final judgment was entered in accordance with the order, and the plaintiff appealed to this court from such judgment and order.

No question is made as to the regularity of the proceedings. The assignments of error attack the propriety of the trial court's decision of the question which it is assumed arose on the pleadings.

Appellant contends that inasmuch as it is conceded that part, at least, of the exempt property is exempt as against the bankruptcy proceedings, therefore the lien of the attachment remains in force, unaffected by the bankruptcy, as to such part thereof as to which the bankrupt's claim for exemptions shall be allowed; and, as the statutes of this state do not allow any exemptions against a debt incurred for property obtained under false pretenses, the plaintiff has the right to hold and subject to his claim any property of the defendant which does not pass to the trustee in bankruptcy. The respondent contends that, under section 67f of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]), the lien acquired by the attachment levy was dissolved by the bankruptcy of the debtor, and that the trustee is entitled to the possession of all the debtor's property, whether exempt or not; that the trustee is entitled to take and hold the exempt property until

the debtor's claim to exemptions has been allowed. Respondent's contention is fairly met by the decision of this court in Dry Goods Co. v. Nelson, 10 N. D. 580, 88 N. W. 703, 58 L. R. A. 770, where it was said: "Exempt property constitutes no part of the estate which passes to the trustee for the benefit of his creditors. * * * Exempt property is not disturbed, but is left to the debtor, to be held by him subject to the laws of the state, entirely freed from federal interference." Judge Jones, of the Northern District of Alabama, in the case of In re Tune (D. C.) 115 Fed. 906, differs from us on this question; but Judge Trieber of the Eastern district of Arkansas, in a case similar to the one at bar, took the same view of the statute as we do. In re Durham (D. C.) 104 Fed. 231. See, also, In re Little (D. C.) 110 Fed. 621. Until the question is authoritatively settled in the federal courts, we see no reason to depart from the views expressed in the Nelson case.

The lien of the attachment remains in force, notwithstanding the bankruptcy, upon so much of the property as is exempt from those proceedings. The adjustment of the debtor's claim for exemptions is a matter which pertains to the administration of the bankrupt estate, over which the court in which those proceedings are pending has exclusive jurisdiction. Until that tribunal shall have determined how much of the attached property is exempt, and consequently how much of it has passed to the trustee, it is clear that the attaching creditor has the right, so far as the trustee is concerned, to hold it. The attaching creditor has a lien on all that does not belong to the trustee, and it is conceded that the debtor's demand for exemptions has not been passed upon by the bankruptcy court. It is conceded that when the exemptions are allowed they may include all of the attached property. In that event the attachment will not be affected by the bankruptcy. In short, it is not yet known whether or not the trustee is entitled to any of the attached property. Until the trustee has established what part, if any, of this property belongs to him, freed from the attachment lien, he is in no position to claim it. For these reasons, the ruling of the trial court was erroneous.

The procedure adopted in this case is unwarranted by statute, principle or precedent. A simple action at law for the recovery of a debt seems to have been transmuted into an action by the trustee in bankruptcy to recover the possession of specific personal property from the plaintiff. The original cause of action has entirely

dropped out of sight. This procedure has apparently resulted from the erroneous idea that the right to the provisional remedy of attachment was part of the cause of action. Hence the intervention was permitted on the supposition that the trustee in bankruptcy had an interest in the subject matter of the action adverse to both parties. An attachment is a mere provisional remedy in an action. It is not part of the cause of action, or relief sought thereby. In this case the cause of action, stated in general terms, was the defendant's breach of contract to pay the purchase price of goods, and the relief sought was the recovery of the purchase price. The allegations as to false pretenses and the demand for a writ of attachment had no proper place in the complaint, and were mere surplusage. Sobolisk v. Jacobson, 6 N. D. 175, 69 N. W. 46. The attachment, and the grounds therefor, as well as the right to hold the property levied on, were matters entirely extraneous to the cause of action. There was no ground for the intervention.

We have passed upon the merits of the question which the record purports to present, because the parties seem to have consented to this irregular manner of litigating it, and because the facts presented did not warrant the dissolution of the attachment. The orderly administration of justice, however, demands substantial adherence to regular procedure, and the unwarranted departure from the established rules of practice disclosed by this record should not be tolerated by the trial court.

The judgment and order are reversed. All concur.

(103 N. W. 408.)

PETER CLEMENS, GEORGE A. CLEMENS, WALTER H. CLEMENS, MARY C. CLEMENS AND GRACE A. CLEMENS, MINORS, BY ANNA CLEMENS, THEIR GUARDIAN, v. ROYAL NEIGHBORS OF AMERICA.

Opinion filed February 28, 1905.

Life Insurance — Suicide.

1. Under the language of a benefit certificate of insurance in a fraternal society, stating that said certificate shall be void "if the member holding this certificate * * * shall die * * * by any means or act which if used or done by such member while in the possession of all natural faculties unimpaired * * * would be self-destruction." a death by suicide avoids the policy; and such language is equivalent to providing that death by self-destruction, whether sane or insane, avoids the policy.

Death by Suicide Not Presumed — Evidence — Construction of Policy.

2. In case of death under circumstances not explained, the legal presumption is that such death was not by suicide, and that presumption will remain until overcome by evidence establishing a death by suicide.

Same — Directed Verdict.

3. Where the circumstances surrounding the death of a person all point to death by suicide, and there are no facts from which a different conclusion might be reasonably reached or inferred, a directed verdict will be sustained—that death was caused by suicide.

Note in Handwriting of the Suicide Found With Remains Admissible.

4. Where a note is found in a room where a person is found dead, caused by violence, and such note is in the handwriting of the deceased, and gives directions as to burial and other matters, such note is competent evidence on the question whether the death was suicide or not.

Ambiguous Language Construed.

5. Ambiguous language in a certificate of insurance will be construed in favor of the insured.

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

Action by Peter Clemens and others against the Royal Neighbors of America. Judgment for defendant and plaintiffs appeal.

Affirmed.

S. G. Roberts and *Martin Ryan*, for appellants.

It was error to admit proofs of death on the trial, they being made on hearsay by the guardian of the minor plaintiffs. Stevens v. Continental Casualty Co., 12 N. D. 463, 97 N. W. 862; 15 Am. & Eng. Enc. Law (2d Ed.) 71; 2 Jones on Evidence, section 361.

It was error denying motion to strike out coroner's certificate in medical proof of death. 2 Jones on Evidence, section 368.

It was error to admit parol evidence of the contents of the note alleged to have been found in the room where deceased's body was found, there being no proof that it was in the handwriting of decedent, or that it was written contemporaneously with or immediately prior to his death; and is not a confession or admission of an intent to commit suicide, or any other wrongful act, and is no part of the res gestae. Fitch v. Popular Life Ins. Co., 59 N. Y. 557, 17 Am. Rep. 372; Bridges v. Eggleston, 7 Am. Dec. 212; Rawls v.

American Mut. Life Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280; Swift v. Massachusetts Mut. Life Ins. Co., 63 N. Y. 186, 20 Am. Rep. 522; Seiler v. Economic Life Ass'n, 74 N. W. 941.

Unless the note was part of the res gestae it would not be binding on the plaintiffs. Metcalf v. Conner, 12 Am. Dec. 340.

There must be proof by competent evidence of death resulting from a bullet wound in the head before any admission or declaration of the deceased is admissible. I Bish. Crim. Pro., section 1058; Wharton Crim. Ev., section 632; Wills Circumstantial Ev. 88; People v. Jones, 31 Cal. 566; Mathews v. State, 28 Am. Rep. 698.

Parol proof of the contents of the note found in the room with decedent's body was not admissible, there being no evidence of the loss or destruction of the original. Jones on Evidence, section 599.

It was error to admit the opinion of the witness Samuel Mitchell as to the cause of death, there being no proper foundation laid by showing the witness to be qualified to express an opinion, and such opinion not being based upon any examination made by the witness or any other person. 2 Jones on Evidence, section 370.

Expert opinion must be based upon facts within the knowledge of the witness or upon proper hypothetical questions. Rogers on Ex. Testimony, 113.

It was error to admit the evidence of the same witness as to the cause of the wound and as to who inflicted it, such facts being solely for the jury. Rogers on Ex. Testimony, 129; People v. Hare, 57 Mich. 505, 24 N. W. 843; State v. Rainsbarger, 37 N. W. 153.

It was error to direct a verdict for the defendant. The cause of death and by whom inflicted can only be drawn from the facts proved, and the jury alone can draw such inferences. Stevens v. Continental Casualty Co., supra; Anthony v. Mercantile Mut. Accident Ass'n, 162 Mass. 354, 38 N. E. 973, 26 L. R. A. 406, 44 Am. St. Rep. 367.

Suicide cannot be presumed, it must be proved by competent evidence. Modern Woodmen of America v. Kozak, 88 N. W. 248; Mitterwallner v. Sup. Lodge of the Knights of the Golden Star, 76 N. Y. Supp, 1001; Mutual Life Ins. Co. v. Wiswell, 44 Pac. 996; Sartell v. Royal Neighbors of America, 88 N. W. 985.

Evidence of suicide must be of a character to exclude with reasonable certainty any other cause of death. Leman v. Manhattan Life Ins. Co, 24 L. R. A. 589; Mutual Life Ins. Co. v. Wiswell, supra; Mallory v. Travelers Ins. Co., 47 N. Y. 52, 7 Am. Rep.

410; Equitable Life Ins. Ass'n v. Patterson, 5 Am. Rep. 535; N. W. Life Ins. Co. v. Hazlett, 55 Am. Rep. 192.

The language in the benefit certificate is vague and uncertain as to its meaning, and its obvious purpose being to mislead plaintiffs, defendant is estopped from claiming forfeiture under it. N. Y. Ins. Co. v. Eggleston, 96 U. S. 572, 24 L. Ed. 841; Phoenix Mut. Life Ins. Co. v. Doster, 106 U. S. 30, 27 L. Ed. 65.

Being ambiguous it must be construed against the insurers. Cook v. Benefit League of Minnesota, 79 N. W. 320; Wallace v. German Ins. Co., 41 Fed. Rep. 742; Rev. Codes, sections 3912 and 3778.

A contract of insurance will, if possible, be construed so as to avoid forfeiture. Bridge v. National Union, 76 N. W. 270.

Forfeiture is not to be declared unless the terms of the contract expressly require it. Warwick v. Supreme Council K. of D., 32 S. E. 951.

Benj. D. Smith and *Fred B. Morrill,* for respondent.

Parol evidence of the contents of the note found in the room with the body of deceased was properly admitted. Notice was served to produce the original. The presumption is that the writing would be among the effects of the deceased and pass to the possession of the plaintiffs. It was shown that it was not in such possession. It was shown to be lost and beyond the reach of the defendant. Under such circumstances parol evidence was clearly admissible. Kerr v. Modern Woodmen of America, 117 Fed. 593; Renner v. Bank of Columbia, 22 U. S. 581, 6 L. Ed. 166; Clark v. Hornbeck, 17 N. J. Eq. 430; Wade v. Wark, 13 Tex. 482.

The sufficiency of the proof that a written instrument cannot be procured by the party desirous of proving its contents by secondary evidence is for the trial court. Milford v. Veazie, 14 Atl. 730; Smith v. Brown, 151 Mass. 389, 24 N. E. 31; United States v. Sutter, 62 U. S. 170, 16 L. Ed. 119; Stratton v. Hawks, 43 Kan. 541, 23 Pac. 591; Carr v. Miller, 43 Ill. 179; Walker v. School Dist., 22 Conn. 326.

Its decision will not be reviewed unless based upon an error of law. Smith v. Brown, 151 Mass. 338, 24 N. E. 31; Bonds v. Smith, 106 N. C. 553; Gorgos v. Hertz, 150 Pa. St. 538; Bain v. Welsh, 85 Me. 108.

Evidence of the contents of the note was admissible as part of the res gestae, and as showing the intention with which the act was

done and the character and nature of the act. Hale v. Life Indemnity & Inv. Co., 68 N. W. 182; Weld v. Mutual Life Ins. Co., 61 Ill. App. 187; Rens v. N. W. Mut. Relief Ass'n, 75 N. W. 991; Conn. Life Ins. Co. v. McWhirter, 73 Fed. 44; Railway Co. v. Jackson, 81 Ind. 19; Kerr v. Modern Woodmen of America, 117 Fed. 593; Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. Rep. 909; Rodgers v. Manhattan Life Ins. Co., 71 Pac. 348; Robbins v. Spencer, 38 N. E. 522.

The rule regarding the proof of the corpus delicti does not require that before evidence of who is the cause or perpetrator of the act or result may be *introduced* that the act itself must first be proved as done, but that before *conviction may be had* it must be proved that the act was in fact done. 3 Greenleaf on Evidence, section 30; State v. Davis, 48 Kan. 1; State v. Patter, 52 Vt. 33.

The opinion of Dr. Mitchell as to the cause of the death and who inflicted the wound was properly admitted. He was a physician and surgeon of fifteen years' experience; had had experience with bullets, and had actually examined the body and the wound. His opinion, based upon knowledge derived as attending physician and coroner and actual official examination, was clearly admissible as to the cause of the death and the instrument which caused it. 12 Am. & Eng. Enc. Law, 444; State v. Tippett, 94 Iowa, 646, 63 N. W. 445; People v. Hare, 57 Mich, 505, 24 N. W. 843; People v. Foley, 59 Mich. 440, 26 N. W. 699; Prince v. State, 100 Ala. 144, 46 Am. St. Rep. 28; People v. Wong Chuey, 117 Cal. 624, 49 Pac. 833; State v. Cross, 68 Iowa, 180, 26 N. W. 62.

The admissibility of the evidence as to deceased's social and business standing cannot be raised in this court, as the question was not followed up by an offer of evidence and it does not appear upon its face to be competent. Halley v. Folsom, 1 N. D. 325, 48 N. W. 219.

If such evidence was improperly excluded, it was immaterial error, as the evidence shows conclusively that the death of deceased was caused by his own act—intentionally.

Proofs of death are competent evidence as to the admission contained therein, and are binding upon the person in whose favor and for whose benefit they are made. Hart v. Trustees of Supreme Lodge of Fraternal Alliance, 84 N. W. 851; Hassencamp v. Mutual Ben. Ins. Co., 120 Fed. 475; Spruil v. Insurance Co., 27 S. E. 39; Travelers' Ins. Co. v. Nitterhouse, 38 N. E. 1110; Mut. Benefit Life

Ins. Co. v. Higginbotham, 95 U. S. 380, 24 L. Ed. 499; Modern Woodmen of America v. Kozak, 88 N. W. 248; Supreme Lodge v. Beck, 181 U. S. 49.

Such evidence is admissible and competent but not conclusive. The evidence shows that the physicians made a personal examination of the body, wound and the surrounding circumstances, and their statements were based upon personal knowledge and observation and not hearsay. Under such circumstances the statements were clearly admissible. United States Life Ins. Co. v. Kielgast, 22 N. E. 467, 6 L. R. A. 65; Supreme Lodge L. of H. v. Fletcher, 29 S. 523; Fien v. Association, 60 Ill. App. 274; Mut. Benefit Life Ins. Co. v. Higginbotham, supra; Metzradt v. Modern Brotherhood of America, 84 N. W. 498; 1 Greenleaf on Evidence, 566; Grand Lodge v. Weiting, 68 Ill. App. 408, 168 Ill. 408, 48 N. E. 59; Walther v. Mutual Ins. Co., 4 Pac. 413.

If there is sufficient competent evidence to justify a directed verdict upon any of the grounds upon which it is requested, such verdict will stand, although other evidence which was inadmissible was admitted or the verdict was directed upon an improper ground. Tabin v. McKinney, 84 N. W. 228; Meyers v. Kingston Coal Co., 17 Atl. 891.

Where the facts proven require a finding of suicide the court should direct a verdict to that effect for the party setting up such defense. Bowman v. Eppinger, 1 N. D. 21, 44 N. W. 1000; Ingham v. Nat'l Union Ins. Co., 72 N. W. 559; Komfield v. Supreme Lodge, 72 Mo. App. 604; Supreme Lodge v. Fletcher, 28 So. 523; Pagett v. Conn. Mut. Life Ins. Co., 55 N. Y. App. Div. 638; Mutual Life Ins. Co. v. Tillman, 84 Tex. 31; Mutual Life Ins. Co. v. Haywood, 27 S. W. 36; Agen v. Metropolitan Life Ins. Co., 80 N. W. 1020; Rens v. N. W. Mutual Relief Ass'n, 75 N. W. 991; First Nat'l Bank v. Comfort, 4 Dak. 167, 28 N. W. 855; Metropolitan R. R. Co. v. Moore, 121 U. S. 558, 30 L. Ed. 1022.

The by-laws of a fraternal beneficiary society are a part of the contract of insurance as much as the certificate of application. It makes no difference whether they were adopted before or after the contract was entered into. Supreme Lodge K. of P. v. Trebbe, 179 Ill. 348, 53 N. E. 730; Supreme Commandery v. Answorth, 71 Ala. 436, 46 Am. Rep. 332; National Union v. Thomas, 10 App. Cases, 277.

MORGAN, C. J. Action upon a benefit certificate of insurance issued by the defendant, a corporation organized under the laws of the state of Illinois, doing business in this state as a fraternal beneficial society. The members of the society are permitted to avail themselves of the benefit of the insurance provided for by its by-laws upon the acceptance of an application for insurance, payment of a certain fee, and the issuing of a certificate by the society. Payment of losses by the death of insured members is provided for by the collection of assessments from the members. The complaint alleges that one William Clemens received from the defendant a benefit certificate of insurance on the 9th day of May, 1899, and that the defendant thereby insured the life of said Clemens for a sum not to exceed $2,000; that said certificate provided that, in case of the death of said Clemens, said sum should become payable to his surviving children; that said Clemens died on the 3d day of November, 1900; that the defendant refuses to make an assessment from the members to pay said surviving children, although due proof of the death of said Clemens has been made as provided by the laws of said society. The answer alleges that said Clemens came to his death by suicide, and that, under the contract of insurance entered into between the defendant and Clemens, death by suicide forfeited all insurance. The trial court directed a verdict for the defendant. The plaintiffs procured a settlement of a statement of the case, and have appealed from the judgment.

The plaintiffs contend that the judgment should be reversed upon three grounds: (1) That the defendant is estopped from claiming that death by suicide is a forfeiture of the right to the insurance provided for by the benefit certificate; (2) that the evidence bearing upon the question of the suicide of Clemens should have been submitted to the jury; (3) that errors were committed in receiving and excluding evidence at the trial.

Upon the first question, the evidence shows that the certificate of insurance contained the following provision: That "William Clemens is entitled to the privileges of this order and the beneficiary or beneficiaries * * * to participate in its benefit fund * * * which will be paid to his children * * * subject to all conditions of this certificate and the laws of this order and liable to forfeiture if said neighbor shall not comply with the said conditions, laws and such by-laws and rules as are now in force

or hereafter may be adopted by the supreme camp of the order," etc. The application for membership was made a part of the benefit certificate, by express language, and contained the following stipulation or admission: "I understand that the laws of this order now in force or hereafter enacted enter into and become a part of every contract of indemnity by and between the members and the order and govern all rights thereunder. I understand and agree that this order does not indemnify against death from suicide," etc. Section 102a of the by-laws of the order provided as follows: "If any member of this society holding a benefit certificate heretofore or hereafter issued shall come to his or her death by his or her hands, sane or insane, said benefit certificate of said member shall thereby become absolutely null and void." It is stipulated by the parties that this section of the by-laws was in force when the application was made, and when the certificate and all its terms and conditions were accepted in writing by Clemens, and ever since has been in force. The appellant concedes that, under the language of the application and section 102a, death by suicide would render the certificate null and void, and subject to forfeiture. But it is argued that the following clause of the certificate, stating that it will be void "if the member holding this certificate * * * shall die * * * by any means or act which if used or done by such member while in possession of all natural faculties unimpaired would be deemed self-destruction," is so ambiguous and obscure and contradictory, and inconsistent with the provisions of the application and by-laws, that no effect can be given to it, and that the defendant should be estopped from asserting any defense based thereon. It is true, as contended, that ambiguous stipulations in a contract of insurance will be construed in favor of the beneficiary, and most strongly against the insurer. The reason why such construction is given such contracts is that the contracts are prepared by the insurer. Cook v. Benefit League (Minn.) 79 N. W. 320; Joyce on Insurance, section 65. A court will not indulge in a liberal construction of the terms of an insurance contract to uphold a forfeiture, but will construe such contract so as to avoid a forfeiture, if the language thereof will sustain such a construction. Kerr on Insurance, p. 432; Warwick v. Supreme Council K. of D. (Ga.) 32 S. E. 951; Inghram v. National Union (Iowa) 72 N. W. 559; Wallace v. German-American Ins. Co. (C. C.) 41 Fed. 742.

The principle contended for is not, however, applicable to the conditions in the benefit certificate in this case. The language used conveys but one meaning. It is not susceptible of an ambiguous construction, nor can the language be construed to convey any meaning inconsistent with the by-laws referring to the same subject-matter. The idea conveyed is that if the assured shall die by his own act, or through means of his own selection, the certificate would be void, whatever his condition of mind at the time. It is equivalent to saying that if the assured should die by his own hand, whether sane or insane, the certificate would be void. The authorities are quite uniform that such a condition in a policy would defeat a recovery thereon if the insured commits suicide. Kerr on Insurance, p. 395, and cases cited.

It is true that the same language is not used in the certificate that is used in the application for insurance, and in the by-laws pertaining to the effect of a death by suicide, but that does not avoid the contract in favor of a member of such society as this, as, by the very terms of the certificate, changes in the by-laws are made binding upon the assured; he having, in writing, accepted the certificate and all the conditions thereof. In this case there was no change in the conditions. The changes consisted in the language expressing the same condition. The following cases sustain the right of the insurer to change the by-laws as the conditions under which the liability is incurred when the assured consents to such change. Kerr on Insurance, section 61, and cases cited; Loeffler v. Modern Woodmen, 100 Wis. 79, 75 N. W. 1012; Daughtry v. Knights of Pythias, 48 La. Ann. 1203, 20 South. 712, 55 Am. St. Rep. 310; Supreme Commandery Knights Golden Rule v. Ainsworth (Ala.) 46 Am. Rep. 332. The identical language used in this benefit certificate has been construed by other courts, and held to be the equivalent of saying that if the assured should die by his own hands, sane or insane, then the certificate would be void. Keefer v. Modern Woodmen of America (Pa.) 52 Atl. 164; Cotter v. Royal Neighbors (Minn.) 79 N. W. 542.

The facts bearing upon the question of suicide are: Clemens died on the 3d day of November, 1900. He was a married man, about forty years of age. His family consisted of a wife and five children. His family relations were pleasant, and his standing in the community in which he resided was the highest. His business was that of the local agent for the Great Northern Elevator Com-

pany at Leonard, N. D., and he had been such agent for about nine years. On the morning of November 3, 1900, Clemens was at the depot, and there met the general superintendent of the elevator company and one Conrie. They started for the elevator together. After arriving at the elevator and unlocking the door, Clemens was asked to go to the lumber yard by a customer. He excused himself, saying he would return as soon as possible. Later Clemens went to the post office, got his mail, and took it to his residence. While at the depot he met a Catholic priest, whom he invited to become his guest while at Leonard. The invitation was accepted, and the priest went to his house. When Clemens arrived at home he spoke to the priest, but what he said is not stated. He left the priest in the dining room, passed into the parlor, immediately returned to the dining room, and went upstairs. When he went upstairs he was calm, and his appearance the same as it ordinarily was. From twenty minutes to an hour thereafter he was found lying on the floor, dead, with a bullet hole in the right side of his head, back of the ear. A revolver was found lying near his feet. There was blood on the floor and on his head, and on a mirror in front of which he was found He was found lying on his back, with his feet near the wall, on which the mirror, with blood on it, was hung. There were no powder marks on his face or head. No one heard the report of the firing of the revolver, nor any noise from his falling. The room was eight by twelve feet in dimensions. There was no post mortem examination or inquest, and the wound was not probed to find the bullet. It is proven that the bullet wound in the head was the cause of his death. On a table in the room was found a note in Clemens' handwriting. The note was not produced at the trial, but a sufficient foundation was laid for the introduction by defendant of secondary proof of its contents. The note was as follows: "Bury me at Leonard. Kiss the children for me. Don't take this too hard. Will." An examination of the elevator company's books kept by him showed that he was short in his accounts in the sum of $4,500.

The plaintiffs insist that these undisputed facts should have been submitted to the jury, to determine whether Clemens' death was caused by his own voluntary act or by other means. The presumption is that a death caused by unexplained means was not suicidal. In the absence of proof, such death will be presumed to have been caused by accidental means. Stevens v. Continental Cas-

ualty Co., 12 N. D. 469, 97 N. W. 862, and cases cited. And the burden of proof is upon the insurer to show that death was caused in a manner or by means that exempt him from liability. Has the presumption of law that death was not caused by suicide been overcome by the defendant, as a matter of law? If so, the direction of a verdict was proper. If reasonable men, viewing these undisputed facts, might differ in their conclusions as to whether the deceased committed suicide, then the facts should have been submitted to the jury. If there is no evidence in the record that can be said to be inconsistent with the conclusion of death by suicide, then the question was properly one for the court to direct the jury to find a verdict for the defendant. We think the facts all point to death by suicide, and are inconsistent with any other reasonable theory. If it be said that it might have been an accidental death, or one criminal by another, the note conclusively rebuts such possibility. The circumstances of meeting his employer, his shortage, and the impending exposure that must follow, the note, the position of the wound, the blood on the revolver and on the mirror, and that he was alone in the room, are sufficient facts, as a matter of law, to overcome the presumption against a death by suicidal means. A verdict for the plaintiff under such circumstances could not be sustained, and would be without any evidence to support it. The following authorities sustain a direction of a verdict in cases similar to the one at bar: Inghram v. National Union, 103 Iowa, 395, 72 N. W. 559; Kornfield v. Supreme Lodge O. M. P., 72 Mo. App. 604; Supreme Lodge K. of H. v. Fletcher (Miss.) 29 South. 523; Mutual Life Ins. Co. v. Hayward (Tex. Civ. App.) 27 S. W. 36 (note); Agen v. Metropolitan Life Ins. Co., 105 Wis. 217, 80 N. W. 1020, 76 Am. St. Rep. 905; Kerr on Insurance, p. 777.

Objection is made that the contents of the note found on the table in the room should not have been received in evidence. The basis of the objection is that there is no proof as to the time when it was written. We think the claim untenable. The language of the note indicates that it was written just preceding the shooting. The finding of it in the room when the dead body was discovered also indicates that it was written, or at least placed on the table, just before the shooting. The note was relevant as bearing on the manner of death, the same as declarations of an intention to commit suicide are. Mutual Life Ins. Co. v. Hayward, supra;

Hale v. Life Indemnity & Investment Co., 65 Minn. 548, 68 N. W. 182; Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706.

We have reached a conclusion in the case on undisputed testimony not objected to, except as to the note. Hence it becomes unnecessary to consider plaintiffs' other objections to the testimony that was received as bearing upon the question whether deceased committed suicide or not.

The judgment is affirmed. All concur.

ENGERUD, J., having been of counsel, took no part in the decision of the above case; HON. CHARLES J. FISK, judge of the First Judicial District, sitting in his stead by request.

(103 N. W. 402.)

CLARA LOGAN v. GEORGE W. FREERKS, A. J. BESSIE AND MARTIN C. FREERKS.

Opinion filed April 22, 1905.

Money Had and Received — Action.

1. A complaint alleged that plaintiff intrusted certain money to defendants, to be used by them for the purpose of securing bail for one B, and also alleged that defendants were to return the same to plaintiff when such bail was exonerated, and further alleged that such bail was thereafter exonerated, and defendants received said money into their possession, and converted the same to their own use, and refused to repay the same to plaintiff. *Held*, that the cause of action should be treated as ex contractu, instead of ex delicto, and a recovery permitted upon the theory of money had and received under an implied promise to repay the same. *Held*, further, that it must be so treated in view of defendant's answer, and the issues thereby tendered.

Although a Party Proceeds to Trial on a Mistaken Theory, He Is Entitled to Relief Consistent With the Issues and Proof.

2. The fact that a party proceeds to trial upon a mistaken idea as to the nature of an action and the scope of the issues framed by the pleadings does not deprive him of the right to such relief as is consistent with the real issues and the proof in the case.

Burden of Proof — Evidence.

3. Defendants, who were attorneys, admitted the receipt of the money from plaintiff, and its retention by them, and sought to justify their conduct by alleging that plaintiff employed them to defend an-

other, charged with crime, and authorized them to retain said money for the purpose of paying for such legal services and for their disbursements. *Held*, that the burden was upon defendants to establish such defense.

Books of Account Used to Refresh Memory May Be Offered in Connection With Cross-Examination of Witness Using Them.

4. A certain ledger belonging to defendants was used by one of them to refresh his memory while testifying to the account kept by defendants against plaintiff therein for alleged services and disbursements. *Held*, error to deny plaintiff's offer to introduce said ledger in evidence in connection with the cross-examination of such defendant.

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

Action by Clara Logan against George W. Freerks and others. Judgment for defendants and plaintiff appeals.

Reversed.

M. A. Hildreth, for appellant.

The court erred in its charge, "the burden of proof in this case is upon the plaintiff to show by a fair preponderance of evidence the conversion claimed." The relation of attorney and client existed between plaintiff and the defendants. The burden was on defendants to show that they received the money in dispute in a lawful and legitimate manner and the burden to establish a perfect fairness and adequacy of the consideration and good faith of the transaction is upon the attorney. Klein v. Borchert, 95 N. W. 215; Whitehead v. Kennedy, 69 N. Y. 469; Robinson v. Hawes, 22 N. W. 222; Stanton v. Clinton, Hart & Brewer, 2 N. W. 1027; Starr & Rice v. Vandeheyn, 9 Johns. 253; Howe v. Ransom & Johnson, 11 Paige Ch. 538; Brock v. Barnes, 40 Barb. 529.

The proof showed that plaintiff was entitled to recover some amount as for money had and received. The instructions to the jury destroyed absolutely the right of the plaintiff to even recover the amount which the defendants conceded they owed the plaintiff. Reed v. Hayward, 82 App. Div. Rep. Sup. Ct. of N. Y. 417; Riegi v. Phelps, 4 N. D. 274, 60 N. W. 402.

The instruction of the court that the plaintiff should recover $1,500 in dispute, and interest thereon, or nothing, was erroneously prejudicial to the rights of the plaintiff. The defendants claimed

a contract, either express or implied, by which the plaintiff agreed to pay them for defending Blanchard. Evidence was introduced under this theory of the defendants and the court instructed the jury in the following language: "In the first place I want to call your attention to the fact that you are not in this law suit trying the value of the services of Freerks, Bessie & Freerks rendered to Allen I. Blanchard." Under defendants' theory the court permitted them to show the character of their services for Blanchard, the amount of their disbursements for him and the value of such services, and the surrender of Blanchard for the purpose of procuring means to defend him. The plaintiff was entitled to have the action submitted upon the issues not only framed by herself but as tendered by the defendants. It is not the policy of the courts to make a multitude of suits, but to prevent litigation. Conaughty v. Nichols, 42 N. Y. 83, 76 N. Y. 211, 77 N. Y. 99.

The court erred in holding that the burden of proof was upon the plaintiff, and taking the question of the value of the services and their character from the jury. The burden of proof is on defendants to show that the plaintiff was not prejudiced by their conduct in reference to money for which suit was brought. Vanasse v. Reid, 111 Wis. 303, 87 N. W. 192; Burnham v. Hesselton, 9 L. R. A. 90; 1 Am. & Eng. Enc. Law, 958.

The rule is well settled on this question of the burden of proof. Elmore v. Johnson, 21 L. R. A. 366; Walling v. Eggers, 78 S. W. 428; Western Coal & Mining Co. v. Hollenbeck, 80 S. W. 145; Michels v. West, 109 Ill. App. 418; Moffatt v. Moffatt, 57 N. W. 954; Blunt v. Barrett, 124 N. Y. 117, 26 N. E. 318.

Defendants pleaded a confession and avoidance. The burden therefore was upon the defendants to make good the plea. Home Fire Ins. Co. v. Johansen, 80 N. W. 1047; Wheeler v. Lawson, 103 N. Y. 40, 8 N. E. 360; L. S. & M. S. Ry. Co. v. Felton, 103 Fed. 227, 43 C. C. A. 189; Aetna Life Ins. Co. v. Ward, 140 U. S. 76, 11 Sup. Ct. Rep. 720; Selma R. & D. R. Co. v. U. S., 139 U. S. 560, 11 Sup. Ct. Rep 638; Board of Supervisors of Milwaukee Co. v. Pabst, 70 Wis. 352, 35 N. W. 337; Osgood v. Groseclose, 159 Ill. 511, 42 N. E. 885; Bollenbacher v. First Nat. Bank of Bloomington, 35 N. E. 403; Kuenster v. Woodhouse, 77 N. W. 165; Continental Bldg. & Loan Ass'n v. Aulger, 74 N. W. 405.

It was one of the issues in the case as to whether or not the defendants could turn over Allen I. Blanchard and secure posses-

sion of the money deposited for his appearance in the manner that they did. The court in its charge practically said to the jury that it was perfectly legitimate for the defendants to procure money in such manner, and that they should not draw any unfavorable inference from that fact. The instruction was not only misleading but put too narrow a construction upon the evidence in the case. Kvello v. Taylor, 5 N. D. 76, 63 N. W. 889; Grisell v. Bank of Woonsocket, 12 S. D. 93, 80 N. W. 161; Parliman v. Young, 2 Dak. 175, 4 N. W. 139; Young v. Harris, 4 Dak. 367, 32 N. W. 139; Lindblom v. Sonstelie, 10 N. D. 140, 86 N. W. 357; Welter v. Leistikow, 9 N. D. 283, 83 N. W. 9.

The defendant George W. Freerks was permitted to use his books of account and to testify therefrom; the court refused to permit the plaintiff to introduce such books of account in evidence. This was prejudicial error. Davy v. Jones, 68 Me. 398, 1 Greenleaf on Evidence, 526, 88 N. Y. 334; Whitmore v. Peck, 19 Albany Law Journal, 400; Adams v. Olin, 40 St. Rep. 551; Waldorn v. Evans, 46 N. W. 607.

Freerks & Freerks and *A. J. Bessie,* for respondents.

As a general rule the burden of proof rests upon the party who would be defeated if no evidence at all were offered. 11 Am. & Eng. Enc. Law (2d Ed.) 535.

The term "burden of proof" has two distinct meanings: First, to the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case; second, to the duty of procuring evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a prima facie case. 5 Am. & Eng. Enc. Law (2d Ed.) 21.

The trial court used the term in the former sense. In this sense of the term, the "burden of proof" never shifts, but the party who affirms has the burden of proof. Willett v. Rich, 56 Am. Rep. 684; Steph. Ev. 175; Chaflin v. Mayer, 75 N. Y. 260; Scott v. Wood, 22 Pac. 871.

Unnecessary allegation of matters of defense does not cast the burden of establishing them upon the defendant, where the plaintiff's claim is denied. 5 Am. & Eng. Enc. Law (2d Ed.) 32; Tarbox v. Steamboat Co., 50 Me. 345; Atkinson v. Goodrich Transp. Co., 31 N. W. 169; Lamb v. Camden & Amboy R. R. & T. Co., 46 N. Y. 271; Heinemann v. Heard, 62 N. Y. 448; Heilmann v.

Lazarus, 90 N. Y. 672; Tourtelot v. Rosebrook, 11 Metc. 460; Delano v. Bartlett, 6 Cush. 364; Central Bridge Corporation v. Butler, 2 Gray, 130; Bacon v. Rogers, 8 Allen, 146; Robinson v. Railway Co., 7 Gray, 94; Nichols v. Munsel, 115 Mass. 567; Morrison v. Clarke, 7 Cush. 213; Brown v. King, 5 Metc. 173; Wood v. Chicago, M. & St. P. Ry. Co., 51 Wis. 201, 8 N. W. 214; Steffen v. Railway Co., 46 Wis. 262; Lockwood v. Chicago & N. W. Railway Co., 55 Wis. 63, 12 N. W. 401.

In dealing with his client, in his own interest, the attorney should show that the transaction is fair and honest; but the defendants have not the burden of showing the negative of the alleged conversion by a preponderance of the evidence.

The plaintiff gave the money in dispute to the defendants for the defense of Blanchard. With her knowledge and consent it was deposited with the First National Bank of Moorhead, Minnesota, as security to the officers signing the bail bond. The bond was released, and a like sum of money was paid to defendants by a Minneapolis draft and afterwards paid. At no time after its deposit did the defendants have either actual or constructive possession of the money alleged to have been converted. Best v. Muir, 8 N. D. 44, 77 N. W. 95; Plano Mfg. Co. v. Jones, 8 N. D. 315, 79 N. W. 338.

FISK, Special Judge. This action was brought in the district court of Cass county to recover the sum of $1,500 and interest, which sum plaintiff claims was intrusted to the defendants in December, 1901, for the purpose of securing bail for one Blanchard, who was at that time in the custody of the sheriff of Clay county, Minnesota, charged with a public offense, and was to be returned to plaintiff when such bail was exonerated; that said money was so used by the defendants, but that subsequently defendants caused said Blanchard to be surrendered and the bail exonerated, and received said bail money, or its equivalent, back into their possession, and refused, upon demand, to pay the same to plaintiff, and appropriated the same to their own use. The defendants answered jointly, admitting the receipt of the $1,500, and alleging that they deposited the same in a bank in Moorhead to indemnify against liability certain persons who became sureties upon a bail bond given for the release of said Blanchard from custody; and they allege that thereafter, and on May 21, 1901, at plaintiff's request, they caused said Blanchard to be surrendered and the bail exonerated,

whereupon the sum of $1,500, in the form of a bank draft, was paid to them, upon which they received said sum of money. They seek to justify their retention of all this money, with the exception of the sum of $107.75, which they concede is due plaintiff, by alleging that the plaintiff employed them as attorneys to defend the said Blanchard against the charge for which he was arrested; and in a very voluminous answer they set forth a great mass of evidentiary facts, stating in detail each item of services claimed to have been performed and expenses incurred, with their charge therefor, followed with an allegation of the reasonableness of such charge; and they conclude by alleging "that all the items of said account, correctly entered therein, show a balance due said plaintiff of $107.75, and the said defendants have at all times been ready and willing to pay said sum to the plaintiff, and have repeatedly offered to settle said account by paying the balance thereof in cash to the plaintiff, and that the plaintiff has refused to accept such balance, and the said defendants now offer to pay said plaintiffs such balance, and hereby tender judgment to the plaintiff for said sum, and all costs up to the time of such tender herein incurred." And the answer contains a prayer for judgment as follows: "Wherefore defendants pray that the plaintiff may be awarded judgment for the sum of $107.75, and costs incurred to the time of the tender herein, and that the defendants have judgment for all the costs and disbursements herein after the date hereof." To the portion of the answer alleging that she employed the defendants to defend Blanchard, or that she agreed to pay them therefor, the plaintiff replied, denying the same, although such reply was unnecessary, there being no counterclaim in the answer. Upon the issues thus framed the parties went to trial before a jury, and a great mass of testimony was introduced by both parties relating to the questions involved under the pleadings as thus framed; and on the third day of the trial the record discloses the following statement made by the court: "The Court: Now at this time the court makes the following statement for the purposes of the record: This being an action in conversion, the court during the first day of the trial, called the attention of counsel to that fact, and asked whether it was sought to try the issue which might grow out of the value of attorneys' services and disbursements, in view of their defense that they did not convert the money, but had received it on account of services which they claim to have rendered the plaintiff at her

instance and request. At that time it was the general understanding that we would try the case, and try this issue as well as the issue of conversion. Now at this time counsel for the defense suggest and state that they propose to stand upon the pleadings, and the issue as presented thereby, viz., the simple question of conversion." The record is silent as to any acquiescence therein by plaintiff's counsel; nor does such statement show any ruling or order made by the court changing the issues theretofore framed by the pleadings, or in any way departing from the theory of the case adopted and pursued by all from the beginning of the trial until that time. The defendants' counsel did not ask to change the answer, but simply announced their construction of the same. There is nothing to show that either the court or plaintiff's counsel in any manner agreed with defendants' counsel as to such construction. And the record discloses that the trial thereafter proceeded to the close of the evidence the same as before such statement was made, but in his instructions to the jury the trial judge evidently adopted the theory of defendants' counsel, by instructing them, among other things, as follows: "This is an action in what is known in law as 'conversion.' The plaintiff claims that she intrusted to the defendants the sum of $1,500, to be used in securing bail for one Allen I. Blanchard, Jr., and which was to be returned to her if said Blanchard appeared for trial. The defendants admit the receipt of the money and its retention, but flatly deny the conversion. Upon the other hand, the defendants insist that the plaintiff employed them to defend the said Blanchard, and gave permission to retain the money to cover their attorney's fees and disbursements. * * * The burden of proof in this case is upon the plaintiff to show, by a fair preponderance of evidence, the conversion claimed. * * * Some evidence has been offered as to moneys advanced by plaintiff in the defense of young Blanchard; also as to the services they rendered for him. I say to you, gentlemen, this evidence has been offered simply to throw light upon the real question for you to determine, viz., did the defendants convert the $1,500? It has not been allowed for the purpose of your going into an accounting between these parties. If the defendants converted the money, that ends the matter. Plaintiff should recover the whole amount. If they did not, then the defendants must win. If any matters about fees are left in dispute, you are not called upon to settle that in this case. * * * In

the first place, I want to call your attention to the fact that you are not, in this lawsuit, trying the value of the services of Freerks, Bessie & Freerks, rendered to Allan I. Blanchard. * * * If there is any dispute upon the question of fees, as between Mrs. Logan and these defendants, you gentlemen have nothing to do with that whatever—not the slightest." In due time these instructions were duly excepted to by plaintiff. The jury returned a general verdict in favor of the defendants; also made certain findings under the direction of the court. Thereafter a motion for a new trial was made and denied, and judgment entered in favor of defendants and against plaintiff, dismissing the complaint upon the merits, and for costs, and this appeal was taken from such judgment.

We are agreed that this judgment should be reversed and a new trial ordered. Counsel for defendants, as well as the trial court, evidently misconceived the nature of the action, and the scope of the issues tendered by the pleadings, and, starting from the false premise that it is an action in tort for conversion, have reached a conclusion which is palpably erroneous. The complaint merely sets forth the facts that plaintiff intrusted this money to defendants for a specific purpose, upon an agreement that the same was to be repaid when such purpose was fulfilled, and that thereafter such purpose was fulfilled, and defendants received said money, and "converted the same to their own use, and have refused to pay the same to this plaintiff, though often demanded so to do." Does it necessarily follow from the use of such language in a complaint that the plaintiff is seeking to recover damages as for a conversion? We think not. We must not lose sight of the fact that under the Code of Civil Procedure the forms of all actions at law and suits in equity are abolished, and in this state there is but one form of action for the enforcement or protection of private rights and the redress of private wrongs. The Code provides that the complaint in such action, aside from the title and prayer for judgment, shall contain merely a plain and concise statement of the facts constituting a cause of action. Of course, the primary rights of the parties and their corresponding duties remain the same under the code procedure as before, but it is no longer possible to determine the nature of the cause of action by the form of the action or the form of the summons, as such forms are entirely abrogated, and we must look alone to the allegations of the complaint; and a

learned author has even gone to the extent of laying down the doctrine that under the reformed procedure a complaint properly drawn not only does not necessarily disclose whether the action is founded on tort or contract, but, if the provisions of the Code of Civil Procedure are strictly complied with, it would not disclose such fact. Pomeroy on Rem. & Remedial Rights, section 573. We find no adjudicated cases expressly indorsing this doctrine, and we refrain from expressing our approval or disapproval thereof, as the question is not involved herein. If the words "and converted the same to their own use" had been omitted from the complaint, no one would contend that the cause of action was other than one ex contractu, to recover for breach of the promise to repay the money, or to recover as for money had and received to plaintiff's use. We think that the intention of the plaintiff was to set forth in the complaint a cause of action ex contractu, and the words above quoted should be treated as surplusage. The allegation that defendants converted this money to their own use, and refused to repay the same to plaintiff, amounts simply to an allegation of defendant's breach of promise to return said money to plaintiff. See Austin v. Rawdon, 44 N. Y. 63, 68, 69, and Conaughty v. Nichols, 42 N. Y. 83.

But even if there could be a doubt as to the nature of the cause of action as disclosed by the complaint, still we think that defendants, by their answer, have placed it beyond their power to contend that the action is one in tort for conversion. By their answer they squarely tender the issue as to their employment by the plaintiff, and the value of their services rendered and expenses incurred, and they seek to offset the same against plaintiff's demand; and they even tender judgment to the plaintiff for a sum which they concede to be due her. They thereby, in effect, treat the action as an action based on contract, as such defense would be improper in an action based on tort. The plaintiff was entitled to have this action submitted to the jury upon the issues, not simply framed by her in the complaint, but the issues as tendered by the defendants themselves, because, assuming that the jury found that the plaintiff employed the defendants, it was within their province, under the issues as tendered by the defendants, to determine whether or not they should keep all this fund for their services and disbursements in behalf of Blanchard. The plaintiff accepted this issue as thus tendered by defendants, and there cer-

tainly could be no just reason why such issue should not be disposed of in this action. That defendants tendered this issue by their answer is apparent from the fact that they allege each item of services claimed to have been performed, and the value thereof, and tender judgment in favor of the plaintiff for a balance which they concede to be due her. The parties not only adopted this theory by their pleadings, but the same theory was adhered to throughout the trial, and a great amount of testimony was introduced relative to the value of the services performed and expenses incurred by defendants. Counsel for respondents, as well as the trial court, however, take the position that all the new matter in the answer in regard to the employment of defendants by plaintiff, and the extent of the services performed, and the value thereof, simply amounts to a denial of the conversion alleged in the complaint. On the third day of the trial such theory on the part of defendants' counsel was announced by the court, but, as we have said, no change was made in the answer, nor in the nature of the proof thereafter offered; and, if there had been, we would be obliged to hold that it would be error, unless the record shows that plaintiff either actually or impliedly consented thereto. The record shows no such consent.

Even if the parties were all mistaken as to the scope of the issues, and proceeded to trial upon the theory that the cause of action was ex delicto and not ex contractu, still we think they should not operate to deprive them of the right to have the real issues submitted and determined, and such relief granted as the facts would warrant. The case of Conaughty v. Nichols, 42 N. Y. 83, is analogous on principle. The action was brought against the defendants, who were factors, to recover the proceeds of produce assigned to them for sale by the plaintiff. Plaintiff alleged in his complaint and proved upon the trial, among other facts, that he consigned to the defendants certain produce, to be sold by them, and the net proceeds to be remitted to him; that the defendants received and sold said property; and that after deducting all expenses of sale there was due the plaintiff the sum of $618, which he demanded of the defendants, who omitted and refused to pay the same. The complaint contained the following allegation: "And have converted the same to their own use to the damage of the said plaintiff in the sum of $618, for which said last-mentioned sum said plaintiff demands judgment against the defendants." De-

fendants' counsel contended that they were simply agents for the plaintiff, and were only liable in an action on contract, and were not liable in an action in tort, and that there was no conversion of plaintiff's property by defendants. The referee nonsuited the plaintiff upon the ground that the cause of action stated in the complaint was for a tort, and the proof established a cause of action upon contract; and Ingalls, J., in disposing of the case, said: "The plaintiff established a cause of action against defendants upon contract, and was entitled to recover the amount of his claim, unless the referee was correct in holding that the complaint contained but one cause of action, and that was for a tort. If the words 'and have converted the same to their own use' had been omitted in the complaint, it could not reasonably be contended that the same was not adapted to the cause of action established by the evidence. The case therefore seems to be reduced to the proposition whether the plaintiff, having alleged facts constituting a cause of action, and having sustained them by proof upon the trial, should have been nonsuited because the pleading contained an allegation adapted to a complaint in an action ex delicto, and which was unnecessary to be stated to justify a recovery on contract. We are of the opinion that no such rigid rule of construction in regard to pleadings should prevail under the liberal system introduced by the Code. It is not only contrary to the express provisions of the Code, but at variance with the decisions which have been made construing and enforcing the same. * * * And it is quite probable that the plaintiff intended, down to the trial, to recover against the defendants for a wrongful conversion of the proceeds of the sale of the property consigned to them; and doubtless the mistake should have been fatal, but for the ample statement of facts contained in the complaint, which justified a recovery on contract for the amount of his demand. It does not follow that because the parties go down to trial upon a particular theory, which is not supported by the proof, the cause is to be dismissed, when there are facts alleged in the complaint and sustained by the evidence sufficient to justify a recovery upon a different theory or form of action. There is no substantial reason why, under such circumstances, a party should be turned out of court and compelled to commence a new action; thereby occasioning expense, delay and multiplicity of suits to accomplish a just result. It is against the spirit and letter of the Code, and substantial justice is not pro-

moted thereby." To the same effect is Tugman v. National Steamship Co., 76 N. Y. 207.

From what we have here said it necessarily follows that the judgment must be reversed and a new trial ordered, and in view of the fact that nearly all the rulings on which the other assignments of error are based were predicated upon an erroneous theory as to the nature of the issues involved, and upon another trial most of such questions will not arise, we will but briefly notice two of the other assignments of error.

The trial court instructed the jury that the burden of proof was upon the plaintiff to establish the conversion alleged. This was technically correct if the action was for conversion, and if the answer amounted simply to a general denial, as was held; but in view of the new matter in the answer, which we think amounted to a confession and avoidance of the facts alleged in the complaint, this instruction was erroneous. By the answer, and especially by their proof, defendants, in effect, admitted the receipt of the money for a specific purpose, and sought to justify its retention for another purpose. We think the burden was upon them, instead of plaintiff, to show that they were employed by her to defend Blanchard, as claimed by them. If they were so employed, then the relation between them was at least analogous to that of attorney and client, and they owed her the same duty that they would owe to a client to exercise good faith and honesty in their transactions with her, at least so far as this fund in their hands belonging to her was concerned; and the same rule as to the burden of proof would govern in an action brought by her to recover such fund, whether such action is based upon contract or in tort. Hence we unhesitatingly hold that the trial court committed reversible error in charging the jury as to the burden of proof.

The defendant George W. Freerks was permitted, in giving his testimony, to use a certain ledger of account belonging to and kept by defendants, for the purpose of refreshing his memory as to the various charges made against the plaintiff for services performed and disbursements incurred. Plaintiff's counsel offered this book in evidence as a part of his cross-examination of this witness, but such offer was objected to, and the objection sustained, and plaintiff assigns this as error. We think such offer should have been received. The witness having used the ledger to refresh his memory regarding the account against plaintiff, it was plaintiff's right

to have the same go before the jury, and to have the jury draw therefrom such deductions as the entries therein might warrant.

For the foregoing reasons, the judgment appealed from is reversed, and a new trial ordered. All concur.

ENGERUD, J., having been of counsel in the court below, took no part in the decision; Judge C. J. FISK, of the First Judicial District, sitting by request.

(103 N. W. 426.)

STATE OF NORTH DAKOTA v. STAR J. ERICKSON.

Opinion filed April 22, 1905.

Intoxicating Liquors — Indictment.

1. Under section 8047, subd. 7, Rev. Codes 1899, an indictment otherwise sufficient will be held sufficient when "the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition and in such a manner as to enable a person of common understanding to know what is intended."

Common Nuisance.

2. The indictment in this case charges the defendant with committing the crime of keeping and maintaining a common nuisance, and, in charging the acts constituting the crime, alleges that the defendant "willfully and unlawfully" kept a place (describing it) where intoxicating liquors were sold, bartered and given away, without first requiring the persons receiving the same to subscribe affidavits, etc. *Held*, (1) that the allegation that the defendant unlawfully kept a place where intoxicating liquors were sold necessarily implies that the sales were unlawful; and (2) that the further allegations which attempt to expressly negative lawful sales may be treated as surplusage, and are not misleading or prejudicial, and the indictment is sufficient.

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

Star J. Erickson was convicted of maintaining a common nuisance, and appeals.

Affirmed.

V. B. Noble, E. B. Goss, H. S. Blood and *G. A. Bangs*, for appellant.

A. G. Burr, State's Attorney, for the state.

YOUNG, J. The defendant was convicted of the crime of keeping and maintaining a common nuisance, upon an indictment which, omitting the formal parts and verification, reads as follows: "That heretofore, to wit: Between the 26th day of December, A. D. 1901, and the 26th day of June, A. D. 1902, at the county of Bottineau and state of North Dakota, one Star J. Erickson, late of said county and state, did commit the crime of keeping and maintaining a common nuisance committed as follows, to wit: That at said time and place the said Star J. Erickson did willfully and unlawfully keep and maintain a place, to wit: In that certain frame building fronting on the street and situated on lot 7, block 6, in the original townsite of the village of Souris, in township 163, range 77, in said county and state, where intoxicating liquors were sold, bartered and given away then and there to persons applicants for said intoxicating liquors without first requiring said applicant or applicants to make, execute and subscribe to a written or printed affidavit of the said applicant or applicants as required by chapter 63 of the Penal Code of the state of North Dakota, said affidavit being required to set forth the particular medicinal, scientific or sacramental purposes for which said intoxicating liquors were required, the kind and quantity of said intoxicating liquors desired, that said intoxicating liquors were necessary and actually needed for any particular purpose, that said intoxicating liquors were not intended to be used by said applicant or applicants as a beverage or to be sold, bartered or given away by said applicant or applicants, or that said applicant or applicants were over the age of twenty-one years. This contrary," etc.

The only error which we can consider is the order overruling defendant's demurrer to the indictment. The demurrer challenged the sufficiency of the indictment upon three grounds: (1) That it does not contain a statement of the acts constituting the offense in ordinary and concise language, or in such a manner as to enable a person of common understanding to know what is intended: (2) that the facts stated in the indictment do not constitute a public offense; (3) that it does not negative a sale by the defendant as a pharmacist, under a druggist's permit, to a patient on a physician's prescription.

We are of the opinion that the demurrer was properly overruled. Section 7605, Rev. Codes 1899, under which the indictment is drawn, so far as material, reads as follows: "All places where

intoxicating liquors are sold, bartered or given away, in violation of any of the provisions of this chapter, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter or delivery in violation of this chapter, are hereby declared to be common nuisances. * * *" And it provides for the punishment of the owner or keeper thereof. An indictment which is otherwise sufficient must be held sufficient when "the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." Subdivision 7, section 8047, Rev. Codes 1899. The indictment charges that the defendant "did commit the crime of keeping and maintaining a common nuisance," and, in charging the manner of its commission, states that the defendant "did willfully and unlawfully keep and maintain a place [describing it] where intoxicating liquors were sold, bartered and given away. * * *" This sufficiently informs the defendant of the crime with which he is charged, and the acts constituting the crime. The further allegation, in which the pleader has apparently attempted to expressly negative the lawful character of the sales, and to describe the general character of affidavits which legalize sales when made under a permit, may be treated as surplusage. The statement that the liquors were sold, bartered and given away without the protection of affidavits was unnecessary, and this is also true as to the attempt to describe the affidavits. The defendant is charged with "willfully and unlawfully" keeping and maintaining a place where intoxicating liquors were sold, bartered and given away. This sufficiently charges that the sales there made were unlawful, for the keeping of the place could not be unlawful unless the sales were also unlawful. It has been held that an indictment for keeping a tippling house, which is a place where liquors are sold without license, is good, without an averment that the defendant had no license, and for the reason that the charge that the defendant kept a tippling house necessarily implied that he had no license. Commonwealth v. Allen, 15 B. Mon. (Ky.) 1; Commonwealth v. Riley, 14 Bush (Ky.) 44; Commonwealth v. Harvey, 16 B. Mon. (Ky.) 1; Commonwealth v .Campbell, 5 Bush (Ky.) 311. So, too, it has been held under a statute like our own that an information for keeping and maintaining a common nuisance is not

fatally defective "because it does not charge that the defendant had no permit or license to sell." State v. Teissedre, 30 Kan. 476, 2 Pac. 108, 650; State v. Allen, 32 Iowa, 248; State v. Freeman, 27 Iowa, 333.

It is true, as counsel for appellant contend, that there may be lawful sales of liquors in this state by a pharmacist under a permit, and that places where only lawful sales are made are not common nuisances; but it is also true that, where unlawful sales are made, the fact that the seller had a permit does not exempt the place from the condemnation of the statute, as a common nuisance. State v. McGruer, 9 N. D. 566, 84 N. W. 363; State v. Donovan, 10 N. D. 203, 86 N. W. 709.

This indictment does not disclose whether or not the defendant had a permit. That fact, however, is not material, for it is the keeping of the place where the prohibited acts are done which constitutes the crime, and unlawful sales by a person holding a permit are no less unlawful than sales made by persons without a permit. As previously stated, the indictment, though not a model in pleading, sufficiently charges that the sales were unlawful. It charges that the defendant unlawfully kept a place where intoxicating liquors were sold. The allegation that he unlawfully kept the place is equivalent to alleging that the sales were unlawful.

The remaining errors assigned and argued cannot be considered because of the appellant's failure to prepare and present a record of the facts upon which the court acted in making the rulings complained of. This case was tried at the same term of court and the indictment was presented by the same grand jury as the indictment in the case of State v. Scholfield, 102 N. W. 878, 13 N. D. 664. The record presents the same defects as are pointed out in that case, and the errors assigned cannot be considered for the same reasons.

Judgment affirmed. All concur.

(103 N. W. 389.)

THE BANK OF PARK RIVER, A CORPORATION, v. THE TOWN OF NORTON, A CORPORATION.

Opinion filed April 22, 1905.

Towns — Purchase of Road Grader — Power of Board.

1. Under the provisions of section 1115a, Rev. Codes 1899, relating to purchase of road graders by township boards, the township board may purchase such graders or other road machinery on its own motion, without previous authorization or petition by the freeholders or voters of the township.

Same — Payments.

2. Under the provisions of section 1115a, providing that the township board may purchase road machinery "on credit or otherwise," such board may purchase such machinery, and order it paid out of the general fund in certain cases, instead of by taxation.

Appeal — Review of Evidence — Trial De Novo.

3. In appeals to this court under section 5630, Rev. Codes 1899, the evidence cannot be reviewed unless the appellant demands a trial anew of all the issues or of some particular fact.

Appeal from District Court, Walsh county; *Lauder*, J.

Action by the Bank of Park River against the town of Norton. Judgment for plaintiff, and defendant appeals.

Modified.

Rehearing denied June 29, 1905.

E. R. Sinkler, for appellant.

The order not being drawn upon the fund out of which it is payable is void. 1 Dill on Mun. Cor. 505; Argenti v. City of San Francisco, 16 Cal. 256; Martin v. City and County of San Francisco, 16 Cal. 285; Minor v. Loggins, 37 S. W. 1086; 15 Am. & Eng. Enc. Law (1st Ed.) 1214; People ex rel. J. G. Cooke v. Lewis Wood, 71 N. Y. 371; Baker v. City of Seattle, 27 Pac. 462; Rev. Codes, sections 1919, 1294, 2598, 1115f.

The mode of contracting constitutes the measure of the power of the officer of a municipal corporation. Rev. Codes, section 2538; 1 Dill on Mun. Cor. 447; Zottman v. City and County of San Francisco, 20 Cal. 97.

Burden is on plaintiff to show their power. Crawford v. Albany Ice Co., 60 Pac. 14; 14 Enc. Pl. & Pr. 241.

Where an order has not been presented and indorsed "Not paid for want of funds," no interest can be had. Rev. Codes, section 2614; Freeman v. City of Huron, 73 N. W. 260.

Township warrants are not negotiable. Gilman v. Township of Gilby, 80 N. W. 889, 8 N. D. 627; Goose River Bank v. Willow Lake Twp., 1 N. D. 26, 44 N. W. 1002; 1 Dill on Mun. Cor. sections 503, 487, 504; Miner v. Vedder, 33 N. W. 47; Hubbell v. Town of Custer City, 87 N. W. 620; Storey v. Murphy, 81 N. W. 23.

H. A. Libby, for respondent.

A city is liable on its warrants issued by it, although no funds have been collected for their payment, where such city has had time to levy and collect a tax for the purpose and has failed to do so. Blackman v. City of Hot Springs, 85 N. W. 996; Warner v. City of New Orleans, 87 Fed. 828.

The meeting of the board of supervisors was regular and the notice was waived. Beaver Creek v. Hastings, 52 Mich. 528, 18 N. W. 250; Lord v. Anoka, 36 Minn. 176; States v. Borough of Washington, 2 Am. & Eng. Corp. Cas. 39; 15 Am. & Eng. Enc. Law (1st Ed.) 1034.

The former order of the Supreme Court granting judgment for the relief demanded in the complaint was *with prejudice* and is an affirmance of the order of the lower court appealed from. Rules of Supreme Court, Rule XXXVI.

MORGAN, C. J. This cause was tried in the district court under the provisions of section 5630, Rev. Codes 1899. This court so held on a former appeal from an order denying a new trial in this case. 12 N. D. 497, 97 N. W. 860. The appellant has not demanded a trial de novo on this appeal, and is therefore not entitled to a review of the evidence on the appeal. State v. McGruer, 9 N. D. 566, 84 N. W. 363; Security Improvement Co. v. Cass. County, 9 N. D. 555, 84 N. W. 477. It therefore remains only to determine whether the pleadings and findings will sustain the judgment.

The action was brought upon an order issued by the township board of the town of Norton to the Fleming Manufacturing Company, as evidence of a portion of the purchase price of a road grader purchased by said board, which order is as follows:

"Treasurer of the town of Norton, Walsh county, state of North Dakota: Pay to Fleming Manufacturing Company or order, the

sum of one hundred dollars out of any moneys in the treasury not otherwise appropriated, being due Jan. 1st, 1901, without interest. No. 18,646. J. H. Langton, Chairman of Supervisors. Countersigned, H. J. Axtel, Clerk."

The complaint alleges the due and authorized execution of the order, and sets it forth in full; its due assignment to the plaintiff; its due presentment to the township treasurer for payment; the refusal to pay and a demand for judgment for the amount of money due thereon, with costs.

The answer contains (1) a general denial; (2) that the order was issued without the alleged essential prerequisite to its issue of a petition of a majority of the freeholders of the township to the chairman of the township board praying that he contract for or purchase the machinery desired upon credit or otherwise. Other defenses are alleged, but become immaterial, as the evidence cannot be reviewed.

Findings of fact were made by the trial court to the effect that all the allegations of the complaint are true; that the township board purchased the grader described in the complaint, and issued the order set forth in the complaint for a part of its purchase price; that the amount of the purchase price was duly audited by said board at a regularly called meeting thereof; that the plaintiff is the owner of said order; and that the same was duly presented for payment, and payment refused. As conclusions of law the court found that the purchase of the grader was made under legal authority regularly exercised, and that the plaintiff is entitled to the relief demanded in the complaint.

The appeal is from the judgment adjudging the recovery of the amount of the order with interest and costs. The appellant's principal contention is that the township board had no authority under the statute to purchase the grader. The statute under which it is claimed that the township board acted is section 1115a, Rev. Codes 1899, which reads as follows: "The township board of any township is authorized to purchase for the use of the township, upon credit or otherwise, any tools, road machine or road grader, or either of them, or one or more of either of them for the use of the township, or the use of the overseer of the districts therein, as in this article provided. Such implements when purchased, shall be paid for in not to exceed five annual payments out of the highway tax of the township, according to the contract therefor, and the chairman of the township board shall issue orders for the payment of the

same, and such orders shall be attested by and registered with the township clerk, and the township clerk shall certify to the supervisors of such township, at the time of assessing the highway tax for such township, the sum necessary to pay such orders, and this sum shall be added to the other taxes to be raised for highway purposes, and when collected shall be applied to the payment of such orders and to no other purpose until all such orders are paid. The township board shall have the custody and control of all implements so purchased." The contention that this section does not authorize the purchase of a grader by a township board cannot be upheld. Its language is explicit that the board is authorized to do so. This section and section 1115b were evidently enacted to meet different conditions or exigencies existing in townships. Section 1115a vests the board with discretionary power to purchase road machinery upon its own motion. The board might deem it unnecessary to purchase any road machinery when a majority of the freeholders deemed such purchase necessary. In such case the chairman of the board "shall, upon being petitioned in writing by a majority of the freeholders of the town, contract for and purchase * * * a road machine," etc., as provided for by said section 1115b. Construing the two sections together, it is clear that section 1115a confers unqualified authority upon the board to purchase road machines, and that section 1115b confers upon the freeholders the right to require the chairman of the board alone to purchase such machines for the use of the township by a proper petition in writing.

The appellant further contends that the township is not liable in this action, as the plaintiff has sued the township as liable generally upon the order, and insists that the order is not binding upon the township as a general liability, but that the township is liable only after the taxes for the payment of the machine have been levied pursuant to section 1115a; and further insists that the order should have been drawn upon the special fund to be raised from taxation, and, not being so drawn, that it is void. We cannot agree to this contention as a matter of law. Section 1115a is a general provision governing the purchase of road machinery by township boards. It provides for the purchase of machinery "on credit or otherwise." This language necessarily indicates that purchases on credit and taxation after the purchase are not the only mode of securing such machinery. If so, the word "otherwise" becomes entirely meaningless, and of no force. If not purchased on

credit, the provision that it should be paid out of special taxes to be raised has no application, as special taxation would be unnecessary. To give effect to all the words of the section, it must be held to authorize purchases not to be paid for out of special taxes, but out of the general fund. There is nothing in the findings nor in the pleadings to show that there would be no money in the general fund that could be legally applied to the payment of the order in suit when it became due. Such money might have been provided for by the action of the township taken in contemplation of purchasing a road grader, or through some other source. It is clear that section 1115a does not provide for payment for road machines exclusively by taxation.

There are other assignments of error, but as they involve an examination of the evidence they cannot be considered for the reason above stated.

The judgment as entered includes interest at 8 per cent from the date of the order. This was error. Legal interest from January 1, 1901, only is chargeable. The judgment is modified to that extent, and, as thus modified, will be affirmed, and it is so ordered. All concur.

(104 N. W. 525.)

THE COLONIAL & UNITED STATES MORTGAGE COMPANY, LIMITED, v. THE NORTHWEST THRESHER COMPANY.

Opinion filed April 27, 1905.

Statute of Limitation in Mortgage Foreclosure — Suspension of the Statute.

1. Action to foreclose a mortgage on real property is not a proceeding in rem, but is an action in personam, and comes within the operation of section 5210, Rev. Codes 1899, which excepts from the period limited for commencing an action the time during which the person against whom the cause of action has accrued is absent from the state.

Same — Foreign Corporation May Plead the Statute.

2. A foreign corporation which has complied with the laws of this state governing such corporations, and which has been regularly and continuously doing business in this state during the entire period required to bar an action, and during all that time has had an agent resident here upon whom process could be served, can avail itself of the statute of limitations of this state.

Same — Absence of Mortgagee After Parting With Title.

3. The absence of the mortgagee from the state after he has parted with the title to the mortgaged property does not prevent the statute of limitations from running in favor of his grantee.

Foreclosure of Mortgage May Be Barred Although the Debt Secured Is Not Outlawed.

4. An action to foreclose a mortgage on real property is a remedy distinct from the remedies by which the creditor may enforce the personal obligation for the debt secured by the mortgage, and may become barred by the statute of limitations, even though the debt is not outlawed.

Mortgagor's Grantee May Plead Statute of Limitation Although Mortgage Debt Is Neither Barred nor Discharged.

5. Although the property passed to the defendant's grantor subject to the mortgage, and was in equity the primary fund for the payment of the mortgage debt, that doctrine cannot be extended so as to prevent the defendant from availing himself of the statute of limitations as a defense against an action to foreclose the mortgage, even though the debt is neither discharged nor barred as against the debtor.

Young, J., dissenting.

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

Action by the Colonial & United States Mortgage Company, Limited, against the Northwestern Thresher Company. Judgment for plaintiff, and defendant appeals.

Reversed.

Ball, Watson & Maclay, for appellant.

The absence from the state, or the nonresidence of the original mortgagor, does not extend the time within which an action of foreclosure may be brought, as against subsequent grantees or holders of the equity of redemption. Wood v. Goodfellow, 43 Cal. 185; Watt v. Wright, 66 Cal. 202, 5 Pac. 91; Lord v. Morris, 18 Cal. 482; George v. Butler, 67 Pac. 263; Anderson v. Baxter, 4 Ore. 105; Eubanks v. Leveridge, Fed. Cases, 4544; Bush v. White, 85 Mo. 339; Arthur v. Screven, 17 S. E. 640; Fowler v. Wood, 28 N. Y. Supp. 976.

Where no personal liability rests upon a person to pay the debt, the action is substantially one in rem. Hogaboom v. Flower, 72 Pac. 547.

If the mortgagor has parted with the title and has no power to give a new mortgage binding upon the premises, he has no power to revive a mortgage already outlawed. Cook v. Prindle, 66 N. W. 781; Hubbard v. Insurance Co., 25 Kan. 172; Schmucker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765.

The right to sue upon the debt (not the debt itself) might be extinguished, while the right to bar the redemption might still exist as against the owner of the property. Satterlund v. Beal, 12 N. D. 122, 95 N. W. 518.

As pointed out in Arthur v. Screven, and Fowler v. Wood, supra, the action contemplated by the statute is an action *against the person* who has left the state. Rev. Codes 1899, section 5210. Although the action is in rem, it is necessary to make the owner of the legal title defendant since the action is brought to foreclose his right of redemption. The action exists only against the owner, and if the absence of any person can affect the right to commence and maintain an action in rem, it must be the absence of him against whom the action may be brought.

A foreign corporation can plead the statute of limitations if it has placed itself in such a position that it can be served with process. 13 Am. & Eng. Enc. Law, 904; Turcott v. Railway, 45 S. W. 1067; City of St. Paul v. Chicago, M. & St. P. Ry. Co., 48 N. W. 17, 21.

Newman, Spalding & Stambaugh, for respondent.

This is a civil action in personam, and all the provisions of the Code of Civil Procedure for the limitation of time for the bringing of civil actions on contract for the payment of money and the foreclosure of mortgages, as well as suspending the running of the statute, as those limiting the time for commencing such action, apply with full force to this action. Rev Codes 1899, section 5156 and 5181. Anderson v. Baxter, 4 Ore. 105, followed in Eubanks v. Leveridge, 4 Sawyer, 274, stand alone in holding a foreclosure action to be one in rem. The latter case follows only because pending in a federal court sitting in Oregon. The doctrine is repudiated in Minnesota, Iowa and Illinois. Walley v. Eldridge, 24 Minn. 358; Brown v. Rockhold, 49 Iowa, 282; Emery v. Kiegham, 94 Ill. 543.

The statute of limitations, including sections suspending its running, applies to all actions in which there is necessarily a plaintiff and a defendant, regardless of the character of the action, the relief sought or other circumstances. Grattan v. Wiggins, 23 Cal. 16.

Absence of the mortgagor from the state at the maturity of the debt secured by the mortgage, his continuous residence out of, and failure to return to, the state, prevents the running of the statute of limitations. Section 4859, Comp. Laws.

The statute cannot be pleaded by either of the subsequent grantees, subject to the mortgage, until both the mortgage and debt are barred. Rev. Codes, section 4694; Waterson v. Kirkwood, 17 Kan. 9; Schmucker v. Seivert, supra; Cross v. Allen, 141 U. S. 528, 35 L. Ed. 843, 12 Sup. Ct. Rep. 67; Ewell v. Daggs, 108 U. S. 143, 27 L. Ed. 682; Eborn v. Cannon, 32 Tex. 244; McKean v. James, 87 Tex. 104; Mahon v. Cooley, 36 Iowa, 479; Jones on Mortgages, section 1204; Coe v. Finlayson, 26 So. 704; Willis v. Farley, 24 Cal. 491; N. Y. Life Ins. Co. v. Covert, 6 Abb. N. S. 154; Murdock v. Waterman, 145 N. Y. 55, 39 N. E. 829; Herndt v. Porterfield, 9 N. W. 322.

Appellant took the mortgaged premises subject to the mortgage debt. The land continued in its hands a primary fund for the payment of the debt, and to the extent of the value of the mortgaged premises it became a principal debtor. Johnson v. Zink, 51 N. Y. 333; Sands v. Church, 6 N. Y. 347; Hartley v. Harrison, 24 N. Y. 170; Freeman v. Auld, 44 N. Y. 50; Insurance Co. v. Nelson, 78 N. Y. 137; Bennett v. Bates, 94 N. Y. 354; Murray v. Marshall, 94 N. Y. 611; Colgrove v. Talman, 67 N. Y. 94, 23 Am. Rep. 90; Horton v. Davis, 26 N. Y. 495; Fuller v. Hunt, 48 Iowa, 163; Tice v. Anin, 2 Johns. Ch. 125; Palmer v. Butler, 36 Iowa, 576; Sanger v. Nightingale, 122 U. S. 176, 30 L. Ed. 1105.

The statute of limitations commenced to run upon this implied agreement, that having taken the premises subject to the mortgage, promised to pay it, at the time it was made, that is, at the time of the conveyance of the equity of redemption. Schmucker v. Seibert, supra.

The land being in the hands of appellant, a primary fund for the payment of the debt secured by the mortgage, which is still a subsisting, valid debt, and it, having purchased subject to the mortgage, cannot plead the statute of limitations. Hyer v. Pruyn, 7 Paige Ch. 465, 34 Am. Dec. 355; Hughes v. Edwards, 9 Wheaton, 489, 22 U. S. 489, 6 L. Ed. 142; Waterson v. Kirkwood, 17 Kan. 9; Schmucker v. Seibert, supra; Life Ins. & Trust Co. v. Covert, 6 Abb. Pr. N. S. 154; Murdock v. Waterman, supra.

A foreign corporation cannot plead the statute of limitations. Olcot v. Tioga R. R. Co., 20 N. Y. 210, 75 Am. Dec. 393; Rathburn v. Northern Central Ry. Co., 50 N. Y. 656; Larson v. Aultman & Taylor Co., 56 N. W. 915; Hanchett v. Blair, 100 Fed. 817; Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. Rep. 466, 37 L. Ed. 316; State v. Cent. Pac. Ry. Co, 10 Nev. 47; N. Mo. R. R. Co. v. Akers, 4 Kan. 453, 96 Am Dec. 183; Lain v. Bank, 6 Kan. 74; Morrill v. Ingle, 23 Kan. 32; Bauserman v. Charlotte, 46 Kan. 482; State v. National Acc. Soc. of New York, 79 N. W. 220; Thompson on Corporations, sections 7841, 7900; Rev. Codes, section 5121.

ENGERUD, J. This is an action to foreclose a mortgage upon 160 acres of land situated in Dickey county. The mortgage was executed on May 16, 1883, and recorded on June 11, 1883. It was given by Fred West, who was then the owner of the land, to secure his note for $335 of even date. The note became due November 1, 1888. No payments have been made upon it. In the fall of 1887 West moved from the territory of Dakota, and has since been absent from this jurisdiction. In December, 1887, after leaving the territory, he conveyed the land to E. S. Brown, receiver of the Northwestern Manufacturing and Car Company, a Minnesota corporation. On February 1, 1888, Brown conveyed to the Minnesota Thresher Manufacturing Company, also a Minnesota corporation. Both deeds expressly except the plaintiff's mortgage from the covenants of warranty. On August 7, 1901, the last-named grantee conveyed to R. H. Bronson, who had been appointed receiver for said corporation, and on August 9, 1901, the latter conveyed to the Northwest Thresher Company, a Minnesota corporation, the defendant in the present action. These several corporations had complied with the laws of the territory and state, and were at all times amenable to suit in this jurisdiction. The mortgagor and debtor is not made a party to this action. The only relief sought is a decree for the foreclosure of the mortgage and the sale of the mortgaged premises to satisfy the debt. The defendant interposed as its sole defense the statute of limitations. This defense was overruled by the trial court, and judgment was rendered as prayed for in the complaint. The defendant has appealed from the judgment, and demands a review of the entire case in this court, under section 5630, Rev. Codes 1899.

The only question involved upon this appeal is whether the statute of limitations is available to this appellant as a defense against

the plaintiff's action. The time within which an action to foreclose a mortgage of real property must be commenced in this state is limited to ten years from the time the cause of action accrued. Rev. Codes 1899, sections 5199, 5200. If, when a cause of action shall accrue against any person, he shall be out of the state, the statute does not begin to run until his return into the state. Rev. Codes 1899, section 5210.

Appellant first contends that this action is one in rem against the mortgaged property, and hence that the several objections which will be hereafter noticed, urged against the defense of the statute on the ground that the person against whom the cause of action accrued was absent from the state, have no application. We are agreed that this is not an action in rem, but an action in personam. Our views on this subject are fully and clearly expressed by Judge Mitchell in Bardell v. Collins, 44 Minn. 97, 46 N. W. 315, 9 L. R. A. 152, 20 Am. St. Rep. 547: "It is not an action in rem, but an action in personam. It is true, it has for its object certain specific real property against which it is sought to enforce the lien of the mortgage, and in that sense it partakes somewhat of the nature of a proceeding in rem, but not differently, or in any other sense, than do actions in ejectment, replevin, for specific performance of a contract to convey, to determine adverse claims to real estate and the like. The rights and equities of all parties interested in the mortgaged premises are to be adjusted in the action, which proceeds, not against the property, but against the persons; and the judgment binds only those who are parties to the suit and those in privity with them. Whalley v. Eldridge, 24 Minn. 358. Next, it is not only an action in personam, but is also strictly judicial in its character, proceeding according to due course of common law, like any other action cognizable in courts of equity or common law." We are all, therefore, of the opinion that the absence from the state of the person against whom the cause of action accrued stays the running of the statute of limitations against an action to foreclose a mortgage, the same as in any other action in personam.

The mortgage debt was due November 1, 1888, and the present cause of action, therefore, accrued not later than November 2, 1888. At that time the mortgaged premises were owned by the Minnesota Thresher Company, and such ownership continued until 1901. That company was a foreign corporation organized and existing under the laws of Minnesota. It was stipulated to be a fact,

however, that said corporation during all that time was doing business here; that during all the time mentioned it had a resident agent authorized to accept service of process, and had in all respects complied with the laws of the territory, and subsequently those of the state, relating to foreign corporations doing business here. It was further stipulated to be a fact that the appellant Northwest Thresher Company was organized in June, 1901, under the laws of Minnesota, as the successor of the Minnesota Thresher Company, for the purpose of taking and absorbing the property, assets and business of the old company, and that the new company has continued to do business in this jurisdiction, and has complied with all the conditions imposed by law upon foreign corporations doing business in this state. The respondent contends that the statute does not run in favor of a foreign corporation, even though it has been continuously doing business in this state, and though it could at all times have been personally served with process within this jurisdiction. The weight of authority is against respondent's contention. Huss v. Railway Co., 66 Ala. 472; Lawrence v. Ballou, 50 Cal. 258; King v. National M. & E. Co., 4 Mont. 1, 1 Pac. 727; Wall v. Railway Co., 69 Iowa, 498, 29 N. W. 427; Insurance Co. v. Duerson's Ex'r, 28 Grat. 630; Turcott v. Railway Co. (Tenn. Sup.) 45 S. W. 1067, 40 L. R. A. 768, 70 Am. St. Rep. 661; City v. Railway Co. (Minn.) 48 N. W. 17; Pennsylvania Co. v. Sloan, 1 Ill. App. 364; Abell v. Insurance Co., 18 W. Va. 400. The courts of New York, Wisconsin and Nevada hold that a foreign corporation is incapable of being present in a state other than that under whose laws it exists, and hence, under all circumstances, a foreign corporation is absent from all other states than that of its domicile. Consequently those courts hold that a foreign corporation comes within that provision of the statute of limitations which excepts absentees from its operation. Olcott v. Railway Co., 20 N. Y. 210, 75 Am. Dec. 393; Rathbun v. Railway Co., 50 N. Y. 656; Larson v. Aultman & Taylor Co. (Wis.) 56 N. W. 915, 39 Am. St. Rep. 893; Insurance Co. v. Fricke (Wis.) 74 N. W. 372, 41 L. R. A. 557; State v. Society (Wis.) 79 N. W. 220; Robinson v. Imperial, etc., Co., 5 Nev. 44. In our opinion, the rule adopted by the majority of the courts is the sound one—that a corporation, although created by the laws of another state, should be deemed to be present in the state, and entitled to the protection of the statute of limitations, if it has been regularly engaged in doing business in this state, and has had

its agent or agents here, and been amenable to personal service of the process of our courts.

It is urged, however, by respondent, that the decision in Olcott v. Railway Co., 20 N. Y. 210, 75 Am. Dec. 393, is conclusive upon us, because our statute of limitations, including the provision which now appears as section 5210, Rev. Codes 1899, was borrowed from New York, and adopted in this state after the decision in Olcott v. Railway Co. was rendered, and hence it must be presumed that the act was adopted with the interpretation placed upon it by the courts of the state from which it was borrowed. The rule invoked is a familiar one often recognized by this court, but we do not think it has any application in this case. The defendant in that case was a Pennsylvania corporation, and had not been amenable to process in New York the full six years required to bar the action. It was asserted in its behalf, however, that the provisions which excepted from the operation of the statute persons absent from the state applied only to natural persons; and it was argued, therefore, that a foreign corporation could successfully plead the limitation statute of New York in bar of an action against it in that state, even though it had been beyond the reach of process from the courts of that state the entire six years. The court held that a corporation was a "person" within the meaning of the law, and that, if it had not been subject to the process of the courts of the state, it could not invoke the statute of limitations. Whatever else was said in that case was obiter dicta.

The question whether a corporation can or cannot be present in any state other than that under whose laws it was organized is a question rather of general law than of interpretation of this statute. It is a question we should feel at liberty to decide for ourselves, even if the rule counsel invokes were an inflexible one. We hold, therefore, that the statute of limitations has run in favor of this defendant and its predecessor, the Minnesota Thresher Company, if the latter was the person against whom the cause of action accrued.

This brings us to the question upon which the members of this court are unable to agree. Did the absence from the state of the mortgagor and debtor, West, prevent the running of the statute against this suit to foreclose the mortgage? The courts of Illinois, Texas, Kansas and Iowa hold that the debtor's absence, even though he has parted with the title to the mortgaged premises, tolls the

statute. In California, Washington, Oregon, Nebraska, Missouri, New York and South Carolina the contrary has been held. The majority of the court has reached the conclusion that the absence of West did not toll the statute. Our attention has been called to the following cases from Illinois: Emory v. Keighan, 94 Ill. 543; Schifferstein v. Allison, 24 Ill. App. 294; Id., 123 Ill. 662, 15 N. E. 275; Banking Ass'n v. Bank, 157 Ill, 524, 41 N. E. 919; Jones v. Foster, 175 Ill. 459, 51 N. E. 862; Richey v. Sinclair, 167 Ill. 184, 47 N. E. 364. Analysis will show that none of these cases are authority in this jurisdiction. In Emory v. Keighan, Banking Ass'n v. Bank and Jones v. Foster, the facts were that the owner of the equity of redemption had been absent from the state; and in Schifferstein v. Allison a partial payment had been made within the statutory period by the owner of the fee. In Richey v. Sinclair, however, the mortgagor had been absent from the state after he had parted with the title, and it was held that his absence prevented the statute from running in favor of his grantee. The reasoning in the last case cited, as well as in the others from that state, is based upon two propositions, which will be found most clearly set forth in Pollock v. Maison, 41 Ill. 516; (1) A mortgage was there regarded as a conveyance of an estate in land, defeasible only by the extinguishment of the debt. (2) The statute of limitations was regarded as creating a presumption of payment or release of the debt by lapse of time, and hence the neglect of the creditor to commence an action to recover his debt within the statutory period was presumptive evidence that the debt was extinguished. It followed as a necessary consequence that, if the debt was extinguished, the mortgagee's estate was likewise extinguished, and, conversely, if the debt was not extinguished, the mortgagee's title was not defeated. As to whether the later rulings in Illinois are sound in principle, in view of the changes made by the legislature of that state in the limitation laws since the decision in Pollock v. Maison, we venture no opinion. See, however, Tate v. Hawkins, 81 Ky. 577, 50 Am. Rep. 181. It is manifest that the decisions from Illinois proceed upon a theory that is untenable in this state. Here, under the express provisions of our Civil Code, a mortgage is a mere lien, and conveys no estate in the land. Rev. Codes 1899, section 4699; Halloran v. Holmes, 13 N. D. 411, 101 N. W. 310. The statute of limitations of this state does not create presumptions or extinguish obligations. It merely bars the remedy upon which it operates, if

the defendant elects to avail himself of the statutory defense by answer. Satterlund v. Beal, 12 N. D. 122, 95 N. W. 518; Wood on Limitations, section 5; Fowler v. Wood, 78 Hun, 304, 28 N. Y. Supp. 976, affirmed 150 N. Y. 584, 44 N. E. 1124. In Oregon and Nebraska it was held that the absence of the mortgagor did not toll the statute, because the action to foreclose was an action in rem. Anderson v Baxter, 4 Ore. 105; Peters v. Dunnels, 5 Neb. 460. We cannot follow these cases, because we hold that this action is not in rem. The decisions from Texas, Kansas and Iowa are in point, but, in our opinion, those decisions rest on propositions which are as unsound in principle as they are opposed to precedent. They lead to absurd and unjust results, and thwart the object sought to be obtained by the statute, instead of promoting that object and furthering justice. Cases fairly representing the views of the Texas courts are Ewell v. Daggs, 108 U. S. 143, 2 Sup. Ct. 408, 27 L. Ed. 682; Falwell v. Hening, 78 Tex. 278, 14 S. W. 613. From Kansas may be cited Waterson v. Kirkwood, 17 Kan. 9, and Schmucker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765; and from Iowa, Clinton Co. v. Cox, 37 Iowa, 570; Brown v. Rockhold, 49 Iowa, 282; Robertson v. Stuhlmiller, 93 Iowa, 326, 61 N. W. 986; and Leeds Lumber Co. v. Haworth, 98 Iowa, 463, 67 N. W. 383, 60 Am. St. Rep. 199.

The rule adopted by these several courts seems to have been based upon the same reasons. Those reasons are tersely stated in Clinton County v. Cox, 37 Iowa, 570, as follows: "Under the laws of this state a mortgage conveys no interest in or title to lands, but is simply a lien thereon for the purpose of securing the indebtedness which is its foundation. It is an incident—a security in the nature of a lien—of the debt. It survives until the debt be paid or discharged, or the mortgage is released. It is a convoy bearing a lien for the protection of the debt, and as long as that exists it is not relieved of the duty of protection, or rendered ineffective for that purpose. When the debt is discharged, or, by operation of law, may no longer be enforced, its functions terminate, and not before." In that case, as in the others cited, it was held that the absence of the debtor after he had parted with the title prevented the statute from running in favor of his grantee against a suit to foreclose. It is clear that a part payment by the mortgagor after the conveyance would have had the same effect, because, under the rule which these cases announce, any act which prevents

the statute from running in favor of the debtor has the like effect on the mortgage, whether the debtor has any interest in the mortgaged premises or not.

It will be observed that the fundamental proposition upon which the reasoning is based which has led to the conclusions reached by the courts of Iowa, Kansas and Texas is this (quoting from Clinton Co. v. Cox, 37 Iowa, 570): "It [the mortgage] is an incident * * * of the debt. It survives until the debt be paid or discharged, or the mortgage is released. * * * When the debt is discharged, or by operation of law may no longer be enforced, its functions terminate, and not before." The fallacy in this proposition is patent. It is true that the mortgage is a mere incident to the debt—"a convoy bearing a lien for the protection of the debt." It is also true that the extinguishment of the debt also extinguishes the mortgage. It is not true, however, that, when the personal liability for the debt is no longer enforceable by reason of the statute of limitations, the functions of the mortgage terminate. It is not true, because the fact that the statutory defense is available to the debtor does not extinguish the debt. It merely bars the remedy to enforce the personal liability, and leaves the debt in existence. Consequently, so long as the debt is not extinguished, the mortgage exists, and is enforceable until the remedies to enforce the lien are also barred by the lapse of time within which the statutes require them to be invoked. The statute of limitations operates on the remedy only. That being the effect and operation of the statute, it follows that the remedy against the debtor on his personal liability may be barred by lapse of time and yet the remedy upon the mortgage remain available; and it is likewise apparent that the converse is true, the remedy for the enforcement of the mortgage may be barred although an action at law against the debtor is still maintainable.

The decisions in Kansas, Iowa and Texas are erroneous, because those courts have misapplied the doctrine that a mortgage is a mere incident of the debt it secures. It is true that, by reason of this relationship of the mortgage to the debt, anything that operates to extinguish the latter necessarily discharges the former, because the incident cannot survive the principal. These courts, however, fail to distinguish between the extinguishment of the debt itself and the absence or loss of a remedy to enforce the personal liability for it. The failure to make the distinction is apparently due to the

fact that those courts have assumed, as it was expressly declared in Schmucker v. Seibert, 18 Kan. 104, 109, 26 Am. Rep. 765, and in Duty v. Graham, 12 Tex. 427, 435, 436, 62 Am. Dec. 534, that, because the mortgage is an incident to the debt, therefore the remedy to enforce the lien was also a mere incident or part of the remedy or cause of action against the debtor to enforce his personal liability. This reasoning, and the propositions upon which it rests, are in direct conflict with the overwhelming weight of authority. Joy v. Adams, 26 Me. 330; Thayer v. Mann, 19 Pick. 535; Richmond v. Aiken, 25 Vt. 324; Baldwin v. Norton, 2 Conn. 161; Pratt v. Huggins, 29 Barb. 282; Fowler v. Wood, 78 Hun, 304, 28 N. Y. Supp. 976; Colton v. Depew, 60 N. J. Eq. 454, 46 Atl. 728, 83 Am. St. Rep. 650; Demuth v. Bank, 85 Md. 315, 37 Atl. 266, 60 Am. St. Rep. 322; Arthur v. Screven (S. C.) 17 S. E. 640; Elkins v. Edwards, 8 Ga. 326; Bizzell v. Nix, 60 Ala. 281, 31 Am. Rep. 38; Browne v. Browne, 17 Fla. 607, 35 Am. Rep. 96; Kendall v. Clarke, 90 Ky. 178, 13 S. W. 583; Tate v. Hawkins, 81 Ky. 577, 50 Am. Rep. 181; Ins. Co. v. Brown, 11 Mich. 265; Wiswell v. Baxter, 20 Wis. 680; Whipple v. Barnes, 21 Wis. 332; Lewis v. Schwenn, 93 Mo. 26, 2 S. W. 391, 3 Am. St. Rep. 511; Bush v. White, 85 Mo. 339; Bank v. Guttschlick, 14 Pet. 19-30, 10 L. Ed. 335; Eubanks v. Leveridge, 4 Sawy. 274, Fed. Cas. No. 4544. It has been held that the two causes of action could not even be joined in the absence of a statutory provision to that effect. Ins. Co. v. Brown, 11 Mich, 265; Borden v. Gilbert, 13 Wis. 670; Stilwell v. Kellogg, 14 Wis. 461; Cary v. Wheeler, 14 Wis. 281; Faesi v. Goetz, 15 Wis. 231; Doan v. Holly, 25 Mo. 357, and 26 Mo. 186.

The doctrine established by the foregoing cases is well stated by Judge Deady in Eubanks v. Leveridge. The case was tried in the federal court in Oregon, and, of course, the decision of the Supreme Court of Oregon on the question involved was conclusive on the federal court sitting in that state. The state court had held that an action to foreclose was not barred by the absence of the mortgagor after he parted with the title, because the action was in rem; but Judge Deady reached the same conclusions for reasons different from those of the state court. He said: "But I apprehend the true doctrine to be that the remedy upon the note and mortgage is, like the transaction itself, twofold. The making and delivery of the note, and the failure to pay the same according to its tenor, gives the holder thereof a right of action against the maker,

upon which he can obtain a personal judgment for the sum due thereon. So the execution and delivery of the mortgage creates a lien upon the property included in it to secure the payment of the sum mentioned in the note, and, in case of a default in such payment, a suit may be maintained upon this 'sealed instrument,' the mortgage, to enforce such lien for the purpose of paying the debt. Notwithstanding section 410 of the Code provides that in a suit 'to foreclose a lien, where there is also a personal obligation for the payment of the debt,' in addition to the decree of foreclosure and sale, 'a decree may be given against the person giving the same for the amount thereof,' yet I apprehend that either the remedy upon the personal obligation or the mortgage may be pursued for the collection of the debt without reference to the other. * * * These authorities go to show that the holder of a note and mortgage has two distinct remedies for the collection of his debt, and that they exist and may be pursued independently of each other."

The doctrine recognized and established by these cases has been embodied in our Civil Code, and is expressed by section 4696, Rev. Codes 1899, which declares: "A lien is not extinguished by the mere lapse of time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." Bearing in mind the proposition established by the foregoing authorities and embodied in our Civil Code by the section just quoted, that the debt and the mortgage give rise to distinct and independent remedies, either of which may be resorted to within the time limited by the statute for each so long as the obligation secured by the mortgage is not extinguished, it seems to us the question is one of easy solution.

The remedy on the personal obligation for the debt and that on the mortgage may, and often must, be pursued against different defendants and in divers jurisdictions. The remedy on the mortgage must be invoked in the jurisdiction where the property lies, and the time within which it must be commenced is governed by the law of that state. The only person or persons affected by that remedy are those who are interested in the property adversely to the mortgage. Those persons are the only necessary parties to such an action. It is against them that the cause of action for the foreclosure of the lien accrues. It is in their favor and for their protection that the statute operates. The acts or situation of the debtor who has no interest in the land clearly should not toll the

statute in an action to which he is not a necessary party. It is clear that it is only he in whose favor and for whose protection the statute operates who can waive or deprive himself of its benefits. Such is the reasoning of the courts of California, Washington, New York, Missouri and South Carolina, and we think those decisions are in accord with both law and common sense. Wood v. Goodfellow, 43 Cal. 185; Watt v. Wright, 66 Cal. 202, 5 Pac. 91; George v. Butler, 26 Wash. 456, 67 Pac. 263, 57 L. R. A. 396, 90 Am. St. Rep. 756; Denny v. Palmer, 26 Wash. 469, 67 Pac. 268, 90 Am. St. Rep. 766; Bush v. White, 85 Mo. 339; Arthur v. Screven (S. C.) 17 S. E. 640; Fowler v. Wood, 78 Hun, 304, 28 N. Y. Supp. 976, affirmed in 150 N. Y. 584, 44 N. E. 1124. See, also, Tate v. Hawkins, 81 Ky. 577, 50 Am. Rep. 181.

Our attention has been called to Prof. Pomeroy's definition of the term "cause of action" in sections 452 et seq. of Pomeroy's Code Remedies, where that author deals with the subject of joinder of causes of action under the Code. It is claimed that the definition there given by Prof. Pomeroy of the term "cause of action" is the only accurate definition of that term, and that it is universal in its application. However interesting a discussion of that subject may be from an academic standpoint, it is unnecessary to indulge in such a discussion in solving the problem presented in this case. The view we take of the question before us does not make it necessary to question or criticize Prof. Pomeroy's definition. It is not the cause of action that is barred by the statute of limitations; it is the remedy for the cause of action that is taken away. This is plainly recognized, and even well illustrated, by some of Prof. Pomeroy's illustrations in section 454 of the work referred to. A contract to convey lands, and defendant's breach, constitute a "cause of action." The single cause of action gives rise to two remedies or actions: First, an action for damages; second, a suit for specific performance. Now, suppose the former were barred in six years and the latter in ten years, it is plain to be seen that the plaintiff having such "cause of action" might be deprived of his action for damages by lapse of time and still maintain specific performance. In other words, the single cause of action gave rise to the right to two remedies or actions; one remedy is barred, but the other remains. The same is true of a mortgage. The nonpayment of the debt is a single cause of action in the sense that term is used by Prof. Pomeroy, but it gives rise to two remedies: First, an action

at law to recover the debt; and, second, a suit in equity to foreclose the mortgage. The former remedy is barred in six years, and the latter is not barred until ten years. It is not claimed by Prof. Pomeroy that the proposition stated by Judge Deady in Eubank v. Leveridge, supra, and the other cases cited in that connection, is not true; nor does the argument of Prof. Pomeroy in any way conflict with the reasoning and the proposition in that case. It may be true that the term "cause of action" is improperly used in this connection by the judges who wrote the opinions in all the cases cited above, but the idea those cases convey to a practical mind is that the non-payment of the debt gives rise to two distinct causes of action—an action on the debt, and a suit to foreclose. These cases also serve to show that the term "cause of action" is commonly used in a sense different from that attached to it by Prof. Pomeroy, the technical accuracy of which we do not care to question.

Section 5106, Rev. Codes 1899, directs that "words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears." And section 5151, Rev. Codes 1899, directs that "words and phrases are to be 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." Section 5147, Rev. Codes 1899, provides that "the provisions of the Code of Civil Procedure and all proceedings under it are to be liberally construed with a view to effect its objects and promote justice." We think that the term "cause of action" as used in the statute of limitations is used, not in the technical sense that Prof. Pomeroy uses it, but the statute uses it in the popular sense of the right to maintain the particular action against which the statute is invoked. It is a matter of common knowledge that such is the common meaning of the term, and that fact is well illustrated by the use of that term in the numerous decisions we have cited. This interpretation of the term serves to promote the object of the statute and further justice and conforms to the requirement "words should be construed in their ordinary sense." Attaching the ordinary meaning to the term "cause of action," it is clear that a cause of action accrues, within the meaning of the statute of limitations, when the holder thereof first obtains the right to re-

sort to that particular form of action for relief. Ganser v. Ganser, 83 Minn. 199, 86 N. W. 18, 85 Am. St. Rep. 461.

The question, then, is, against whom did the right of foreclosure accrue? There can be only one answer to that question. It accrued against the person or persons who were interested in the land adversely to the mortgage. These are the only necessary parties defendant. It is their right or title which it is the object of the suit to extinguish by means of a judicial sale, to the end that the proceeds of such sale may be applied to the satisfaction of the debt. Jones on Mortgages (6th Ed.) section 1394 et seq. It is entirely immaterial whether that person happens to be the mortgagor and debtor, or some third person holding title subject to the mortgage. In either case the obligation created by the mortgage that the debt shall be paid from a sale of the land in a judicial proceeding is equally binding on the fee owner. The mortgage was a contract with the owner of the fee to the effect that, if the debt was not paid at maturity, then the debt could be collected out of the land by an action against any person who might subsequently become the owner. It was not a contract that the mortgagor would pay, or that he would sell the land and pay, but it was a contract that the land should pay. It was an obligation which became fastened upon the land itself, and was enforceable against any person who might subsequently become the owner. Consequently the failure of the personal debtor to pay at maturity gave the mortgagee a right to maintain an action to enforce the obligation which the mortgage fastened on the land. It manifestly does not lie in his mouth to say that he was not bound to know against whom to commence the action. He had no right to assume that the mortgagor would forever continue to be the owner of the land. The mortgage gave him no assurance on that subject. The statute was notice to the mortgagee that every day's delay in enforcing the mortgage brought him so much nearer to the time when his remedy would be gone. In short, the instant the right to enforce the mortgage arose, that instant the mortgagee was put on inquiry to ascertain against whom the action to enforce it must be brought. It is incorrect to say that this reasoning foists a new contract on the mortgagee without his consent. As stated before, his contract in the mortgage was that the land should be answerable for the debt if the personal debtor failed to pay, but the mortgagor did not agree to continue his ownership of the land nor to personally sell the land. He merely

gave the mortgagee a remedy for the collection of the debt from the land by an action to be brought against whomsoever might be the owner when the remedy became available. And the mortgagee's neglect to avail himself of that remedy within the time fixed by the statute is a good defense to the action. Such is the plain language and manifest intent of the statute. Fowler v. Wood, supra. It is also just as clear that it is the intent of the statute that the remedy shall not be barred by the lapse of time in favor of a necessary party defendant who is not within the reach of process, so he can be personally served. Yet the Kansas cases lead to the result that, although the owner of the fee is a necessary party, yet his absence from the state does not toll the statute. Hogaboom v. Flower, 72 Pac. 547.

One more point remains to be noticed. Respondent contends that on the facts of this case it must be presumed that the amount of the mortgage debt was retained by West's grantee from the purchase price for the purpose of satisfying the mortgage, and that the land thereby became the primary fund for the payment of the debt: that the land stood charged with a trust in the hands of West's immediate and remote grantees, including this appellant, for the payment out of the land of the mortgage debt; that this trust was one for the protection of West as well as the plaintiff; and, inasmuch as West is still liable for the debt, and could not plead the statute as a defense in this state, therefore the plea of statute of limitations by this defendant ought not in equity to be permitted. To sustain this contention, the court would have to assume the power to ignore the statute of limitations because in its opinion equity requires it. There are only two things which could stay the running of the statute against this action: Absence of the defendant, or an acknowledgment or new promise within ten years, which new promise or acknowledgment can be proved only by a partial payment or written evidence. In this case neither of these are present, and the court has no power to recognize any exceptions to the statute other than those which the legislature has made. Teigen v. Drake, 13 N. D. 502, 101 N. W. 893. The plaintiff's cause of action accrued in November, 1888, against the Minnesota Thresher Company, and became barred in November, 1898, before this defendant acquired the land.

The judgment is reversed, and the district court is directed to enter judgment in favor of the appellant and against the respondent

for the dismissal of the action and for the taxable costs and disbursements.

YOUNG, J. (dissenting). I cannot agree to the conclusion which my associates have announced in this case. In my opinion it is not warranted by the language of section 5210, Rev. Codes 1899, which we all agree applies to this action, and does violence to well-settled legal principles. Their conclusion, as I view it, rests upon a misconstruction of the governing statute so radical in character that in effect it amounts to a judicial amendment. It may be true that the results which will follow in this case are desirable, and that the consequences which will follow the adoption of the theory of the majority in future cases, arising upon different facts, involving, as they necessarily will, its future elaboration and application, may be in furtherance of justice. This, however, even if true, a point which I cannot concede, does not touch the question, for the question of policy of limitations of actions and the extent of the restrictions to be placed upon the right to invoke the various remedies belongs to the legislature and not to the courts, and I take it that the courts are only acting within the limits of their authority and duty when they apply the statutes as they are written without regard to motives of expediency or policy. All attempts to depart from this rule have properly been received with strong disapprobation. The courts do not now, unless compelled by the force of former decisions, give a strained construction to evade the effect of these statutes. McCluny v. Silliman, 3 Pet. (U. S.) 270, 7 L. Ed. 676. It has been well said that "this is not the epoch when * * * a statute of limitations * * * should be frittered away by judicial refinements and subtle exceptions that never entered into the contemplation of its enlightened framers, and it has for years been a subject of avowed and sincere regret with the most distinguished judges and eminent jurists of the age that any constructive innovations were ever ingrafted upon acts of limitation." Mr. Justice Livingstone, of the Supreme Court of the United States, said: "It is as much a duty to give effect to laws of this description, with which the courts, however, take great liberties, as to any other which the legislature may be disposed to pass. When the will of the legislature is clearly expressed, it ought to be followed without regard to consequences, and a construction derived from a consideration of its reason and spirit should never be resorted to but where the expressions are so ambiguous as to render such mode of

interpretation unavoidable." Fisher v. Harnden, 1 Paine, 61, Fed. Cas. No. 4819; Angell on Limitations, section 23. Referring to this subject in McIver v. Ragan, 2 Wheat. 25, 4 L. Ed. 175, Chief Justice Marshall said: "Wherever the situation of a party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception, and it would be going far for this court to add to these exceptions." Likewise Chancellor Kent, in Demarest v. Wynkoop, 3 Johns. Ch. 146, 8 Am. Dec. 467, maintained that "it would be not only impolitic, but contrary to established rule, both in law and equity, to depart from the plain meaning and literal expression of these statutes." Angell on Limitations, section 485, after referring to the authorities, states that "it obviously appears that statutes of limitations are to be strictly construed by courts of justice, and that, although there may have been some instances in which this rule has been departed from, owing to conceptions of inherent equity, they have altogether failed in establishing a contrary precedent."

With this rule of construction for my guidance, I now turn to the merits. The action is to foreclose a real estate mortgage securing the mortgagor's note, which matured November 1, 1888. The mortgagor has been absent from the territory and state since 1887. In that year, and before the note was due, he conveyed the mortgaged premises, subject to the plaintiff's mortgage. In 1901 it was conveyed to defendant, likewise subject to the plaintiff's mortgage. This action was commenced in 1903. The cause of action accrued on November 1, 1888, when the mortgagor made default in meeting his obligation. His default gave the party to whom the obligation was due two remedies for its enforcement: (1) An action at law to recover from the personal assets of the debtor; or (2) an action in equity to enforce payment by a sale of the mortgaged premises, and, through a deficiency judgment, against the debtor, if the land proved insufficient to discharge the obligation. Section 5865, Rev. Codes 1899. The legislature has placed different and definite periods of limitation upon these remedies. The action at law is limited to six years, the foreclosure action is limited to ten years, from the time when the cause of action as to which the remedy is sought accrued. The legislature has also provided for an extension of these periods. The defendant, a foreign corporation, whose title was received subject to the plaintiff's mortgage, and but two years

prior to the commencement of this action, pleads, as its sole defense, the statute of limitations. It will be noted that sufficient time has elapsed since the cause of action accrued against the mortgagor, which was November 1, 1888, to bar both remedies, unless it has been extended by the mortgagor's absence. If the statute was tolled by his absence the action is not barred. The case turns entirely upon section 5210, Rev. Codes 1899, which, so far as material, reads as follows: "If, when the cause of action shall accrue against any person, he shall be out of the state, such action may be commenced within the terms herein respectively limited after the return of such person into the state. * * * " Some courts have treated foreclosure actions as in rem, and the cause of action as one against the land. From this assumption the conclusion is logical and necessary that the mortgagor's absence does not extend the period of foreclosure; for it is only when the cause of action is against a person, and the person against whom it accrues is absent, that the statute declares that the period is extended. The cases holding that the action is in rem represent the minority view. Anderson v. Baxter, 4 Ore. 105, and the decision of Judge Deady, of the federal district court, in Eubanks v. Leveridge, 4 Sawy. 474, Fed. Cas. No. 4544, an Oregon case in which he followed the conclusion in the case just cited, and Peters v. Dunnels, 5 Neb. 460, are of this class. The decided weight of authority is the other way. As stated in the majority opinion, "we are agreed that this action is not in rem," and "we are of the opinion that the absence from the state of a person against whom the cause of action accrued stays the running of the statute of limitations against an action to foreclose a mortgage, the same as in any other action in personam." In other words, section 5210, supra, which extends the time for commencing an action when the person against whom the cause of action accrues is absent from the state applies to this action.

It is apparent, then, that the decisive question is this, against whom did the cause of action in this case accrue? for it is the fact of the absence of the person against whom "the cause of action shall accrue" which this statute declares shall extend the period for commencing the action. It is in answering this question that I am compelled to part company with my associates. My answer is that it is the absence of the obligor, Fred West, the person who executed the note and mortgage, the person whose obligation this action is brought to enforce, and the only person who, upon this

record, owes any obligation, contractual or otherwise, to the plaintiff. In my view, the question involves no difficulty, and, if it were not for the views of my associates, I would not consider it fairly debatable. There is no controversy as to the facts, and there is no ambiguity in the language of the statute, and no obscurity or uncertainty as to the meaning of the phrase "cause of action." The statute makes the general declaration applicable to all actions that the absence of the person against whom the "cause of action shall accrue" shall extend the period for commencing the action. This declaration, applied in the light of the legal meaning of the phrase "cause of action"—and I do not understand that it has any other meaning—will designate with certainty in every action the persons whose absence tolls the statute, i. e., the debtor or person whose obligation is being enforced. The phrase "cause of action" was coined early in the history of English jurisprudence. It is a phrase peculiar to the language of the law and the courts. It was employed in the acts of parliament from an early day (see statute 21, James I, c. 16, entitled "An act for the limitation of action," etc.), and it has been a familiar phrase in the statutes of this country from its earliest history. While it is true the language of the courts and text-writers in defining it has not always been uniform, yet it may be safely stated that in every instance in which its elements were under discussion it has been held to include as one of its essential and constituent elements an obligation, or legal duty, an obligation or duty resting upon the person against whom the cause of action exists. The cause of action accrues in favor of the person to whom the obligation or duty is due, and it accrues against the person who owes the obligation or duty, and arises upon the latter's default. The following analysis by Prof. Pomeroy in his Code Remedies, section 453, has been generally approved by the courts and text-writers, and, so far as I know, as to its essential elements it has never been criticized: "Every judicial action must involve the following elements: A primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant, which consists in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting upon the defendant, springing from this delict; and finally, the remedy or relief itself. Every action, however complicated or however simple, must contain these essential elements. Of these elements, the primary

right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term, and as it is used in the Codes of the several states. They are the legal cause or foundation whence the right of action springs." Section 459. "The different reliefs which the plaintiff seeks to obtain do not constitute different causes of action." Other courts and text-writers have defined it as follows: Veeder v. Baker, 83 N. Y. 161. "It may be said to be composed of the right of the plaintiff, and the obligation, duty or wrong of the defendant, and these combined, it is sufficiently accurate to say, constitute the cause of action." Wildman v. Wildman, 70 Conn. 700, 41 Atl. 1; Goodrich v. Alfred, 72 Conn. 260, 43 Atl. 1041. "Stated in brief, a cause of action may be said to consist of a right belonging to the plaintiff, and some wrong or omission done by the defendant by which that right has been violated." Kennerty v. The E. P. Co., 21 S. C. 226, 53 Am. Rep. 671. "A cause of action, defined in a few words, is a primary right of one, either legal or equitable, invaded by another." Dicey on Parties to Actions, p. 8. "A cause of action; i. e., a right on the part of one person, combined with a violation of or infringement upon such right by another." Maxwell on Code Pleading, 97. "(1) A primary right of plaintiff, and a wrong done by defendant in respect to such right." Phillips on Code Pleading, section 32. "A primary right and its corresponding duties, and (2) the infringement of this right by a party owing this duty." See also sections 29 to 33, inclusive. 1 Estee's Pleadings, section 128. "A right on the part of one person, the plaintiff, combined with a violation or infringement of that right by another person, the defendant." 2 Words and Phrases, 1115. "A cause of action may be said to consist of the right belonging to the plaintiff and some wrongful act or omission done by the defendant by which that right has been violated." Note numerous cases cited. Emory v. Hazard Powder Co., 22 S. C. 476, 53 Am. Rep. 730, 732. "Causes of action are very often confounded with remedies, and, being regarded as synonymous, the rules established with reference to the one are sometimes supposed to be applicable to the other. This, however, is a mistaken view of the subject, as a brief investigation will show. A cause of action may be defined in general terms to be a legal right, invaded without justification or sufficient excuse. Upon such invasion a cause of action arises, which entitles the party injured to some relief by the application of such remedies as the laws may afford. But the

cause of action and the remedy sought are entirely different matters. The one precedes, and, it is true, gives rise to the other, but they are separate and distinct from each other, and are governed by different rules and principles." See, also, Andrews' Am. Law, sections 1063, 1064; Armes Co. v. Railway Co., 7 Yale Law Review, 245, also found on page 1153, Appendix Andrews' Am. Law; Frost v. Witter (Cal.) 64 Pac. 705, 84 Am. St. Rep. 53; Fields v. Daisy Gold Mining Co. (Utah) 73 Pac. 521; Bank v. Dickinson, 6 N. D. 222, 235, 239, 69 N. W. 455, 49 L. R. A. 285; Von Campe v. City of Chicago (Ill. Sup.) 29 N. E. 892. It is manifest that the cause of action which gave rise to the remedy now being invoked accrued against Webb, the debtor and mortgagor, and against no one else. It was his debt, and it is secured by his mortgage. He alone executed the mortgage, and it was upon his own property. No one else has agreed to pay the debt; no one else signed the mortgage; no one else has assumed any contractual relations with the plaintiff either as to the note or mortgage. It was his default, and his alone, which gave rise to the plaintiff's cause of action. The several grantees took their title with constructive notice of the mortgage, and expressly subject to it. They did not obligate themselves to pay the debt. They therefore owed the plaintiff no duty. They have made no default, and as between them and the plaintiff there has been no concurrence of right, duty and default which would give rise to a cause of action against them. Had they assumed the mortgage and agreed to pay the debt, or had they given the mortgage upon their own property to secure West's debt, a cause of action would have arisen against them in plaintiff's favor, and the statute would, as to that cause of action, run in their favor as to all remedies to enforce it. Daniels v. Johnson, 129 Cal. 419, 61 Pac. 1107, 79 Am. St. Rep. 123; Farmers' National Bank v. Gates, 33 Ore. 388, 54 Pac. 205, 72 Am. St. Rep. 724; Fowler v. Wood, 78 Hun (N. Y.) 304, 28 N. Y. Supp. 976. But we have no such case here. The grantees have assumed no liability, and have made no default. The remedy invoked against the defendant is upon the cause of action against the mortgagor and debtor upon his debt, and his mortgage, and rests upon his default, and not upon any default of his grantee. The "cause of action" accrued against him. He has been absent from the state. The statute declares that in that event the time for commencing the action is extended. This action was therefore brought within the statutory

period. This conclusion, to my mind, cannot be avoided if the statute be given effect. The majority opinion does not meet the question with directness, if at all; and I am therefore in some doubt as to the exact ground upon which they really rest their conclusion. If they mean that "the cause of action" does in fact accrue against a grantee who takes expressly subject to the mortgage, I disagree with them as to the fact. If they mean that the period of time for commencing an action depends upon the presence or absence of "parties," I answer that the statute does not so provide, for it only extends the period upon the absence of the obligor or obligors—the person or persons against whom "the cause of action accrues." In some instances the necessary party or parties defendant may be the same person or persons whose obligation is being enforced. In this case that is not true, and this is frequently the case in equity actions, especially in foreclosure actions in which subsequent purchasers and incumbrancers are made defendants. So far as this conclusion is based upon the ground that the phrase "cause of action" has a different and "popular" meaning, and that the "popular" meaning should be ascribed to it so that the statute may include "necessary parties" instead of merely obligors, it rests, as has been previously pointed out, upon an unwarranted assumption. This is the first instance in which this statute has been before this court. Neither this court nor any other court, so far as I can learn, has ever held that the phrase "cause of action" as used in this statute has any other than its legal meaning, and I cannot assent to its amendment by judicial construction. Neither do I agree that courts can avoid giving effect to a statute which is written in plain terms upon the ground that it would be in "furtherance of justice" to do so. The legislature having declared the law, it is our duty to apply it as it is written.

The majority hold that the action to foreclose the mortgage is barred. In defense of this conclusion they state, and it is a correct statement, for the statute so provides, "that the remedy against the debtor on his personal liability may be barred by lapse of time and yet the remedy upon the mortgage remain available." Following this, they state that "it is likewise apparent that the converse is true—the remedy for the enforcement of the mortgage may be barred though the action at law against the debtor is still maintainable." The converse is not true in this state, for the legislature has fixed a longer period for commencing the foreclosure

action than for the action at law. The statement is specious, but unsound. If the legislature had fixed the same period for both actions, the bar would fall as to both at the same time. If it had reversed the periods and fixed six years for the foreclosure action and ten years for the action at law, the remedy by foreclosure would of course be lost before the action at law was barred. But this is not our statute. On the contrary, it preserves the remedy by foreclosure for ten years and the remedy at law for only six years. In short, the statute itself preserves the remedy by foreclosure after the action at law is barred, which is directly contrary to the conclusions reached by my associates. It is true, a number of courts have held that the absence of the mortgagor from the state will not extend the period for commencing a foreclosure action as against a resident grantee, but I am free to confess that I am unable to find in the opinions in these cases any satisfactory reason for that conclusion. They will be found to rest either upon an erroneous assumption of fact, or upon the courts' views as to what the law ought to be. The reasons advanced are noted for their lack of harmony, and it is evident that they do not appeal to my associates, for they apparently are unwilling to rest their conclusion upon the grounds stated by any court which reached a like result. It will be found upon an examination of these cases that the grounds stated by the majority in this case are in some respects without precedent. This is particularly true as to the new meaning ascribed to the phrase "cause of action."

In the following cases a statute like our own was applied to foreclosure actions, and the question under consideration was directly involved. In Waterson v. Kirkwood, 17 Kan. 9, the grantees of one Pearsoll, the absent mortgagor, pleaded the statute of limitations. Their plea was overruled. The court said: "They have merely succeeded to the rights of Pearsoll; they stand in his shoes; they have nothing more than he at any time had the right to transfer them. The stream has not and cannot rise higher than the fountain, nor can they, by the purchase of Pearsoll's interest in the land, cast additional burdens and inconvenience upon the holder of the mortgage. And therefore, as Pearsoll had never obtained or had the right to plead the statute of limitations, the grantees * * * have no such right." See, also, opinion of Judge Brewer in Schmucker v. Seibert, 18 Kan. 104, 26 Am. Rep. 765. In Clinton County v. Cox, 37 Iowa, 570, the plea of the resident grantee of one Cox,

the absent mortgagor, was overruled, against the contention which is made in this case—that because the action could have been brought before the ten-year period expired, notwithstanding the mortgagor's absence, the action was therefore barred—with the cogent statement that "the law does not so provide." This conclusion was again announced in Robertson v. Stuhlmiller, 93 Iowa, 326, 61 N. W. 986, upon a like state of facts. The court said: "The obligation to Stuhlmiller [the mortgagor] is valid, and the lien of the mortgage is still in force. * * * The interest of the grantee is junior to the lien of the mortgage, * * * because the title he acquired is subject to the mortgage." These decisions were rendered by a united court, and this was true in Leeds Lumber Co. v. Haworth, 98 Iowa, 463, 67 N. W. 383, 60 Am. St. Rep. 199, in which the same court held that "an action to foreclose a mechanic's lien which was not barred by limitation against the principal debtor because of his removal from the state before the statute had fully run was not barred as to other lienors who have been residents of the state during the entire period." The question also arose in Minnesota in Whaley v. Eldridge, 24 Minn. 358. It was contended by a subsequent grantee that the statute had run notwithstanding the mortgagor's absence from the state, upon the theory that the action was in rem, and that the statutory exception for absence was not applicable; citing in support of this view Anderson v. Baxter, 4 Ore. 105, and Eubanks v. Leveridge, 4 Sawy. 274, Fed. Cas. No. 4544. This the court denied, and held that the time had been extended. It is true, it appears in the statement of facts prefixed to the opinion, that the mortgagor's immediate grantee was also absent. That fact, however, was not adverted to in the briefs of counsel or in the opinion of the court, and plainly was not considered of any legal significance. As to the effect accorded to this decision, see Bush v. White, 85 Mo. 361, and 2 Pingree on Mortgages, section 1572. The courts of Illinois, applying a statute like our own, have held against the conclusions of my associates in a series of cases. In Banking Association v. Bank, 157 Ill. 524-536, 41 N. E. 919, it was argued on behalf of one who held under a sheriff's deed that, inasmuch as the mortgage might have been foreclosed notwithstanding the mortgagor's absence, no reason remained why the statutory exception for absence should apply or the time of the mortgagor's absence be deducted. This was answered in the following language: "As the case comes within the express language

of the exception, we cannot assume the province of the legislature and say that the exceptions are not to apply." Again, in Richey v. Sinclair, 167 Ill. 184, 47 N. E. 364, it was held in a foreclosure action that "the time of the mortgagor's absence from the state after the right of action accrued on the debt cannot be reckoned as a part of the time limited for the commencement of the foreclosure proceedings against his grantee, though he is not a party to the suit;" basing its conclusion upon a previous case, Emory v. Keighan, 94 Ill. 543, in which it had held, in harmony with the almost unanimous voice of authority, that "the rights of one holding under a mortgage of real estate may be affected by the fact that the payment of interest or payment of a part of the mortgage debt by the mortgagor after maturity and before the statute of limitations had run, though he may not be a party to either;" and stating that, "upon the same principle and for a like reason, the grantee of the mortgagor will be affected by the fact that the mortgagor had gone out of the state and thus arrested the running of the statute of limitations. The holding has been uniform in this state." This construction of the statute was also followed in Falwell v. Hening, 78 Tex. 278, 14 S. W. 613, in which it was held that the absence from the state of the maker of a vendor's lien suspends the statute as well against the lien as against the indebtedness, and that a purchaser from the vendee or mortgagor could not avoid the lien by limitation while the debt and lien are valid against the original vendee. See, also, Jones v. Foster, 175 Ill. 459, 51 N. E. 862; Emory v. Keighan, 94 Ill. 543; Von Campe v. Chicago, 140 Ill. 361, 370, 29 N. E. 892, is to the same effect, and more to the point relied upon by my associates, in that it holds that "grantees are not the persons against whom the cause of action accrues within the meaning of section 18" (our section 5210, supra). Ewell v. Daggs, 108 U. S. 143, 2 Sup. Ct. 408, 28 L. Ed. 682, is in point upon the principle upon which the foregoing case rests, aside from their adherence to the governing statute. That was a foreclosure action, wherein a grantee of the mortgagor, as in this action, relied upon the statute of limitations. James B. Ewell and his wife gave a note to Daggs, secured by a mortgage upon land which in equity belonged to George W. Ewell, a brother. Later, James B. Ewell transferred the land back to his brother, George, the latter having no knowledge of the existence of the mortgage. George pleaded the statute of limitations. Mr. Justice Matthews, speak-

ing for the court, said: "There is no force in the suggestion that, although the defense of the statute of limitations would not avail Jas. B. Ewell, * * * it, nevertheless, is a protection to Geo. W. Ewell, because * * * the suit now pending was not brought till after the time limited for an action to recover the debt. For the present suit is not to recover the debt, nor is it a suit against Geo. B. Ewell. He is a party defendant, because he has an interest by a subsequent conveyance in the lands sought to be sold under the mortgage. He has an equity of redemption, which entitles him to prevent a foreclosure and sale by payment of the mortgage debt; but the debt he has to pay is not his own, but that of Jas. B. Ewell. If he can show that debt no longer exists because it has been barred by the statute of limitations, he is entitled to do so; but he must do it by showing that it is barred as between the parties to it. If not, the land is still subject to the pledge, because the condition has not been performed. It is not to the purpose for the appellant to show that he owes the debt no longer, for in fact he never owed it at all; but his land is subject to its payment as long as it exists as a debt against the mortgagor, for that was its condition when his title accrued." Mr. Justice Washington in Hughes v. Edwards, 9 Wheat. (U. S.) 489, 6 L. Ed. 142, sets forth the legal relation existing between a purchaser and the holder of a prior mortgage as to this question in the following language: "A purchaser, with notice, can be in no better situation than the person from whom he derives the title, and is bound by the same equity which would affect his rights. The mortgagor, after forfeiture, has no title at law, and none in equity, but to redeem upon the terms of paying the debt and interest. His conveyance to a purchaser with notice passes nothing but an equity of redemption, and the latter can, no more than the mortgagor, assert that equity against the mortgagee without paying the debt, or showing that it has been paid or released, or that there are circumstances in the case sufficient to warrant the presumption of those facts, or one of them." See also, upon the same principle, it was held in Murdock v. Waterman, 145 N. Y. 55, 39 N. E. 829, 27 L. R. A. 418, that "a partial payment by a mortgagor of the debt, even after he had conveyed the premises mortgaged, would continue the lien of the mortgage. * * * The mortgage is an incident to the debt, and, when payments are made by the debtor, the mortgagee is not called upon to inquire how the mortgagor has dealt with

the equity of redemption. If the mortgage is recorded, the purchaser has constructive notice of its existence, and a dealing with the debt between the debtor and creditor in the usual course is to be expected. The mortgagors, until at least the debt is barred, represent all persons interested in the land." This is indeed so well settled that it is now seldom questioned. See N. Y. Life Ins. Co. v. Covert, 6 Abb. Prac. (N. S.) 154; Kendall v. Tracey, 64 Vt. 522, 24 Atl. 1118; Sanger v. Nightingale, 122 U. S. 176, 7 Sup. Ct. 1109, 30 L. Ed. 1106; and Hanchett v. Blair, 100 Fed. 817, 41 C. C. A. 76, and cases cited on page 825 of 100 U. S., page 84 of 41 C. C. A. "The general if not universal rule is that a partial payment or an acknowledgment of a debt which would prevent the statute from running against it will also prevent the statute from running against the remedy on the security." Carson v. Cochran, 52 Minn. 67, 53 N. W. 1130. See, also, Wiltsee on Mortgages, section 65; 2 Jones on Mortgages, section 1214b, 1201, 1202; 2 Pingree on Mortgages, sections 1570, 1572.

I will now refer to the cases cited in support of the conclusion that the absence of the mortgagor does not toll the statute. We are agreed that Anderson v. Baxter, 4 Ore. 105, and Peters v. Dunnells, 5 Neb. 460, which hold that the action is in rem, are unsound, and furnish no precedent for the construction or application of this statute. Tate v. Hawkins, 81 Ky. 577, 50 Am. Rep. 181, does not touch the question of absence, or the effect to be given to the statute involved in this case. Fowler v. Wood, 78 Hun. 304, 28 N. Y. Supp. 976, affirmed without opinion in 150 N. Y. 584, 44 N. E. 1124, is in its facts wholly unlike the case at bar. It was not a case like this, in which the grantee of an absent mortgagor pleads the statute. The mortgagor had mortgaged her own property to secure the debt of another. The plea of the statute was interposed by the mortgagor, and she had resided in the state for the full period. The court held that the absence of the maker of the note, to secure which she had mortgaged her individual property, did not toll the statute as to the action to foreclose her mortgage, and upon the ground that she was the obligor and that it was her obligation which was being enforced, a position which is in entire accord with the cases previously cited, and in my view, a correct application of the statute. In Bush v. White, 85 Mo. 339, an ejectment action, the court apparently was of the opinion that the mortgagor's absence would toll the statute if he still held the title, but held that his

absence would not toll the statute after he had parted with his title. This conclusion rests upon the following statement: "If the mortgagor's absence happens after he has parted with his estate, the reasons for deducting his absence, so far as any proceeding against the land is concerned, are wanting. He has ceased to be a necessary party to such proceeding as it rests in the ordinary process of suits. His assigns and the owner of the land is a necessary party to the ordinary process of law for the purpose of foreclosing the mortgage, and the debtor is not a necessary party." The reason upon which this case rests is directly opposed to that stated in Lackland v. Smith, 5 Mo. App. 153, an action in equity against one Garesche, the resident holder of the legal title upon a cause of action against Smith. It was argued that the action might have been commenced at any time by personal service on Garesche and publication against Smith. The court said: "It seems to be a sufficient answer to this objection to say that a cause of action accrued against Smith, and that the statute is express that in every such case the time of absence from the state shall be counted out. Wag. St. p. 919, section 16. The fact that one has left property in the state, subject to attachment, does not keep the statute running. Hancock v. Heugh, 1 Mo. 678. And, because plaintiff might have brought suit by publication, it does not follow that he was guilty of laches in not doing so. Fisher v. Fisher, 43 Miss. 212. Process of law could not be served on Smith, and, whilst this was so, the statute was arrested as to any cause of action accruing against him." In Arthur v. Screven (S. C.) 17 S. E. 640, a foreclosure action, the grantee of a mortgagor stood upon two defenses: (1) That he was an innocent purchaser; and (2) upon the statute of limitations. The court, after sustaining the first defense, also held that the plea of the statute was good, stating that "the provisions of the section relating to absence relate only to absentees, and have no reference whatever to any person who may be liable to a suit even upon the same cause of action accruing at the same time; otherwise, if two persons should sign a joint and several promissory note, and one of them should leave the state and never return, the other could never plead the statute of limitations to an action on their breach of contract evidenced by the note." In Wood v. Goodfellow, 43 Cal. 185, two of the three members of which that court was then composed, the chief justice dissenting, held, upon a plea interposed by the resident grantee, that the mortgagor's absence did not pre-

vent the running of the statute. The ground of their decision is contained in the following quotation: "When the mortgagor has parted with his title to the property and ceases to have any interest therein, those who have succeeded to his rights stand in the same relation to the mortgage as if they had originally made the mortgage on their own property to secure the debt of the mortgagor. The mortgagor has no interest in the property, nor are they under obligation to pay his debt. Their property, however, is bound as collateral security for its payment under the mortgage, which is a contract in writing by which the property is pledged as security for the debt." The court said that the argument that the grantee's absence extended the period would be impregnable, "if it were conceded that the grantee who has succeeded to and now holds the equity of redemption of the mortgagor occupied precisely his status under the statute." In reaching its conclusion, the majority assumed that the relation of the grantee to the mortgagee was the same as one who mortgages his own property to secure the debt of another, and, in fact, used that illustration to elucidate and fortify its conclusions. This case was presented to the Supreme Court of Kansas in Waterson v. Kirkwood, 17 Kan. 9, when the question was new in that state, and that court declared that this "decision is not good law in Kansas," and, in my view, it should not be held good law in North Dakota. In George v. Butler, 26 Wash. 456, 67 Pac. 263, 57 L. R. A. 396, 90 Am. St. Rep. 756, the Supreme Court of that state adopted the doctrine of Wood v. Goodfellow, supra, from which it quoted at length, the case which was repudiated by the Supreme Court of Kansas. In Denny v. Palmer, 26 Wash. 469, 67 Pac. 268, 90 Am. St. Rep. 766, the court restricted the scope of the decision just cited to some extent by holding that notice of some kind to the mortgagee of the transfer is necessary, and denied the right of a resident grantee to plead the statute, upon the ground that he was estopped by his failure to record his deed. The court said: "It appears that respondent did not know that he had a cause of action against appellant prior to the time the deed was recorded. He knew he held a cause of action against the mortgagor as to which the statute of limitations had not run because of the mortgagor's absence from the state, but he could not, under any principle of reason and justice, be chargeable with notice that appellant had any interest in the land, unless appellant's deed had been of record, or some actual

knowledge of its existence been brought home to him or his assigns." In the later case of De Voe v. Rundle, 33 Wash. 604, 611, 74 Pac. 836, that court evidenced some misgivings as to the correctness of the rule it had adopted, and, after conceding that a conflict of authority existed, stated that, inasmuch as it had previously adopted the California rule, it should be followed, "thus preserving the harmonious application of the principle heretofore adopted in a former decision." That the conclusion in each of the cases referred to is grounded either upon error of law or of fact is manifest. The Missouri case rests not upon statute, but upon the ground of expediency and the court's individual reasons why it should not apply to grantees; the South Carolina case to some extent rests upon the same reason, but also upon the erroneous assumption that the grantee and mortgagor are in legal effect joint obligors. The California court, followed by the Washington court, fell into substantially the same error in assuming that the grantee's legal relation to the mortgage is the same as that of one who mortgages his own property to secure the debt of another. If the assumption in the cases last referred to were correct, the conclusion would not be subject to criticism, for in that event the grantee, as an obligor, would be, within the statute, a person against whom "the cause of action accrued." That "the cause of action" is not against him, and that the obligation being enforced is not his, but that of the mortgagor, has already been pointed out. The errors in these cases should not be perpetuated by our approval, and I cannot assent to an alteration of the meaning of the statute to cure them. Neither can I assent to the doctrine laid down by my associates as to the duties of mortgagees. This doctrine requires that mortgagees shall know, and at their peril must know, at all times after the mortgagor's default, and during the entire ten years in which the right to foreclose is optional, what persons, if any, have acquired subsequent and subordinate interests in the mortgaged premises by purchase or otherwise, and whether such persons, or any of them, are residing within the state or are absent therefrom, and, if absent, the date of departure of each and the date of their return. Under the rule laid down by the majority, a mortgagee whose mortgage is duly recorded may not rely upon the notice of the character and extent of his interest which is imparted under the recording act to those who subsequently acquire interests in the mortgaged premises as a full performance of his duty.

This doctrine, in my opinion, nullifies the effect of the recording laws; i. e., that an instrument duly recorded imparts notice to subsequent purchasers and incumbrancers—that such persons are bound to know of prior transfers—and reverses the obligation in this: That it requires that prior incumbrancers shall be bound to a knowledge of subsequent transfers. It not only exacts instant knowledge of the fact of subsequent transfers, but also of the names and places of residence of the persons acquiring such subsequent interests—persons with whom the mortgagee has no contractual relations, who owe him no obligation, and of whose very existence he may be, and often is, entirely ignorant. I know of no legal principle or statute upon which this rule may rest. As an arbitrary rule of duty, it will in many cases require the impossible. If it is meant to bind mortgagees to this knowledge only when the subsequent conveyances are placed of record, it is clear that the rule is unsound, for: (1) "The registration of a deed given by a mortgagor subsequent to the mortgage is no notice of such conveyance to the mortgagee. The latter is under no obligation to search for such conveyance." N. Y. Life Ins. Co. v. Covert (N. Y.) 6 Abb. Prac. (N. S.) 154, 171; Webb on Record Title, sections 4, 152. And (2) even if the recording of a subsequent transfer could be said to impart notice to the holders of prior transfers which are of record (a point which will not be admitted), it cannot be claimed that it imparts continuous notice of the place of residence, and changes in places of residence, of the holders of such subsequent interests. (Since the opinion in this case was filed, the majority of the court have held, in the companion case of Paine v. Dodds, 103 N. W. 931, that the statute will run only from the date of the filing of the deed for record.)

It is well settled, I think, that the mortgagee has done his full duty when he records his mortgage, and in this manner announces to all persons who may subsequently deal with the premises the extent of his interest. He may then remain silent. Dick v. Balch, 8 Pet. (U. S.) 30, 8 L. Ed. 856. And no negligence can be imputed to him for so doing. No restriction is placed upon his right to foreclose so long as he exercises it within the statutory period, and he is not chargeable with negligence because he elects to delay the enforcement of his security. Heretofore it has not been counted a fault for a creditor to indulge his debtor, but rather an

act of grace and favor, to be met with commendation rather than punishment.

It is not necessary to make the subsequent grantees or lienholders parties to the action, unless at the time the action is commenced (and that may always be just prior to the expiration of the ten-year period) their conveyances and liens are then of record. He is not required to consult the records until that time, and then only for the purpose of ascertaining the names of the persons who have acquired interests subsequent to his mortgage, in order to join them as defendants. Section 5231, Rev. Codes, reads as follows: "In an action to foreclose a mortgage or other lien upon real property, no person holding a conveyance from or under the mortgagor of the property mortgaged or other owner thereof, or having a lien upon such property, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action; and the judgment therein rendered and the proceedings therein had are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action."

The rule laid down by the majority establishes different periods of limitation in the same action, and upon the plea of those who are merely parties to the action, which will be determined by the fact of their presence in or absence from the state and the length of their absence, instead of one period fixed by the presence or absence of the person whose obligation is being enforced and against whom the cause of action accures; and, if I am correct in my views, it announces a new rule of property, the effect of which is to transfer interests and rights in real estate which have become vested. I cannot, therefore, consent to the adoption of this doctrine without protest.

From my standpoint, the question as to the right of a foreign corporation to plead the statute is not vital, and I therefore express no opinion upon that point.

The judgment of the trial court, in my view, is proper, and should be affirmed.

(103 N. W. 915.)

THE COLONIAL & UNITED STATES MORTGAGE COMPANY, LIMITED, v. ALEX. D. FLEMINGTON AND GEORGE SCHALLER.

Opinion filed May 1, 1905.

Statute of Limitations in Mortgage Foreclosure — Suspension of Statute.

1. An action to foreclose a mortgage is an action in personam, and comes within the operation of section 5210, Rev. Codes 1899, which excepts from the period limited for commencing an action the time during which the person against whom the cause of action accrued is absent from the state.

Foreclosure of Mortgage May Be Barred Although the Mortgage Debt Is Not Outlawed.

2. An action to foreclose a mortgage on real property is a remedy distinct from the remedies by which the creditor may enforce the personal obligation for the debt secured by the mortgage, and may become barred by the statute of limitations, even though the debt is not outlawed.

Mortgage Foreclosure — Failure to Appoint Administrator Does Not Bar Deceased Mortgagor's Heirs from Pleading Statute of Limitations.

3. The failure to appoint an administrator of the estate of the deceased mortgagor and debtor does not prevent the statute of limitations from running in favor of the mortgagor's heirs against an action to foreclose the mortgage.

Mortgagor's Grantee May Plead Statute of Limitation Although the Mortgage Debt Is Neither Barred Nor Discharged.

4. Although the property passed to the defendant's grantor subject to the mortgage, and was in equity the primary fund for the payment of the mortgage debt, that doctrine cannot be extended so as to prevent the defendant from availing himself of the statute of limitations as a defense against an action to foreclose the mortgage, even though the debt is neither discharged nor barred as against the debtor.

Mortgage Foreclosure — Statute of Limitations Barred as to Portion of Land.

5. The mortgagor died intestate, seized of the mortgaged land, before the mortgaged debt was due, and left four heirs, only one of whom was a resident of the state. No administrator was ever appointed. Nearly fourteen years after the debt was due the heirs conveyed the land to defendant. *Held*, that an action to foreclose the mortgage was barred as to one-fourth of the land, but was not barred as to the remaining three-fourths.

Young, J., dissenting.

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

Action by the Colonial & United States Mortgage Company, Limited, against Alex. D. Flemington and George Schaller. Judgment for defendants, and plaintiff appeals.

Reversed.

Newman, Spalding & Stambaugh, for appellant.

If mortgagor dies before the cause of action accrues, the statute of limitations will not begin to run against the debt before the appointment of an administrator, as, until that time, there is no one to be sued and the cause of action cannot accrue. Etter v. Finn, 12 Ark. 632; Hobart v. Turnpike Co., 15 Conn. 145; Andrews v. R. R. Co., 34 Conn. 57; Conyers v. Kennon, 1 Ga. 379; Sherman v. Western, etc., Co., 24 Iowa, 515; Toby v. Allen, 3 Kan. 399; Hull v. Deatley, 7 Bush. (Ky.) 687; Fishwick v. Sewell, 4 Harr. & J. 393; Ruff v. Bull, 7 Harr. & J. 14, 16 Am. Dec. 290; Sewell v. Valentine, 6 Pick. 276; Wood v. Ford, 29 Miss. 57; Polk v. Allen, 19 Mo. 467; Davis v. Garr, 6 N. Y. 124, 55 Am. Dec. 387; Sanford v. Sanford, 62 N. Y. 555; Marsteller v. Marsteller, 93 Pa. St. 350; Pittsburg R. R. Co. v. Hein, 25 O. St. 629; Swan v. Lindsay, 70 Ala. 507; Brenner v. Quick, 88 Ind. 546; City of Fort Wayne v. Hamilton, 132 Ind. 487, 32 N. E. 324, 32 Am. St. Rep. 263. In this state, at least, not until one year after the issuing of letters. Section 5212, Rev. Codes 1899.

No obligation rests on mortgagee to procure appointment of an administrator. Benjamin v. DeGroat, 1 Denio, 151; Davis v. Garr, 6 N. Y. 124, 55 Am. Dec. 387.

No laches can be imputed to the creditor for failure to apply for letters of administration; the statute suspending the operation of the statute of limitations is absolute without regard to length of suspension period. Danglada v. De La Guerra, 10 Cal. 387; Smith v. Hall, 19 Cal. 85; Scoville v. Scoville, 30 How. Pr. 246; Gallup v. Gallup, 11 Metc. (Mass.) 445; Hobart v. Turnpike Co., 15 Conn. 145; Hibernia S. & L. Society v. Herbert, 53 Cal. 373; Casey v. Gibbons, 68 Pac. 1032; Fishwick v. Sewell, 4 H. & J. 393; Bockwell v. Young, 60 Md. 563; Murray v. East India Co., 5 Barn. & Ald. 204.

The statute of limitations cannot be pleaded by a subsequent grantee subject to the mortgage until both the debt and mortgage

are barred. Rev. Codes, section 4694; Waterson v. Kirkwood, 17 Kan. 9; Schmucker v. Siebert, 18 Kan. 104, 26 Am. Rep. 765; Cross v. Allen, 141 U. S. 528, 35 L. Ed. 843, 12 Sup. Ct. Rep. 67; Ewell v. Daggs, 108 U. S. 143, 27 L. Ed. 682; Eborn v. Cannon, 32 Tex. 244; McKean v. James, 87 Tex. 194; Mahon v. Cooley, 36 Iowa, 479; Jones on Mortgages, section 1204; Coe v. Finlayson, 26 So. 704; Willis v. Farley, 24 Cal. 491; N. Y. Life Ins. Co. v. Covert, 6 Abb. N. S. 154; Murdock v. Waterman, 145 N. Y. 55, 39 N. E. 829, 27 L. R. A. 408; Herndt v. Porterfield, 9 N. W. 322.

The premises descended charged with the mortgage debt, and became the primary fund for its payment, which could not, to the amount that could be made out of the land, be paid from the assets of the estate. Comp. Laws, section 4367; Jummel v. Jummel, 7 Paige, 591; Halsey v. Reed, 9 Paige, 446; Johnson v. Corbett, 11 Paige, 265.

Where one purchases the equity of redemption by quitclaim deed, for a nominal consideration and without special contract, the amount paid is presumed to be the purchase price of the property less the mortgage, which the purchaser must discharge. Jones on Mortgages, section 763; Ins. & Trust Co. v. Covert, 6 Abb. Pr. (N. S.) 154 (Ct. of App.).

Where the purchaser takes the premises subject to a mortgage, the land continues in his hands a primary fund for the payment of the debt, and, to the extent of the value of the land, he becomes the principal debtor. Johnson v. Zink, 51 N. Y. 333; Sands v. Church, 6 N. Y. 347; Hartley v. Harrison, 24 N. Y. 170; Freeman v. Auld, 44 N. Y. 50; Insurance Co. v. Nelson, 78 N. Y. 137; Bennett v. Bates, 94 N. Y. 354; Murray v. Marshall, 94 N. Y. 611; Colgrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90; Horton v. Davis, 26 N. Y. 495; Fuller v. Hunt, 48 Iowa, 163; Tice v. Annin, 2 Johns. Ch. 125; Palmer v. Butler, 36 Iowa, 576; Sanger v. Nightingale, 122 U. S. 176, 30 L. Ed. 1105.

The land being in the hands of the defendant, Flemington, the primary fund for the payment of the debt secured by the mortgage, and he, having purchased subject to the mortgage, cannot plead the statute of limitations. Hyer v. Pruyn, 7 Paige Ch. 465, 34 Am. Dec. 355; Hughes v. Edwards, 9 Wheat. 489, 22 U. S. 489, 6 L. Ed. 142; Waterson v. Kirkwood, 17 Kan. 9; Schmucker v. Siebert, 18 Kan. 104, 26 Am. Rep. 765; Life Ins. & Trust Co. v. Covert, 6 Abb. Pr. N. S. 154; Murdock v. Waterman, 145 N. Y. 55, 39 N. E. 829, 27 L. R. 9. 418.

Charles M. Stevens and *E. E. Cassels,* for respondent.

Where the mortgagor died before the cause of action accrued, the running of the statute is not suspended because there is no one to be sued on the claim against the decedent. 19 Am. & Eng. Enc. Law (2d Ed.) 220. The statute of limitations began to run from the time the appellant might have perfected his right to sue, or at least within a limited time thereafter. 19 Am. & Eng. Enc. Law (2d Ed.) 103; Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. Rep. 466; Amy v. City of Watertown, 130 U. S. 320, 9 L. Ed. 537; Wright v. Paine, 62 Ala. 340, 34 Am. Rep. 24; Massie v. Byrd, 87 Ala. 72, 6 So. 145; Newsom v. Board of Com'rs, 103 Ind. 526, 3 N. E. 163; Nelson v. Board of Com'rs of Posey County, 105 Ind. 287, 4 N. E. 703; Prescott v. Gonser, 34 Iowa, 175; Lower v. Miller, 66 Iowa, 408, 23 N. W. 897; Hintrager v. Traut, 69 Iowa, 746, 27 N. W. 807; Great Wes. Tel. Co. v. Purdy, 83 Iowa, 430, 50 N. W. 45; First National Bank v. Greene, 64 Iowa, 445, 17 N. W. 86; Squire v. Parks, 56 Iowa, 407, 9 N. W. 324; Hintragen v. Hennessey, 46 Iowa, 600; Ball v. Keokuk & N. W. Ry. Co., 62 Iowa, 751, 16 N. W. 592; Bauserman v. Charlott, 46 Kan. 480, 29 Pac. 1051; Fox v. First Nat. Bank of Atchison, 9 Kan. App. 18, 57 Pac. 241; Cottrell v. Manlove, 58 Kan. 405, 49 Pac. 519; Travelers Insurance Co. v. Stucki, 4 Kan. App. 424, 46 Pac. 42; Rork v. Board of County Com's of Douglas County, 46 Kan. 175, 26 Pac. 391; Atchison, T. & S. F. R. Co. v. Burlingame Tp., 36 Kan. 622, 14 Pac. 271; Palmer v. Palmer, 36 Mich. 487, 24 Am. Rep. 605; Smith v. Smith's Estate, 91 Mich. 7, 51 N. W. 694; Litchfield v. McDonald, 35 Minn. 167, 28 N. W. 191; State v. Norton, 59 Minn. 424, 61 N. W. 458.

Failure to proceed diligently to secure the appointment of an administrator renders the holder of the mortgage guilty of laches, and his right to foreclose is barred, the statute of limitations having run. 10 Am. & Eng. Enc. Law (2d Ed.) 219, 220, 221; Bauserman v. Charlott, 46 Kan. 380, 26 Pac. 1051; Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. Rep. 466; Culp v. Culp, 51 Kan. 341, 32 Pac. 1118, 21 L. R. A. 550.

The successor in interest of the heirs of the decedent mortgagor may plead the statute of limitations against the foreclosure of the mortgage. 13 Am. & Eng. Enc. Law (2d Ed.) 798; Emory v. Keighan, 94 Ill. 543.

ENGERUD, J. On November 23, 1883, William R. Carey made and delivered to the plaintiff a mortgage of a quarter section of land owned by him in Dickey county, to secure the payment of his promissory note to the plaintiff, of even date, for $353, due November 1, 1888, bearing interest at the rate of 6½ per cent per annum, and to secure five coupon notes for the annual interest on the principal note. The coupon notes bear interest at the rate of 12 per cent per annum after maturity. The mortgagor died intestate in September, 1888, seized of the mortgaged land, and left surviving him, as sole heirs, four daughters, Laura Franke, Louisa Atherton, Sophronia D. Schafer and Alice J. Rose. Mrs. Rose is now, and has been since her father's death, a resident of this state, but the other three daughters have at all times resided in the state of Illinois. Letters of administration have never been applied for or issued on the estate of the deceased mortgagor. In June, 1902, the four heirs joined in a deed of the mortgaged land to the defendant and respondent, Alexander Flemington, and said deed was recorded August 14, 1902. On March 28, 1902, the plaintiff commenced this action against Flemington and one Schaller to foreclose said mortgage. Schaller made no answer, and it appears that he claims no right to the land. The only defense was the statute of limitations, and that defense was sustained by the trial court. The plaintiff has appealed from the judgment dismissing the action, and demands a retrial of all the issues under section 5630, Rev. Codes 1899.

Many of the questions arising in this case have been disposed of by the opinion just handed down in Colonial & United States Mortgage Co. v. Northwest Thresher Co., 103 N. W. 915. We there held that an action to foreclose a mortgage of real property was not one in rem, but was in personam against those interested in the mortgaged property adversely to the mortgage, and hence, under section 5210, Rev. Codes 1899, the absence from the state of the person against whom the cause of action accrued tolled the statute as to him during his absence. We also held that the right to foreclose the mortgage might be barred, even though the debt existed, and the remedies for the collection of the debt from those personally liable therefore were not barred.

In this case, as in the Thresher Co. case, the appellant contends that the land passed to the heirs subject to the mortgage, and therefore became a primary fund for the payment of the mortgage

debt for the protection of the estate of the deceased mortgagor against liability for the debt, and hence neither the heirs nor their grantee could plead the statute as long as the debtor's estate is liable on the debt. For the reasons stated in the case cited, this contention is overruled. It is therefore immaterial to this case to determine what effect the failure to have an administrator appointed had upon the right of the mortgagee to collect the debt from the estate of the deceased debtor.

Both parties agree that the heirs were necessary parties defendant in an action to foreclose this mortgage, if the action had been commenced before the conveyance to respondent. The four heirs succeeded to the deceased mortgagor's title before the mortgage debt was due, and held the title continuously from that time until June, 1902. The cause of action accrued in November, 1888. As to the undivided one-fourth of the land which descended to Alice J. Rose, the statutory bar was complete in November, 1898. The absence from the state of the other three heirs prevented the statute from running in their favor as to the undivided three-fourths of the land which they inherited.

It follows that the respondent's plea must be sustained as to an undivided one-fourth of the land, and that the appellant is entitled to the relief demanded to the extent of the remaining three-fourths of the land. There being no dispute as to the facts, it is a mere matter of computation to determine the amount due on the mortgage. Interest will be computed on the principal note from November 1, 1888, at the rate of 6½ per cent per annum, simple interest, without annual rests. In the absence of a provision to the contrary, the note bears the same rate after maturity as before. Rev. Codes 1899, section 4068. The provision that the interest is payable annually only relates to the interest accruing before maturity. Interest on the three unpaid coupons will be computed in like manner at the rate of 12 per cent per annum from the maturity of the respective coupons. To the amount due on the note and coupons will be added the sums paid by the plaintiff for taxes on said premises as set forth in the complaint, and interest will be computed on the several sums so paid from the dates of the respective payments at the rate of 6½ per cent per annum. The appellant is entitled to the taxable costs and disbursements of both courts against respondent.

The cause is remanded to the district court, which will set aside the judgment appealed from, and render a judgment in accordance with this opinion.

MORGAN, C. J., concurs.

YOUNG, J. (dissenting). In my opinion, this action is not barred. The action is in personam. We are agreed that the provisions of the statute which suspend the running of the statute of limitations upon the death or absence of the person against whom the cause of action accrued apply with the same force and effect to actions to foreclose a real estate mortgage as to other personal actions. The mortgagor's note was due November 1, 1888. Had he been alive and residing in the state upon that date, and defaulted in paying the note, a cause of action would have accrued against him, and the statute would have commenced to run against all remedies to enforce payment, including the present action. The record shows, however, that he died in September preceding the maturity of the note, and that no administrator has been appointed. The statute of limitations has not, therefore, commenced to run, and this action is not barred. It is well settled that a cause of action which has not accrued prior to the debtor's death does not accrue within the meaning of the statute of limitations and start the statute running until a personal representative is appointed. The rule that "the statute of limitations does not begin to run when no administration exists on the decedent's estate at the time the cause of action accrued" may, I think, be said to be of general application. Benjamin v. DeGroot, 1 Denio (N. Y.) 151; Davis v. Garr, 6 N. Y. 124, 55 Am. Dec. 387; Sanford v. Sanford, 62 N. Y. 555; Bucklin v. Ford, 5 Barb. (N. Y.) 393; Weitman v. Thiot, 64 Ga. 11; Hobart v. Turnpike Co., 15 Conn. 145; Marsteller v. Marsteller, 93 Pa. 350; Murray's Adm'r v. East India Co., 5 Barn. & Ald. 204; Danglada v. De La Guerra, 10 Cal. 386; Smith v. Hall, 19 Cal. 85; In re Bullard's Estate, 116 Cal. 355, 48 Pac. 219.

Defendant's counsel contend that, inasmuch as the plaintiff could have procured the appointment of an administrator, it was its duty to do so within a reasonable time and thus start the running of the statute, and, not having done so, it is guilty of laches, and may not say that the statute has not run. This position was sustained by the Supreme Court of Kansas in Bauserman v.

Charlott, 46 Kan. 480, 26 Pac. 1051; s. c., 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316. See, also, Culp v. Culp, 51 Kan. 341, 32 Pac. 1118, 21 L. R. A. 550. The weight of authority is against this view. It is held generally, and the reason is satisfactory, that, inasmuch as the statute imposes no such obligation, the courts have no right to add it. See cases cited supra; also Scovil v. Scovil, 30 How. Prac. (N. Y.) 246; Gallup v. Gallup, 11 Metc. (Mass.) 445; Hibernia Society v. Herbert, 53 Cal. 375; Casey v. Gibbons (Cal.) 68 Pac. 1032; Fishwick's Adm'r v. Sewell (Md.) 4 Har. & J. 393; Rockwell v. Young, 60 Md. 563.

The majority opinion assumes that the cause of action accrued against the several heirs of the mortgagor; that the statute therefore commenced to run; that it was suspended as to the three heirs who were absent from the state, and that as to them the action is not barred; that it was not suspended as to the heir residing in the state, and as to her the action is barred. The assumption that the cause of action accrued against the heirs is, in my opinion, entirely erroneous. It is true the title to the mortgaged premises passed to the heirs upon the mortgagor's death, but it was the title only which passed to them. The obligation of the mortgagor did not pass. The mortgagor's obligation, which this action is brought to enforce, did not by his death become their obligation, and they have not made it their obligation. They merely succeeded to his title, subject, as it was in him, to the plaintiff's mortgage. The mortgage debt is not their debt, and they do not owe the obligation which the plaintiff is seeking to enforce. They have made no default, and it cannot properly be said, therefore, that the cause of action accrued against them. They are merely parties to the action brought to enforce the obligation of the mortgagor. The statute does not take account of parties to an action as such in fixing the time when the statute commences to run or when it is suspended, but rather the person or persons against whom the cause of action accrues, and the heirs are not the persons against whom the cause of action accrued. Substantially the same question was involved in Colonial & U. S. Mortgage Co. v. Northwest Thresher Co., 103 N. W. 915, in which the opinion has just been handed down. My views are there stated at length in a dissenting opinion, and need not now be restated. I may say, however, that the rule, as applied by the majority, in this case goes further and is more objectionable than in the case

referred to. In that case it was held that a mortgagee whose mortgage was recorded was bound at his peril to know that subsequent transfers had been made by the mortgagor, who the grantees were, and, in effect, where they resided. The rule, as applied in this case, charges mortgagees with immediate knowledge of the mortgagor's death, whether he died testate or intestate, and, if intestate, whether he left heirs, and, if so, how many and where they reside, and, if absent from the state, the correct dates of their departure and return. If he is ignorant of the fact, as he usually will be, or is mistaken as to the fact, as he often must be, he forfeits his security to those whose interests in the mortgaged premises are subordinate to his interest. This considered either as a rule of law or of duty, is, in my opinion, indefensible.

The statute not having run, the judgment of the trial court should be reversed, and judgment entered for the plaintiff as prayed for in its complaint.

(103 N. W. 929.)

JOHN A. PAINE v. HELEN DODDS, M. FRICH ET AL.

Opinion filed May 1, 1905.

Foreclosure of Mortgage — Statute of Limitations.

1. Action to foreclose a mortgage on real property is not a proceeding in rem, but is an action in personam, and comes within the operation of section 5210, Rev. Codes 1899, which excepts from the period limited for commencing an action the time during which the person against whom the cause of action has accrued is absent from the state.

Same.

2. Although the property passed to the defendant's grantor subject to the mortgage, and was in equity the primary fund for the payment of the mortgage debt, that doctrine cannot be extended so as to prevent the defendant from availing himself of the statute of limitations as a defense against an action to foreclose the mortgage.

Same — Absence from the State.

3. When the person against whom a cause of action has accrued departs from and establishes his residence out of this state, the statute of limitations ceases to run in his favor from the date of his departure. The clause in section 5210, Rev. Codes 1899, to the effect that only absences of one year or more shall toll the statute, refers to absences by one who has not established a residence out of the state.

Grantee May Add Time the Statute Has Run Against His Grantor to Complete Its Bar.

4. A grantee of mortgaged premises may add to the time the statute of limitations has run in his favor since he acquired the land the time it had run in favor of his grantors, in order to make up the aggregate period required to bar the action to foreclose.

When Defendant Pleads the Statute of Limitations, Plaintiff Must Show Its Suspension.

5. When the plaintiff's own pleadings and evidence show that more time than that limited by the statute for commencing the action has expired since the cause of action accrued, the burden is on the plaintiff to show that the running of the statute had been suspended a sufficient length of time to avoid the statutory bar pleaded by the defendant.

New Trial.

6. In an action tried and appealed under section 5630, Rev. Codes 1899, where the evidence tends to show that the action is barred as to one or more undivided and unequal parts of the land and not barred as to other parts, but fails to disclose as to which parts the bar is complete, and the uncertainty in the proof is due to the fact that neither the trial court nor counsel for either party deemed such proof material, a new trial will be ordered.

Young, J., dissenting.

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

Action by J. A. Paine against Helen Dodds and others. Judgment for defendants, and plaintiff appeals.

Reversed.

Newman, Spalding & Stambaugh, for appellant.

An action for the foreclosure of a mortgage is equitable in its nature, and in personam. Rev. Codes 1899, section 5156; Brainard v. Cooper, 10 N. Y. 356.

An action to foreclose a mortgage is barred ten years after the cause of action accrued, subject to the same exception. Rev. Codes, section 5207; chapter 120, Laws of 1901; Peters v. De La Plaine, 49 N. Y. 362; Ozmun v. Reynolds, 11 Minn. 459; Whalley v. Eldridge, 24 Minn. 358; Clinton County v. Cox, 37 Iowa, 570; Hanchett v. Blair, 100 Fed. 826.

Such action is not barred; debt secured by the mortgage is barred. Rev. Codes 1899, sections 5200, 5201; 13 Am. & Eng. Enc.

Law (1st Ed.) 704; Wiltsie on Mortgage Foreclosure, section 63, note 5.

The provisions of the Probate Code have no application, they only operate to prevent payment of debt from assets of decedent's estate; nonpresentation of claim to administrator does not affect this action. Jones on Mortgages, section 1214; Wiltsie on Mortgage Foreclosure, section 64; Allen v. Moer, 16 Iowa, 307; Rev. Codes 1899, section 6401.

Statute of limitations was suspended when decedent's heirs and administrator departed from and resided out of the state. Rev. Codes, section 5210.

Homestead descends to heirs, subject to homestead rights of widow, charged with the mortgage debt, and becomes a primary fund for the payment of the debt, which could not be a charge upon the assets of the estate. Comp. Laws, section 4367; Jummel v. Jummel, 7 Paige, 591; Halsey v. Reed, 9 Paige, 446; Johnson v. Corbett, 11 Paige, 265.

The defendant Frich took the land subject to the mortgage debt, and it continued in her hands a primary fund for the payment of the debt, and, to the extent of the value of the mortgaged premises, she became the principal debtor. Johnson v. Zink, 51 N. Y. 333; Sands v. Church, 6 N. Y. 347; Hartley v. Harrison, 24 N. Y. 170; Freeman v. Auld, 44 N. Y. 50; Insurance Co. v. Nelson, 78 N. Y. 137; Bennett v. Bates, 94 N. Y. 354; Murray v. Marshall, 94 N. Y. 611; Colgrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90; Horton v. Davis, 26 N. Y. 495; Fuller v. Hunt, 48 Iowa, 163; Tice v. Annin, 2 Johns. Ch. 125; Palmer v. Butler, 36 Iowa, 576; Sanger v. Nightingale, 122 U. S. 176, 30 L. Ed. 1105.

She holds the premises under an agreement to apply the premises to the satisfaction of the mortgage debt, and the statute of limitations does not run upon this obligation so assumed by her prior to its assumption. Murray v. Marshall, 94 N. Y. 611; Schmucker v. Siebert, 18 Kan. 104, 26 Am. Rep. 765.

The land being in the hands of the defendant Frich the primary fund for the payment of the debt, secured by the mortgage, and she, having purchased subject to the mortgage, cannot plead the statute of limitations. Hyer v. Pruyn, 7 Paige Ch. 465, 34 Am. Dec. 355; Hughes v. Edwards, 9 Wheaton, 489, 22 U. S. 489, 6 L. Ed. 142; Waterson v. Kirkwood, 17 Kan. 9; Schmucker v. Siebert, 18 Kan. 104, 26 Am. Rep. 765; Life Ins. & Trust Co. v.

Covert, 6 Abb. Pr. N. S. 154; Murdock v. Waterman, 145 N. Y. 55, 39 N. E. 829, 27 L. R. A. 418.

Tracy R. Bangs, for respondent.

Any person in privity with the claim of which enforcement is sought, such as heirs and personal representatives of a deceased mortgagor, junior mortgagees and subsequent assignees or grantees of the mortgagor, is entitled to plead the statute of limitations. 19 Am. & Eng. Enc. Law, 184; Ewell v. Daggs, 108 U. S. 143, 27 L. Ed. 682; Sanger v. Nightingale, 122 U. S. 176, 30 L. Ed. 1105; Lord v. Morris, 18 Cal. 482; McCarthy v. White, 21 Cal. 495, 82 Am. Dec. 754; Grattan v. Wiggins, 23 Cal. 16; Coster v. Brown, 23 Cal. 143; Schmucker v. Siebert, 18 Kan. 104, 26 Am. Rep. 765; George v. Butler, 67 Pac. 263, 90 Am. St. Rep. 756; Anderson v. Baxter, 4 Ore. 105; Brandenstein v. Johnson, 73 Pac. 744.

The statute of limitations began to run when plaintiff's cause of action accrued, unless some recognized exception postponed its operation. 19 Am. & Eng. Enc. Law, 193. The debt fell due January 1, 1887, and the cause of action accrued January 6, 1887, and unless some disability on the part of the plaintiff postponed the running of the statute, it then commenced to run. Death of a debtor prior to maturity of the debt is not such disability. If the debt is due at the debtor's death, the statute begins to run immediately even if he is a nonresident, and if it ceases to run on his becoming a nonresident, it revives at his death. Hibernian Banking Ass'n v. Com. Nat'l Bank, 41 N. E. 919; Savage v. Scott, 45 Iowa, 130; Teal v. Ayers, 9 Tex. 588.

On the accrual of a cause of action after the debtor's death, the statute commences to run whether there is a party competent to sue or be sued, or not. Hibernia S. & L. Soc. v. Conlin, 7 Pac. 477; Tynan v. Walker, 35 Cal. 634, 95 Am. Dec. 152.

Section 5212 only suspends the running of the statute upon the death of a party against whom action may be brought.

Neither of the defendants owing the plaintiff any legal duty, no cause of action ever accrued against them, and the absence of one, or all, from the state would not suspend the running of the statute. Von Campe v. City of Chicago, 29 N. E. 892; Hill v. Townley, 47 N. E. 653; Belloc v. Rogers, 9 Cal. 124; Schadt v. Heppe, 45 Cal. 433; Carpenter v. Ingalls, 51 N. W. 348, 44 Am. St. Rep. 753.

The mortgagor is the only person charged with any legal duty towards the mortgagee. His estate might be obligated on his death if the claim was duly presented, but failure to do so does not affect the right to foreclose or the running of the statute of limitations. Section 6401, Rev. Codes 1899; Schadt v. Heppe, supra; McMillan v. Heyward, 29 Pac. 744; Thurber v. Miller, 75 N. W. 900; Gleason v. Hawkins, 73 Pac. 533.

If the action is barred as to the mortgagor, it is barred as to the subsequent owner of the land, and the converse of the proposition is true. Hanchett v. Blair, 100 Fed. 817; Ewell v. Daggs, 108 U. S. 143, 27 L. Ed. 682; Sanger v. Nightingale, 122 U. S. 176, 30 L. Ed. 1105.

Notwithstanding the death of the mortgagor and the absence of his administrator and heirs from the state, plaintiff always had, and has, a full and complete remedy upon his mortgage. Hogaboom v. Flower, 72 Pac. 547; Fowler v. Wood, 28 N. Y. Supp. 976; Eubank v. Leveridge, 4 Sawyer, 274; Jones on Mortgages, section 1197.

Section 5210, Rev. Codes 1899, suspending the statute by reason of absence, relates only to personal action; this action is not "against the person," and though, perhaps, not strictly in rem, is of the nature of an action in rem, and the reason for the exceptions in that section does not obtain in an action like this, when no personal responsibility is imputed to any defendant. Wiltsie on Mortgage Foreclosure, section 61; Fields v. Daisy Gold Mining Co., 73 Pac. 521; Fallon v. Butler, 21 Cal. 24, 81 Am. Dec. 140; Nagle v. Macy, 9 Cal. 426; Frische v. Kramer's Lessee, 16 Ohio, 125, 47 Am. Dec. 368; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Freeman v. Alderson, 119 U. S. 185, 30 L. Ed. 372; Cole v. Conner, 10 Iowa, 300; Iowa Loan & Trust Co. v. Dory, 19 N. W. 301; 9 Enc. Pl. & Pr. 220; Kershaw v. Thompson, 4 Johns. Ch. 609; Stevens v. Terry, 48 Fed. 7; Palmer v. McCormick, 28 Fed. 541; 17 Enc. Pl. & Pr. 43; 2 Wood on Limitations (2d Ed.) section 224; Eubanks v. Leveridge, 4 Sawy. 274; Martin v. Bond, 30 Fed. 15; Anderson v. Baxter, 4 Ore. 105; Hartzell v. Vigen, 6 N. D. 117, 69 N. W. 203, 35 L. R. A. 451, 60 Am. St. Rep. 586; Hurley v. Cox, 2 N W. 705; Rector v. Rotten, 3 Neb. 177; Peters v. Dunnells, 5 Neb. 460; Henley v. Estes, 6 Neb. 386; McNaughton v. Burke, 89 N. W. 274; Frerking v. Thomas, 89 N. W. 1005; Colgrove v.

Tallman, 67 N. Y. 95; Culp v. Culp, 32 Pac. 1118; Bauserman v. Charlott, 26 Pac. 1051; Hill v. Townley, 47 N. W. 653.

ENGERUD, J. This is an appeal by plaintiff from a judgment dismissing an action to foreclose a mortgage on real property. The trial court held that the action was barred by the statute of limitations, which was the only defense relied upon. The appeal is under section 5630, Rev. Codes 1899, and, although a new trial of all the issues is demanded by the appellant, the only issue on which there is any controversy is that raised by the plea of the statute of limitations.

On December 24, 1883, James Dodds made and delivered to John R. Paine a principal promissory note for $250, payable January 1, 1887, bearing interest at the rate of 10 per cent per annum, and three coupon notes for the annual interest due respectively on January 1, 1885, 1886 and 1887. To secure the payment of this debt, James Dodd made and delivered to John R. Paine the mortgage in question, covering a quarter section of land owned by the mortgagor in Nelson county, which mortgage was duly recorded January 2, 1884. The mortgagor died intestate November 5, 1884, seized of the mortgaged land, and left surviving him, as his heirs, his widow, Helen Dodds, and three children, David S. Dodds, Mary Colson and Jennie G. Wolff. Letters of administration upon the estate of James Dodds, deceased, were issued in Nelson county to the son, David S. Dodds, April 22, 1885. On April 16, 1887, pursuant to an order of the county court of Nelson county, the premises in question were set apart to the widow, Helen Dodds, as a homestead. David S. Dodds left the state of North Dakota about the middle of the year 1896, and took up his residence in California, where he died in February, 1902. He had never closed up the administration of his father's estate. David Dodds died intestate, leaving surviving him a widow, Mary Dodds, but no children. The mortgagor's daughter Jennie G. Wolff also died intestate, and left as her heirs her husband, Christopher J. Wolff, William Charles Wolff, Mamie Helen Wolff, Louis Joseph Wolff and David Sidney Wolff. The last two named are minors. The evidence fails to show when or where Jennie G. Wolff died. All these heirs have been nonresidents and absent from this state since 1896, but the evidence does not disclose whether they left the state in that year or before, except that it is stipulated that David Dodds left about the middle of 1896, and his widow, Mary Dodds, has never resided

in this state. As to the others, the only evidence as to the time of their departure is a stipulation that they "left the state of North Dakota and took up their residence in the state of California in the year 1896, and prior to that time." We infer from the language of this stipulation that the heirs mentioned left at different times, some in 1896 and some before. On August 12, 1902, John Hennessy was by the county court of Nelson county appointed administrator of the estate of James Dodds, the mortgagor, to succeed David S. Dodds, deceased, and the said Hennessy was also appointed guardian of the estate of the two minor heirs, Louis Joseph and David Sidney Wolff. All the adult heirs have conveyed their respective shares in the mortgaged land to defendant M. Frich by deeds without covenants, which deeds were executed and delivered during the months of February, April and May, 1902, and were all recorded after delivery, and on or before May 17, 1902. The shares of the two minor heirs were sold and conveyed to the defendant Frich by the guardian's deed, January 19, 1903, which deed was recorded the same day. In December, 1898, the mortgage and the debt secured thereby were assigned to the plaintiff. The debt secured by the mortgage was never presented for allowance as a claim against the estate of the deceased mortgagor. The administration of that estate was closed and the administrator discharged in March, 1903, after the commencement of this action. This suit was commenced January 18, 1902, naming as defendants all the heirs of the deceased mortgagor, the administrator of his estate, the guardian of the two heirs and M. Frich, the present owner of the land. The only relief sought is a judgment foreclosing their lien on the land for the amount of the debt and certain taxes paid by the plaintiff.

All the heirs except the two minors had ceased to have any interest in the premises long before the action was commenced, and they were improperly joined as parties defendant. The administrator and the guardian were discharged and their respective trusts terminated, and the rights of the minor heirs had been conveyed to Frich, before the action was tried. It is, therefore, clear that the action was properly dismissed as to all the defendants except Frich.

The main proposition upon which respondents' counsel rely in support of their claim that the action is barred is that an action to foreclose a mortgage on real property is in the nature of a proceed-

ing in rem, and hence is not affected by section 5210, Rev. Codes, which excepts from the limitation period the time during which the person against whom the cause of action accrued is absent from the state. This proposition cannot be sustained, for the reasons given in Colonial & United States Mortgage Co. v. Northwest Thresher Co., 103 N. W. 915, and Mortgage Co. v. Flemington, Id. 929, the opinions in which have just been filed.

Appellant's main proposition is that the land descended to the heirs subject to the mortgage, and became, therefore, the primary fund for the payment of the debt, and that the heirs or their grantee could not plead the statutory bar against this action, which is, in effect, one to subject that primary fund to the purposes for which it was created. This proposition was also overruled in the two preceding cases.

For the reasons stated in those two decisions, the widow and three children of the mortgagor were the persons against whom this cause of action accrued. The action was not barred as to them or the heirs of those of them who had died at the time defendant Frich acquired their respective shares of the land. The cause of action accrued January 6, 1887. The note being nominally payable January 1, 1887, which was a legal holiday, was actually payable January 2, 1887. At that time the territory law allowed three days of grace. Comp. Laws 1887, section 4524. As no suit could be commenced until January 6th, the statutory bar would not be complete until January 6, 1897, but before that time all the living heirs had left the state and taken up their residence in California. Consequently, as to them, the statute ceased running when they left the state, because section 5210, Rev. Codes 1899, provides that if a person against whom a cause of action shall have accrued "shall depart from and reside out of this state, * * * the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action." We think the clause, "or remain continuously absent therefrom for the space of one year or more," which we omitted from the quotation of the section as indicated by the asterisks, refers to absences from the state where no residence is established elsewhere. To construe the statute otherwise would deprive the creditor of the full ten years which the statute was intended to allow within which to commence an action by personal service of the summons. Bassett v. Bassett, 55 Barb. 505, 518; Bank v. Bissell (Cir. Ct.) 7 N. Y. Supp. 53.

The decisive question of law in this case, therefore, is this: Can the defendant Frich add to the time which the statute had run in favor of her predecessor in the title the time she owned the land before the action was commenced, in order to make out the full statutory period of ten years? This question must be answered in the affirmative. Section 5210 excepts from the limitation period the time that the person against whom the cause of action accrued is absent from the state. If this language was construed to mean that absences only on the part of the person against whom the cause of action originally existed would toll the statute, it would defeat the object of the statute. If the owner of mortgaged land after default sold the land and left the state, an action to foreclose the mortgage would never be barred until the death of the absent grantor. Again, if such fee owner died in this state after the cause of action accrued against him, and all his heirs were nonresidents, the statute would continue running against the right to foreclose, notwithstanding the absence of the heirs and the impossibility of obtaining personal service upon them. Both the letter and the spirit of the statute forbid such an interpretation of it. Section 5199, Rev. Codes 1899, provides: "The following actions must be commenced within the following periods after the cause of action has accrued." Then follows the enumeration of the various actions and of the time limited for commencement of the same. It will be noticed that section 5199 does not fix the commencement of the limitation period at the time when the cause of action accrued against the particular person who may subsequently plead the statute. By virtue of this section the limitation period begins to run against the right to maintain an action as soon as the right to such an action comes into existence. Section 5210, however, excepts from the time limited for commencing an action the time that the person against whom the cause of action shall have accrued is absent from the state. The person referred to in section 5210 is not necessarily the person against whom the cause of action first accrued. The same cause of action may have accrued against two or more persons at the same time, or against each of them at different times. When a debtor dies, the cause of action survives against his personal representative. The cause of action remains the same after the death of the debtor as before. Such a cause of action accrues when the debt is due. It first accrues against the debtor, and, after his death, it accrues against his personal representative. So, also,

a cause of action for the enforcement of a lien upon or other right to specific property. The cause of action first accrues when the right to resort to that remedy arises. As we held in Mortgage Co. v. Thresher Co., such a cause of action accrues against the person or persons who are interested in the land adversely to the plaintiff's alleged right. It accrued in the first place against the then adverse parties. If the adverse rights of those persons to the property pass by contract or operation of law to other persons, the same cause of action continues, but the transferees become the persons against whom the same cause of action has accrued. The principles upon which the doctrine of "tacking" is based are applicable in such a case, and for the same reasons, as in a case of adverse possession. To illustrate the application of that principle, we cite the following cases: Moffit v. McDonald, 30 Tenn. 457; Nelson v. Trigg, 72 Tenn. 701; Smith v. Chapin, 31 Conn. 530. As we stated in Colonial & United States Mortgage Co. v. Thresher Co., we construe the term "cause of action" as used in the statute of limitations to be synonymous with the term "right of action." Construing the term "cause of action" in that sense, and reading sections 5199 and 5210 together, we get this meaning from them: The plaintiff must commence his action within the prescribed number of years after his cause of action first accrued, but the absence from the state of any person against whom the right of action has at any time accrued tolls the statute during such absence as against such absentee or his successor in interest. We held in Mortgage Co. v. Thresher Co., that the mortgagee, after his cause of action had accrued, and before he commenced his action, was daily put on inquiry as to the parties against whom his remedy must be enforced. It follows as a corrollary of that proposition that, when a deed of the land is recorded after the cause of action has accrued and before the action has been commenced, the plaintiff is chargeable with knowledge of that fact. We hold, therefore, that the action is barred as to any share of the land of which the successive owners, while holding the title, have been within this state an aggregate period of ten years between January 6, 1887, and the date of the commencement of this action. In computing that time as to any particular share, the time of defendant's ownership should be taken to have begun on the day the deed to her for such share was recorded.

As to the shares of the two minor heirs, it is clear that the action is not barred. The action is barred as to that share of the land inherited by David S. Dodds from his father, because the evidence shows that nine and one-half years have elapsed from the date the cause of action accrued before David S. Dodds left the state, and his share was acquired by Frich, and the latter's deed had been recorded more than six months before the action was commenced. The evidence fails to show when each of the other heirs left the state, but implies that some left in 1896 and some before. On this evidence it can neither be affirmed nor denied that the action is barred as to any particular part of the land other than the respective undivided shares derived from the two minor heirs and from the heirs of David S. Dodds. As to the former the action is not barred, but as to the latter it is. The plaintiff's own pleadings and evidence showed that the cause of action accrued more than ten years before the commencement of the action, and the burden was therefore on him to show, if he could, that the running of the statute had been suspended as to all or some of the heirs by reason of their absence or nonresidence. 19 Am. & Eng. Enc. Law (2d Ed.) pp. 332-334, and cases cited. It follows that the consequences of the absence of proof on the points mentioned would fall upon the plaintiff, if final judgment were to be ordered by us on this record. The statute (Rev. Codes 1899, section 5630) governing the trial and appeal of cases of this nature provides that "the Supreme Court * * * shall finally dispose of the same whenever justice can be done without a new trial, and either affirm or modify the judgment or direct a new judgment to be entered in the district court; the Supreme Court may, however, if it deem such course necessary to the accomplishment of justice order a new trial of the action."

It is apparent that the absence of any definite proof as to when each of the several heirs of the deceased mortgagor left the state is due to the fact that neither the trial court nor counsel for either party deemed such evidence material. Under such circumstances it would be unjust to order final judgment on this appeal, and a new trial should be had.

The judgment appealed from is reversed, and the cause remanded for further proceedings in accordance with this opinion. The appellant will recover the taxable costs of this appeal.

MORGAN, C. J., concurs.

YOUNG, J. (dissenting). We are all agreed that an action to foreclose a real estate mortgage is an action in personam, and that the statute of limitations, together with those provisions which suspend its running upon the death or absence of the person against whom the cause of action accrues, apply to it in like manner as to other personal actions. From this, in my opinion, the conclusion necessarily follows that this action is not barred.

The debtor died November 5, 1884. Subsequently administration was granted upon his estate, and on the date when his obligation matured, to wit, January 1, 1887, a personal representative stood in his place, and the statute commenced to run. Had the administrator continued to reside in the state, the action would have been barred at the expiration of ten years. The record shows that the administrator left the state in the middle of the year 1896. That was less than ten years, and approximately nine years and six months, before the bar of the statute would have fallen had he remained in the state. His departure from the state suspended the further running of the statute. This action was commenced before the appointment of the second administrator, and when it was commenced the statute had run but nine and one-half years. It was therefore brought within time, and is not barred.

I entirely disagree with my associates upon the fundamental principle upon which they rest their conclusion, i. e., that the cause of action accrued against the heirs. My views upon that question are set out at length in a dissenting opinion in Colonial & U. S. Mortgage Co. v. Northwest Thresher Co., 103 N. W. 915, and in Colonial & U. S. Mortgage Co. v. Flemington, Id. 929, in which opinions have just been handed down. They will not, therefore, now be repeated.

The judgment of the district court should be reversed, and judgment entered for the plaintiff as prayed for in his complaint.

(103 N. W. 931.)

THE STATE OF NORTH DAKOTA v. GEORGE O'MALLEY.

Opinion filed May 2, 1905.

Robbery — Evidence — Intent — Intoxication — Instructions.

1. In a trial for robbery, where the defendant, besides denying the commission of the acts charged, claims that he was, by reason

of intoxication, incapable of forming an intent, it is error to instruct the jury, in effect, that the intent to steal should be conclusively presumed from the unlawful and forcible taking unless the defendant was so intoxicated as to be incapable of forming an intent.

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

George O'Malley was convicted of robbery, and appeals.

Reversed.

M. A. Hildreth, for appellant.

The instructions—same as quoted in the opinion—under the evidence of this case were clearly erroneous. State v. Koerner, 8 N. D. 292, 78 N. W. 981, 73 Am. St. Rep. 752; People v. Anderson, 44 Cal. 65; Williams v. Comm., 9 Bush. Ken. 274; Foster v. People, 50 N Y. 598; Hall v. State, 8 Ind. 439; Thompson v. State, 47 Ala. 37; State v. Stewart, 29 Mo. 418; Crocker v. State, 47 Ga. 568; Floyd v. State, 1 Green's Crim. Law Rep. 757; Mooney v. State, 33 Ala. 419.

Carl N. Frich, Attorney General, *W. H. Barnett*, State's Attorney, and *Seth W. Richardson*, Assistant State's Attorney, for respondent.

ENGERUD, J. The defendant was tried and convicted of robbery in the first degree, and appeals from the judgment of conviction. The robbery alleged is the same as that involved in the case of State v. Sanders (just decided) 103 N. W. 419. In this case the defendant testified in his own behalf, denying the commission of the offense, and there was evidence to the effect that he was intoxicated.

In the course of the charge to the jury, the trial court used the following language: "I charge you that a person intends the ordinary consequences of his voluntary act, and that an unlawful act was done with an unlawful intent; and the question here would be, was the condition of the defendant with reference to his intoxication such as to overcome and do away with any intent to commit the crime charged? And in connection with this, I will say that you are to investigate all the evidence with reference to the surrounding circumstances, and ascertain whether he was so intoxicated as to prevent the formation of an intent required by law." This instruction was excepted to, and is assigned as error. The exception

must be sustained. As pointed out in State v. Fordham, 13 N. D. 494, 101 N. W. 888, one of the essential ingredients of the crime of robbery, which it is incumbent on the state to prove, is the intent to steal. As shown in the case cited, it is not the mere unlawful taking of property from the person or presence of another, even though accomplished by force or fear, that constitutes robbery. All these elements may be present, and yet the act be a mere trespass, because the criminal intent is absent. In other words, an unlawful taking is not necessarily a taking with intent to steal. The instruction complained of, in effect, told the jury that, if they believed all the other elements of the crime charged were established by the evidence, then the intent to steal was conclusively presumed, as a matter of law, unless it appeared that by reason of intoxication the defendant was incapable of forming an intent. In short, the only evidence which the jury could consider on the question of intent was that relating to intoxication. This is clearly erroneous, because the intent to steal, like every other element of the crime charged, was a fact to be established to the satisfaction of the jury from all the evidence before them. As was said in State v. Koerner, 8 N. D. 292, 296, 78 N. W. 981, 73 Am. St. Rep. 752: "From an application of a familiar principle that every person is presumed to intend to do that which he does do, and also to intend the natural consequences of his acts, juries very naturally and usually do infer from the acts entering into the crime of larceny, and the manner of their commission, the intent to deprive another of the property taken; but this is by no means a necessary inference, for the intent accompanying the acts may be entirely wanting, or in itself an innocent one. * * * The intent to steal does not follow the act of taking, as a legal and conclusive presumption. * * *"

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

(103 N. W. 421.)

THE STATE OF NORTH DAKOTA v. JOHN SANDERS.

Opinion filed May 2, 1905.

Robbery — Description of Property Taken.

1. An information for robbery sufficiently describes the property alleged to have been taken if the property is described with sufficient certainty to enable the jury to say whether the chattels proved to have been stolen are the same as those referred to in the information, and to enable the court to know judicially that the articles could have been the subject matter of the offense charged.

Information — Allegation of Means Producing Fear.

2. In an information for robbery accomplished by fear, it is not necessary to allege the means whereby the fear was created.

Putting in Fear.

3. The complaining witness was compelled to submit to the robbery by the defendant aiming a pistol at him and ordering him to throw up his hands. *Held*, that the robbery was accomplished by putting in fear.

Allegation of Robbery Accomplished by Fear and Proof of Force and Fear, Not Variance.

4. Proof that a robbery as accomplished by both force and fear is not a variance from an information that alleges that the taking was accomplished by fear.

Evidence — Variance.

5. Although an information for robbery alleges the taking of several articles, it is sufficient to prove the taking of some of them.

Instruction.

6. Where, in a case of robbery, the proof is such that defendant is either guilty of the crime charged, or wholly innocent, it is proper for the court to so instruct the jury.

Stay of Execution Pending Appeal.

7. A certificate of probable cause is not alone sufficient to stay execution in a criminal case, and an application for such certificate with a view to suspending the execution of sentence pending appeal in a criminal case will not be entertained by the Supreme Court, when the defendant has neither offered to give bail, nor applied to the trial judge, under section 8340, Rev. Codes 1899, for a stay of execution without bail.

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

John Sanders was convicted of robbery, and appeals.

Affirmed.

M. A. Hildreth, for appellant.

Where there is no testimony describing the property taken in the robbery as of the kind and character described in the information, such absence of proof is fatal. People v. Jones, 5 Lans. 340.

Robbery involves larceny from the person. It must, therefore, be proved that the property taken was of the same description as that alleged in the information. People v. Jackson, 8 Barb. 637; State v. Longbottoms, 11 Humph. 39; State v. Clark, 8 Reid, 226; Merwin v. People, 26 Mich. 298, 12 Am. Rep. 314; 1 Green's Criminal Rep. 349; People v. Bogart, 36 Cal. 245; People v. Ball, 14 Cal. 101, 73 Am. Dec. 631; Lord v. State, 20 N. H. 404, 51 Am. Dec. 231; Boyle v. State, 37 Tex. 359.

No assault was alleged. The term that complaining witness was put in fear was used. It was at variance with the allegations of the information to prove an assault by one of the defendants by pointing something at him and ordering him to throw up his hands. 2 Bish. New Criminal Law, p. 676, section 1174, and cases cited.

The court should instruct on every phase involved in the trial. State v. Fordham, 13 N. D. 494, 101 N. W. 888. The court failed to instruct the jury that it was essential to the crime of robbery that the property taken from the person of the complaining witness was taken with intent to steal it. Nor did the court instruct that larceny from the person was involved in robbery, and that, under the statutes of this state, the defendant could have been convicted of larceny from the person. Nor did the court instruct that the state should prove: First, that an assault was made upon the complaining witness, and he was, therefore, put in fear of his life; second, that the property was taken from the person of the complaining witness without his consent, and with the felonious intent on the part of the defendant, to take, steal and carry away. This was reversible error.

C. N. Frich, Attorney General, *W. H. Barnett,* State's Attorney, and *Seth W. Richardson,* Assistant State's Attorney, for respondent.

It is not necessary to allege evidence in the information, hence the fact that no assault was charged is of no weight. Appellant held a gun and said "hold up your hands," and pointed it at complaining witness. He held up his hands. He testified that he held

up his hands because he was scared. The only explanation why he did so was complainant's fear, and this makes the allegation in the information in regard to putting in fear sufficient and complete, and disposes of the objection of variance. The information charges taking a hunting knife, a small gold frame photograph and a leather pocket book. The proof shows a knife subsequently described as a deer knife, with deer hair on the handle, also a picture which Sandberg said was of himself, with a gold frame on it, also a pocket book not described. Thus the question of variance was disposed of. The evidence shows that the appellant "held up" Sandberg and Johnson, by means of putting them in fear, took certain property, which was found upon them, and such evidence unquestionably supports a verdict of guilty.

Defendant asked for the following charge: "Physical force may consist in pointing a revolver at a man. Therefore, if you find that the complaining witness held up his hands as the result of the gun being pointed at him, and not as a result of fear, then I charge, you must acquit the defendant." It is impossible to distinguish between the act of pointing a gun and the effect upon the person at which it is pointed, so far as the necessary ingredients of the crime of robbery charged are concerned. Force may consist in pointing a revolver at a person, but the state of mind of the party at which it is pointed, during such act, becomes the proximate condition upon which the subsequent unlawful act may be based, and such unlawful act is properly charged as the means whereby the crime is committed, hence the asked for instruction was properly refused.

ENGERUD, J. The appellant was tried, and found guilty as charged, upon an information which charged the crime of robbery in the following language: "That at said time and place the above-named defendants, George O'Malley and John Sanders, did feloniously and conjointly, by then and there putting him in fear of his life, and against the will and from the person of one John Sandberg, take, steal and carry away certain personal property then and there belonging to said John Sandberg, to wit, one leather pocketbook, one small, gold-framed photograph, picture of said John Sandberg, one hunting knife, and certain and divers coins, to wit, pennies, lawful money of the United States, the exact number to the affiant unknown. All of the above-described property being of the aggregate value of five ($5) dollars." A motion in arrest of judgment was overruled, and this appeal is from the judg-

ment of conviction rendered and entered in accordance with the verdict. The sufficiency of the information was attacked for the first time by the motion in arrest of judgment. It is claimed that the information is insufficient because it does not describe with sufficient accuracy the property taken, and because it does not show the means employed to put the victim of the robbery in fear. Assuming, without deciding, that such defects would be fatal to an information for robbery if not raised until after trial, we are agreed that this information is not defective in either particular. This information describes the property taken with sufficient certainty to enable the jury to say whether the chattels proved to have been stolen are the same as those referred to in the information, and to enable the court to know judicially that the articles could have been the subject-matter of the offense charged. More than this is not required. People v. Jackson, 8 Barb. 637, and authorities there cited; State v. Nipper, 95 N. C. 654. It was not necessary to allege the means whereby the putting in fear was accomplished. That the victim was in fear, and that the defendant caused it for the unlawful purpose, were part of the facts constituting the crime alleged, and to be proven. The means whereby fear was created were part of the evidentiary facts admissible to prove the fact alleged.

There were numerous objections to evidence, and finally a motion for a directed verdict of acquittal, all of which were overruled, and the rulings are assigned as error on this appeal. They are all based upon the contention that there was a fatal variance between the allegations and proof.

The evidence showed that the defendant pointed a pistol at the complaining witness, Sandberg, and made him hold up his hands while defendant's confederate, O'Malley, took from the pockets of their victim various articles of personal property. It is asserted that this proof of the assault with a pistol was inadmissible, because it tended to show a robbery accomplished by force, and not fear, as alleged. There is no merit in the point. The evidence shows that the taking was accomplished by both force and fear. It is clearly no variance when the proof shows more than it was necessary to prove in order to sustain the allegations. Sandberg threw up his hands and submitted to the unlawful taking of his property from his person because the presentation of the pistol and the command to throw up his hands conveyed to his mind, as it was intended to do, the fear that disobedience would endanger his

life. It was clearly a taking accomplished by fear, and it was no less a taking by fear that it may also be termed a forcible taking. As stated before, it was not necessary to allege the means whereby fear was induced, and hence the omission from the information of any mention of an assault with a pistol would not preclude proof that fear was created in that manner.

It is further contended that the description of the property taken, as shown by the evidence, does not conform to the description as alleged. There is no proof showing what kind of money was taken, nor is there any proof that the pocketbook taken was a leather one. The proof shows, however, that a knife and a gold-framed photograph of Sandberg's were taken. These two articles were found in O'Malley's possession when he was arrested, soon after the robbery. They were produced at the trial, identified as the stolen property, and introduced in evidence. The trial court and jury could not tell by an inspection of them whether they corresponded to the description of them in the information. Although the same terms were not used by the witness in describing the articles at the trial as were used in the information, it does not appear from the record that the articles did not answer the description as alleged. It was not necessary to prove the taking of all the articles alleged to have been taken. The taking of any of the articles alleged was sufficient. People v. Wiley, 3 Hill (N. Y.) 194; Bishop's New Criminal Procedure, section 488b, subdivision 4.

Error is assigned because the court did not define the crime of larceny, and inform the jury that it might, instead of acquitting or convicting the defendant of robbery, find him guilty of larceny. The court was not requested to so charge, and, upon the evidence disclosed by the record, the defendant was either guilty as alleged, or he was wholly innocent. The court properly instructed the jury to that effect. Blashfield's Instructions to Juries, sections 190, 191; State v. Reasby, 100 Iowa, 231, 69 N.W. 451.

The other assignments of error based upon exceptions to the charge have not been discussed in the brief or in oral argument, and must be deemed abandoned. We have, however, examined the instructions excepted to, and can detect no error in them.

It is finally urged that the trial court omitted, in charging the jury, to state with sufficient fullness all the elements necessary to constitute the crime charged. There are no assignments of error covering this point, and it will not, therefore, be noticed. We

are not disposed in this case to relax the rule requiring assignments of error, because we are satisfied that no real prejudice has resulted to the appellant by the alleged technical error. Rules will be relaxed only in the interests of justice.

Shortly after the defendant's appeal was perfected, but after he had been conveyed to the state penitentiary and commenced serving his sentence, his counsel applied to this court for a certificate of probable cause, with a view to suspending the further execution of the judgment, and of causing him to be returned to the Cass county jail to remain pending the appeal. The certificate was denied, without regard to the merits, and upon the sole ground that the defendant had not put in bail, and had not, upon application to the trial court, been excused from giving bail. It will be seen by a reference to the provisions of our statute relating to the suspension of the execution of judgment in criminal cases that a certificate of probable cause alone, in a case not capital, does not suspend the execution of the judgment. Section 8335, Rev. Codes 1899, reads as follows: "An appeal to the Supreme Court from a judgment of conviction, stays the execution of the judgment in all capital cases, and in all other cases upon filing with the clerk of the district court of the county in which the conviction was had, a certificate of the judge who presided at the trial, or of a judge of the Supreme Court, that in his opinion there is probable cause for appeal, but not otherwise, except as hereinafter provided." If this were the only provision on the subject, and if it were not for the proviso contained in it, the execution would be stayed by the filing of the certificate of probable cause. California has such a statute. Section 1243, Pen. Code Cal. Section 8335, supra, must, however, be read in connection with section 8340, to which the proviso refers. This section is as follows: "An appeal taken by the defendant does not stay the execution of the judgment in any case not capital, unless bail is put in, except when the judgment is imprisonment in the penitentiary, and an appeal is taken during the term at which the judgment is rendered, and the defendant is unable to give bail, and that fact is satisfactorily shown to the court, it may, in its discretion, order the sheriff or other officer having the defendant in custody, to detain him in custody without taking him to the penitentiary, to abide the judgment on appeal, if the defendant desires it." It will be seen that the legislature has imposed a further condition upon the de-

fendant who would stay the execution of the judgment in a criminal case; i. e., he must put in bail, or must excuse the giving of bail under section 8340, supra. The filing of a certificate of probable cause alone is without effect. The defendant having neither put in bail, nor applied to the trial judge, under section 8340, supra, to excuse himself from giving bail, a certificate of probable cause would avail him nothing, and was therefore denied.

The judgment is affirmed, All concur.

(103 N. W. 419.)

EMMA V. HULET v. THE NORTHERN PACIFIC RAILWAY COMPANY AND AMOS A. GATES.

Opinion filed May 10, 1905.

Deed — Delivery.

1. Where the plaintiff's father, intending to make a gift to his daughter of a tract of land, bought and paid for the same, and caused his vendor to execute and deliver to him a deed thereof, naming his daughter as grantee, such delivery was sufficient to pass title to the plaintiff immediately upon the delivery of the deed to the father, even though the deed remained unrecorded in his custody until produced at the trial.

Gift.

2. Evidence examined, and *held*, that it shows that the donor intended a present gift at the time of the delivery of the deed.

Appeal from District Court, Ransom county: *W. S. Lauder*, J.

Action by Emma V. Hulet against Amos A. Gates. Judgment for plaintiff. Defendant appeals.

Affirmed.

Rourke, Kvello & Adams, for appellant.

An intention to give is essential to the validity of the gift, but it is only one of the requisites to vest title to the thing given in the donee. Thornton on Gifts and Advancements, section 133; Donover v. Argo et ux, 79 Iowa, 574, 44 N. W. 818; Thomlinson v. Ellison, 10 Mo. 105; Richardson v. Gray, 52 N. W. 10; McKenna v. Kelso, 3 N. W. 152.

Delivery of the thing given is essential to the validity of the gift. Thornton on Gifts and Advancements, section 133. The delivery of a deed is essential to convey title. Hooper v. Vanstrom, 100 N. W. 230; Thompson v. Easton, 31 Minn. 99; Bernard v. Thurston, 90 N. W. 574.

Until the deed was delivered with intent to part with dominion over it, and that it should take effect according to its terms, the title remained in the railroad company. Longworth v. Close, Federal Cases, 8489; Newell v. Cochran, 43 N. W. 86; O'Connor v. O'Connor, 69 N. W. 676; Cobb v. Chase et al., 6 N. W. 300; Deere et al. v. Nelson et al., 34 N. W. 809; Moody et al. v. Dryden et al., 34 N. W. 210.

Even filing for record will not transfer title, unless done in pursuance of a previous agreement. O'Connor v. O'Connor et al., 69 N. W. 676; Cobb v. Chase et al., 6 N. W. 300; Deere et al. v. Nelson et al., 34 N. W. 809; Moody et al. v. Dryden et al., 34 N. W. 210. The burden of proof on the donee to show gift. Dotty v. Wilson, 47 N. Y. 580; Perly v. Perly, 144 Mass. 104; Scott v. Reed, 25 Atl. 604.

T. A. Curtis, for respondent.

When the grantor issued its deed and delivered it to the appellant, running to the respondent, the grantee, the grantor parted with all dominion and control over it, and such delivery was good. Young v. Guilbeau, 3 Wall. 636, 18 L. Ed. 262; Porter v. Woodhouse, 59 Conn. 63; Arnegard v. Arnegard, 7 N. D. 475; Munro v. Bowles, 54 L. R. A. 865 and note; Hosley v. Holmes, 27 Mich. 416; Cook et al. v. Patrick et al., 11 L. R. A. 573; Shrader v. Bonker, 65 Barb. 615.

One of the requisites of the delivery of a deed is the intention of the grantor, and of the person to whom it is delivered, that it shall presently become effectual and operative. Walter v. Way et al., 170 Ill. 96, 48 N. E. 421; Fisher et al. v. Hall et al., 41 N. Y. 416; Crocker v. Lowenphel, 83 Ind. 576.

Acceptance of the deed will be presumed from the beneficial nature of the deed. De Le Villain v. Evans et al., 39 Cal. 120; Ferguson v. Miles, 8 Ill. 358, 44 Am. Dec. 702; Thompson v. Candor, 60 Ill. 244; Rivard v. Walker, 39 Ill. 413; Haenni et al. v. Bleisch, 146 Ill. 262, 34 N. E. 153; Crabtree et al. v. Crabtree et al., 159 Ill. 342, 42 N. E. 787; Ward v. Small, 90 Ky. 198, 13 S. W. 1070; Holmes v. McDonald et al., 78 N. W. 647; Wall v. Wall,

30 Miss. 91, 64 Am. Dec. 147; Rose v. Baker, 13 Barb. 233; Munoz v. Wilson et al., 111 N. Y. 303, 18 N. E. 855.

The assent of the party to the grant made for his benefit is presumed until the contrary appears. Peavy v. Tillman, 45 Am. Dec. 365; Halluch v. Bush, 1 Am. Dec. 60; Treadwell v. Bulkley, 4 Am. Dec. 225; Church v. Gillman, 30 Am. Dec. 82; Merrills v. Swift, 46 Am. Dec. 315; Lady Superior v. McNamara, 49 Am. Dec. 384; Blight v. Scheuck, 51 Am. Dec. 478; Boody v. Davis, 51 Am. Dec. 210.

Acceptance of a deed to a minor by a father is a sufficient delivery, the conveyance being beneficial to him. Where the grantee is under disabilities, as in the case of an infant grantee, assent to a beneficial conveyance is presumed, and knowledge of conveyance and delivery is not essential. Baker v. Haskell, 47 N. H. 479; Spencer v. Carr et al., 45 N. Y. 410; Gregory v. Walker, 38 Ala. 26; Rivard v. Walker, 39 Ill. 413; Cecil v. Beaver, 28 Iowa, 241.

A purchase of land by a parent in the name of a child will be considered as an advancement, not a trust. James v. James, 41 Ark. 301; Brown v. Burke, 22 Ga. 574; Taylor v. Taylor, 9 Ill. (4 Gill.) 303; Cartwright v. Wise, 14 Ill. (4 Peck) 417; Bay v. Cook, 31 Ill. 336; Maxwell v. Maxwell, 109 Ill. 588; Hodgson v. Macy, 8 Ind. 121; Mutual Fire Ins. Co. v. Deale, 18 Md. 26, 79 Am. Dec. 673; Tremper v. Barton, 18 Ohio, 418; Murphy v. Nathans, 46 Pa. (10 Wright) 508; Douglas v. Brice, 4 Rich. Eq. (S. C.) 322; Dudley v. Bosworth, 29 Tenn. (10 Humph.) 9.

ENGERUD, J. The plaintiff, claiming to be the owner in fee and in possession of a half section of land in Ransom county, brought this action to quiet title and establish her title against the adverse claims of the defendants Northern Pacific Railroad company and Amos A. Gates. There was no appearance by the railroad company, but the defendant Gates appeared, and in his answer denied any title in plaintiff, and alleged title in himself. The nature of the title claimed by him, so far as material on this appeal, will sufficiently appear in subsequent parts of this opinion. There was a trial by the court without a jury, which resulted in a judgment in favor of the plaintiff for the relief demanded. Defendant Gates appealed from the judgment, and demands a trial de novo in this court.

In addition to the main defense hereinafter discussed, the answer alleged ownership in defendant by virtue of a tax deed, and

also alleged ten years' adverse possession under claim of title in fee. The ruling of the trial court that neither of these allegations was sustained is not questioned by the appellant, and will not be further noticed.

The evidence shows that the land was bought from the Northern Pacific Railroad Company, and paid for by the appellant; that the railroad company, at the request of appellant, executed a deed of the land in question on December 10, 1878, naming this respondent as grantee, which deed was delivered by the company to the appellant immediately after its execution, and has remained in the custody of the appellant unrecorded from that time until it was produced at the trial. The respondent is the daughter of the appellant, and at the time of the execution of the deed in question was thirteen years old, and was living at her father's home in Indiana. The respondent claims that her father had the land deeded to her with the then present intent to vest her with the title as a gift. The appellant's contention with respect to the deed is stated in his answer as follows: "That at the time of procuring the deed to be issued in the name of the plaintiff as aforesaid the defendant intended, when the plaintiff reached her majority, to give her the land in question, if in the meantime she had conducted herself towards the defendant as a good obedient daughter should; reserving to himself in the meantime the right to dispose of said lands as he saw fit. That after the execution of said deed aforesaid, and before reaching her majority, and against the defendant's wish, and in disobedience to his express command, she intermarried with one William Hulet." He further claims that the deed was never delivered to plaintiff with intent to pass title, and also alleges that he retained possession of the land at all times until the plaintiff and her husband clandestinely took possession in March, 1901. It is apparent at a glance that, so far as the railroad company was concerned, there was a delivery of the deed with intent to convey title to the grantee named therein. It is not claimed by the appellant that he ever disclosed to the railroad company his intention to receive the deed and hold it as an undelivered instrument during the minority of his daughter. It is unnecessary in this case to express any opinion as to whether or not an intention on the part of Mr. Gates, the donor (an intention undisclosed either to the grantor or grantee in the deed), would operate to postpone the taking effect of the

deed, because the evidence has fully convinced us that the appellant intended at the time of the execution and delivery of the deed that it should take effect and vest the title in his daughter immediately. It is clear that, if both the grantor and donor intended that the deed should take effect as an absolute conveyance of the title to the grantee named in the deed, the delivery of the deed to the father for the daughter was sufficient to vest the title in her. The deed was beneficial to the grantee, and imposed no conditions or obligations upon her. Under such circumstances the delivery of a deed by the grantor to a third person for the grantee is a sufficient delivery to vest the title in the grantee even though this grantee were ignorant of the fact. This is so because in such cases the law presumes acceptance by the grantee in the absence of evidence of nonacceptance. The actual manual possession of the instrument by the grantee is not necessary or important. Arnegaard v. Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258. The evidence in this case, however, shows that the transaction was made known to the donee by the donor soon after the delivery of the deed, and that she accepted it.

It would serve no useful purpose to discuss the evidence in detail. On the evidence as a whole we are fully satisfied that the deed from the railroad company was intended both by the grantor and this appellant to convey the land to the respondent at the time of its delivery, and that there was a sufficient delivery to effect the purpose intended.

The judgment is accordingly affirmed. All concur.

(103 N. W. 628.)

LOUISA F. PARSONS v. P. J. McCUMBER AND B. L. BOGART, COPARTNERS AS McCUMBER & BOGART, AND W. E. PURCELL.

Opinion filed May 10, 1905.

Estoppel — Evidence.

1. The defendants, who were the real owners of a note and mortgage, foreclosed the mortgage by action in the name of the nominal holder, and collected the greater part of the debt. They concealed from the present plaintiff, who was a defendant in the foreclosure suit, the fact that they were the real owners of the cause of action in the foreclosure suit, and represented to her that the nominal plaintiff was the real creditor. The plaintiff was not misled thereby to

her prejudice, but, after discovering the facts as to the true ownership, procured from the nominal creditor an instrument purporting to assign to her said creditor's claim for the money so collected. *Held*, that the defendants were not estopped to assert that they were the real owners of the money collected.

Appeal from District Court, Richland county; *Fisk*, J.

Action by Louisa F. Parsons against P. J. McCumber and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

A. L. Parsons and *Smith Stimmel*, for appellant.

The appellant purchased the judgment from Stewart, relying upon the acts and declarations of the respondents, and they are estopped from claiming that they are the owners of such judgment, as against appellant's claim. Respondents persistently maintained that Stewart was the real owner of the judgment throughout all the controversies of these parties until this suit was begun, and cannot set up the claim of ownership in themselves. Ohio M. R. Co. v. McCarthy, 96 U. S. 258, 24 L. Ed. 693; Boggs v. Merced Mining Co., 14 Cal. 280-367; Carpenter v. Thurston, 24 Cal. 269-282; Bigelow on Est. 556, 558, 569, 573, 577, 600; Manufacturers & T. Bank v. Hazard, 30 N. Y. 226; Ketchum et al. v. Duncan et al., 96 U. S. 868; 11 Am. & Eng. Enc. Law (2d Ed.) 421, 434; Norman v. Eckerman, 63 N. W. 170; Brown v. Bowen, 30 N. Y. 540; McNeil v. Tenth Nat. Bank, 46 N. Y. 325; Sessions v. Rice, 30 N. W. 735; Hefner v. Vandolah, 57 Ill. 520; 11 Am. & Eng. Enc. of Law (2d Ed.) 427; Dodge v. Pope, 93 Ind. 487 and note; 11 Am. & Eng. Enc. of Law (2d Ed.) 450; 11 Am. & Eng. Enc. of Law (2d Ed.) 436; 14 Ohio St. 414; 16 Ohio St. 75; Peabody v. Lloyd, Banker, 68 N. W. 92; Parliman v. Young, 4 N. W. 139; Brigard v. McNiel, 38 Ill. 400; Bigelow on Estoppel, 586; Fitch v. Baldwin, 17 Johns. 161; Buckman v. Attwood, 44 Ill. 182; Grissler et al. v. Powers, 81 N. Y. 57; Coombs v. Chandler, 33 Ohio St. 178.

Purcell, Bradley & Divet and *McCumber, Forbes & Jones*, for respondents.

Stewart was the trustee of an express trust, and the trust was valid. Pom. Eq. Jur., section 988, note 5; Rev. Codes 1899, section

5223; Pom. Eq. Jur., section 989, note 5; Considerant v. Brisbane, 22 N. Y. 389; Beach on Trusts, 37; Perry on Trusts, sections 81-2; Perry on Trusts, section 86; Childs v. Gordon, 106 Mass. 322; Hackney v. Vrooman, 62 Barb. 650; Beach on Trusts, 51.

No estoppel has been shown that would preclude respondents from showing who were the real owners of the judgment. Appellant should have made clear to respondents the purpose of her desire to know who was the owner of the judgment, or the respondents cannot be said to have had any intention that their representations should be acted upon. Bigelow on Estoppel, p. 617; Cravens v. Kitts, 64 Ind. 581; Shippley v. Fox, 16 Atl. 275; Pierce v. Andrews, 6 Cush. 4; Chester v. Grier, 24 Tenn. 26; Wolley v. Chamberlin, 24 Vt. 270; Hackett v. Callendar, 32 Vt. 97.

ENGERUD, J. The plaintiff has appealed from a judgment of the district court dismissing her action. The action was tried by the court without a jury, and the appellant demands a review of the entire case. The respondents object to a trial de novo on the ground that the statement of the case was improperly settled, and have moved to strike the same from the record. We have examined the record pertaining to that motion, and are agreed that the statement was properly settled; but, inasmuch as the judgment must be affirmed on the merits, it is not necessary to state our reasons for overruling the objections to the propriety of the statement.

On February 20, 1894, in an action wherein Charles J. Stewart was plaintiff and Joel S. Parsons and this appellant, his wife, were defendants, default judgment was rendered and entered in favor of said Stewart and against Joel S. Parsons for the sum of about $1,100, and foreclosing against both defendants therein a real estate mortgage given by them to secure a note previously given by Joel S. Parsons to said Stewart. Pursuant to this judgment the mortgaged land was sold at sheriff's sale to W. E. Purcell for the sum of $900. After that sale Mr. and Mrs. Parsons applied to the district court for an order vacating the judgment and for leave to answer. The application was denied by the district court, and an appeal was then taken to the Supreme Court. On that appeal the order was affirmed as to Mr. Parsons and reversed as to Mrs. Parsons. The decision on that appeal is reported in Stewart v. Parsons, 5 N. D. 273, 65 N. W. 672. While that appeal was pending an execution was issued to collect the balance of the judg-

ment left unpaid after the sale of the land. Pursuant to this execution a quantity of oats belonging to Joel Parsons was seized and sold by the sheriff. The net proceeds of such sale credited on the judgment were about $200. Throughout all these proceedings the firm of McCumber & Bogart appeared as attorneys for Charles J. Stewart, the plaintiff in said foreclosure suit. In the spring of 1897 the plaintiff's husband, claiming to act as the agent of the plaintiff, procured from Charles J. Stewart a formal satisfaction of the judgment, and also a written assignment to the plaintiff of all claims and demands then existing in favor of Stewart against any and all persons whomsoever on account of moneys or other property received or collected by them under or by virtue of said judgment. Stewart was paid $100 for the satisfaction and assignment. The present action was commenced in November, 1900, to recover from McCumber & Bogart the amount collected by them as attorneys for Stewart as the result of the execution sales mentioned; the plaintiff claiming under the assignment from Stewart. Purcell is also made a party defendant, but no money judgment is demanded against him; it being alleged merely that he has or claims to have some unknown interest in or claim upon the demand in question. The prayer for judgment is for the recovery of a specific sum of money from McCumber & Bogart, "and for such other and further relief as she may be entitled to in the premises."

The action seems to have been treated by all parties as a suit in equity for an accounting, and we will accept that view of it, without questioning the propriety thereof.

It is conceded that the proceeds of the execution sales have never been paid over or accounted for to Mr. Stewart. The main defense is that Stewart was merely the nominal plaintiff in the foreclosure suit; that the debt involved in that suit was at all times, both before and after the commencement of that suit, and is still, actually owned by the defendants in this action, Messrs. McCumber & Bogart and W. E. Purcell, and that Mr. Stewart was merely a passive trustee for the benefit of these defendants. It is undisputed that the actual fact with respect to the ownership of the cause of action in the foreclosure suit is as alleged by the defendants, but the plaintiff contends that she procured and paid for the satisfaction and assignment in good faith, relying upon Stewart's apparent ownership of the judgment, and that defendants,

by their conduct, induced her to believe that Stewart was the real owner thereof, and hence that they are estopped to allege ownership in themselves.

It is clearly established by the evidence that the plaintiff, at the time of the taking of the assignment, and a long time before, not only suspected and believed that Stewart was a mere nominal owner of the judgment, but had positive information from the defendants themselves that Stewart had no actual interest in the claim involved in the foreclosure suit. Moreover, among the moving papers used in support of the motion to vacate the foreclosure judgment was an affidavit, sworn to by plaintiff's husband, in which it is stated in positive terms that McCumber & Bogart, and not Stewart, were the real plaintiffs in the case. The entire record on that motion is not in evidence, but, so far as the parts of that record before us disclose anything on the subject, it appears that in opposing the motion to vacate there was no denial of the facts alleged by the moving parties as to the real ownership. Mrs. Parsons was successful on that motion, and it is therefore clear that no prejudice could have resulted to her from the fact that the foreclosure proceedings were instituted in the name of Stewart, instead of in the names of the real parties in interest. If the fact that McCumber & Bogart were the real owners of the cause of action, in whole or in part, was material to her, she then had knowledge of the fact, and was in a position to avail herself of it. It is not pretended that these defendants ever misrepresented to or concealed from this plaintiff the truth as to their real connection with the cause of action in the foreclosure suit after that suit was commenced. The fact that the defendants, before the commencement of the foreclosure suit, concealed from the plaintiff and her husband their true relation to the cause of action in that suit, and represented to the debtors that Stewart was the real creditor, is of no avail to this plaintiff, because she subsequently discovered the concealment and misrepresentations, and was in no way prejudiced thereby. Under these circumstances there is no estoppel by conduct. She procured the assignment from Stewart, knowing he had nothing to assign; and she had not, before taking the assignment, been induced to alter her position to her prejudice by any concealment or misrepresentation on the part of the defendants.

It is unnecessary to express any opinion as to the defense of the statute of limitations, because we are clear that no cause of action ever existed.

The judgment is affirmed. All concur.

(103 N. W. 626.)

WILLIAM C. HAGLER v. FANNIE E. KELLY AND WILLIAM A. MARIN.

Opinion filed May 10, 1905.

Judgment — Entry.

1. In 1892, following the irregular practice which then generally prevailed in this jurisdiction with respect to the manner of entering judgment in the district court, an order for judgment, which embodied the final determination of the action made by the trial court, and was in the form required for a judgment, but concluded with the direction to enter judgment, signed by the judge and attested by the clerk, was recorded in full in the judgment book, where it was again signed by the judge and clerk. *Held*, that such record is a valid judgment.

Taxation.

2. Where judgment was obtained and docketed for personal property taxes pursuant to the provisions of sections 57 and 58, c. 132, pp. 398, 399, Laws 1890, and became a lien upon the property in question before the Revised Codes of 1895 took effect, such lien continued notwithstanding the repeal of the law under which the lien was acquired. Gull River Lumber Co. v. Lee, 73 N. W. 430, 7 N. D. 135, overruled.

County Commissioners — Assignment of Judgment.

3. The board of county commissioners has power to sell and assign a judgment obtained for personal property taxes under the general revenue law of 1890.

County Commissioners — Assignment of Judgment.

4. The board of county commissioners may sell and assign such judgment for less than the amount due thereon if the transaction is free from fraud or other illegality.

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

Action by William C. Hagler against Fannie E. Kelly and William A. Marin. Judgment for plaintiff and defendants appeal.

Affirmed.

Tracy R. Bangs and *W. J. Meyer,* for appellant.

In this state, when order for the entry of a judgment is given, it is the duty of the clerk, under section 5095, to enter judgment in the judgment book and then place a copy of said judgment in the roll. In re Weber, 4 N. D. 119, 59 N. W. 523.

A judgment cannot be entered without an order of the court. In re Weber, supra; Gould v. Duluth & D. Elevator Co., 54 N. W. 316.

There is a difference between an order for a judgment and a judgment. McTavish v. Gt. N. R. R. Co., 8 N. D. 94, 79 N. W. 443; Black on Judgments, section 115.

The vitality of a tax lien being dependent upon the law of 1890, its repeal without reservation, prior to any disposition of the tax by the state or its corporate agencies, destroyed the lien. A lien is a creature of statute, and its extent and operation is fixed by law. 17 Am. & Eng. Enc. Law, 770; Gull River Lumber Co. v. Brock and Lee, 6 N. D. 135, 73 N. W. 430.

A county, through its board of county commissioners, can make no disposition of a tax judgment. It has only the powers expressly granted by words of the statute or the constitution, or are incident to such powers. 1 Am. & Eng. Enc. Law, 426; Shally v. Lash, 14 Minn. 498; James v. Wilde, 25 Minn. 305; Black on Tax Titles, section 153.

A county can enforce the collection of a judgment, but not barter away or compromise it, when against parties not shown to be insolvent. State v. Davis, 75 N. W. 897.

A county is but the agent of the state, as townships, cities and school districts. An agent authorized to collect a claim has no power to sell or compromise it. 1 Am. & Eng. Enc. Law, 1030; Smith v. Johnson, 71 Mo. 382; Bank v. Davis, 14 N. J. Eq. 286; Rodgers v. Bur., 46 Tex. 505; Mallory v. Martiner, 15 Wis. 172.

Unless taxes are expressly or impliedly authorized to be assigned, they are incapable of assignment, and no one can be subrogated to the rights and remedies of the state or municipality. 27 Am. & Eng. Enc. Law (2d Ed.) 380; McInery v. Reed, 23 Iowa, 410.

The remedy provided by statute for the enforcement of taxes is exclusive. Brule County v. King, 77 N. W. 107; McHenry County et al. v. Kidder County, 79 N. W. 875, 8 N. D. 413.

Taxes are not debts and are not assignable. Brule County v. King, 77 N. W. 107.

Scott Rex, for respondent.

The judgment under which the sale was made was valid. In re Weber, 4 N. D. 119. The instrument under consideration was an order for dismissal, not signed or attested by the clerk, nor entered in the judgment book. McTavish v. Gt. N. R. R. Co., 8 N. D. 333.

The word "render" instead of "enter" was used, and the judgment failed to provide that plaintiff recover a specified amount. The law of 1890 provided for the entry of a "judgment." In State v. Red River Valley El. Co., 69 Minn. 131, the court says: "This proceeding is in the nature of a personal action." An appeal from a judgment entered in such a proceeding was entertained in State v. Rand. 30 Minn. 502; Collins v. Welch et al., 12 N. W. 121.

The tax ceased to exist upon the entry of the judgment in which it merged. A final determination by judgment or sentence is a vested right, and therefore unaffected by the subsequent repeal of the statute upon which it depends. 23 Am. & Eng. Enc. Law (1st Ed.) 573; Osborne v. Sutton, 108 Ind. 443.

It has been the policy of the state to vest county boards with ample powers. They can place taxes on the list of uncollectible taxes. Comp. Codes, 1616, section 1243; Rev. Codes 1895, section 61, ch. 126, Laws 1897. They can cancel taxes when uncollectible. Laws 1890, ch. 132, section 56. They can abate. Laws 1891, ch. 120. Can compromise. Laws of 1897, ch. 126, section 59.

Having put the tax into a judgment, the board did not lose its power and control over it except to require its payment in full. The county board has the same power as to cancellation, abatement, etc., over city, town, school and state taxes as county taxes.

The county has the power to sell debts, judgments and other evidences of debt. Brown County v. Jenkins et al., 77 N. W. 579; State v. Davis et al., 75 N. W. 897; Collins v. Welch et al., 43 Am. Rep. 111, 12 N. W. 121; Hall v. Baker, 42 N. W. 104; Washburn County v. Thompson et al., 99 Wis. 585, 75 N. W. 309; State et al. v. Martin (Neb.) 43 N. W. 244; Agnew et al. v. Brall, 124 Ill. 312, 16 N. E. 230; Prest v. Mappin, 14 Ill. 193; Supervisors v. Birdsall, 4 Wend. 454; Railway Co. v. Anthony, 73 Mo. 431; Board v. Bowen, 4 Lans. 31; Prout v. Inhabitants, 154 Mass. 450.

The personal property tax judgment was a right accrued within the meaning of section 2686, Rev. Codes 1895; 26 Am. & Eng. Enc.

Law, 746; Wright Lumber Co. v. Hixon et al., 80 N. W. 1110; Smith v. Kelly, 33 Pac. 642; Louisville Water Co. v. Com., 34 S. W. 1064; People v. N. Y. R. Co., 156 N. Y. 570; Oakland v. Whipple et al., 44 Cal. 303; U. S. v. Iselin, 87 Fed. 194; U. S. v. Burr et al., 159 U. S. 78, 15 Sup. Ct. Rep. 1002; Bruce County v. Cook et al., 35 N. E. 992; Danforth v. McCook County et al., 76 N. W. 940; Commonwealth Appeal, 128 Pa. St. 603.

In case of the amendment or revision of the tax laws, the presumption is very strong that the legislature did not intend to cancel outstanding tax obligations. Cooley on Taxation, 499, 22; Alliance Trust Co. v. Multnomah County, 63 Pa. 496; Wells County v. McHenry County et al., 7 N. D. 246, 74 N. W. 241.

The tax in question was put in judgment and could be collected only under the former laws. Greensborough v. McAdoo, 112 N. C. 359; In re Munn, 165 N. Y. 149; Oakland v. Whipple, 44 Cal. 303; Louisville Water Co. v. Commonwealth, 34 S. W. 1064; State v. Bank, 68 Mo. 515.

ENGERUD, J. Plaintiff, claiming to be the owner in fee of the quarter section of land in controversy, situated in Nelson county, brought this action to quiet title. The complaint is in the statutory form provided by chapter 5, p. 9, Laws 1901. The defendant Fanny E. Kelly answered, alleging title in fee by virtue of a deed from Charles W. Tanner. The defendant William A. Marin, in his answer, claims to have a lien upon the land as assignee of a judgment rendered and docketed against Tanner in favor of Walter A. Wood Mowing & Reaping Machine Company. There was a trial by the court without a jury, and judgment was ordered and entered adjudging that plaintiff was the owner in fee, and quieting his title against the defendants. The defendants appealed from the judgment, and demand a trial de novo of all the issues.

Charles W. Tanner owned the land in fee in 1890, and until Fanny E. Kelly succeeded to his rights under a deed from him executed in 1901, and she now owns the land in fee subject to the lien of the judgment owned by Marin, unless the plaintiff acquired title by the execution sale hereinafter discussed. Personal property taxes for the year 1890 were imposed upon Charles W. Tanner pursuant to the 1890 revenue law (chapter 132, p. 376, Laws 1890). Tanner having failed to pay them, proceedings were instituted against him under the provisions of section 57 of that act

to obtain a judgment against him therefor. The citation was issued and personal service obtained, and on June 21, 1892, judgment by default was taken in the district court of Nelson county for the tax, interest, penalties and costs, aggregating $25.46. The judgment was duly docketed the same day. In April, 1897, the plaintiff purchased this tax judgment from the county, and a formal assignment thereof to him was executed in behalf of the county by the chairman of the board of county commissioners. The then state's attorney, at the request of Mr. Hagler, immediately caused an execution to be issued on said judgment. Pursuant to that writ the sheriff levied upon and sold the land in question to Mr. Hagler for $49.25, and delivered to him a certificate of sale in due form, dated May 25, 1897. The sale was reported to and approved by the district court. No redemption having been made from such sale, the plaintiff received a sheriff's deed of the land in due form, dated June 23, 1898. Upon this sheriff's deed the plaintiff bases his claim of title. The validity of that deed is attacked by the appellants upon three grounds. The appellants contend, first, that there never was any judgment rendered or entered in the district court for the personal property taxes; second, that, even if there was a judgment, such judgment ceased to be a lien on the land on January 1, 1896, when the Revised Codes of 1895 took effect, repealing the provisions of the 1890 revenue law, by force of which the judgment became a lien; third, that the purported sale and assignment of said judgment to the plaintiff by the board of county commissioners was an ultra vires act, and void. We shall dispose of these propositions in the order in which they are stated.

1. The point that there never was any judgment rendered and entered is based on the fact that the judgment upon which the plaintiff relies is a mere copy of the order for judgment recorded in the judgment book. The order for judgment was attached to the judgment roll, was properly entitled, and after the proper recitals continued as follows: "Now, on motion of W. H. Standish, plaintiff's attorney, it is hereby adjudged that the county of Nelson, the plaintiff, recover of Charles W. Tanner, the defendant, the sum of twenty dollars and fifty-one cents, and four dollars and ninety-five cents costs and disbursements, amounting in the whole to twenty five dollars and forty-six cents. And the clerk of court is hereby directed to enter judgment accordingly." This order

was copied literally and in full into the judgment book kept by the clerk of said court, where it was again signed by the presiding judge, and attested by the clerk, and the seal of the court impressed thereon. We think this must be held to be a sufficient judgment. Excluding from the order the final sentence directing the clerk to enter judgment, it will be seen that the entry in the judgment book is a perfect form for a judgment. The fact that the judge signed it and the clerk attested the signature does not destroy its effect as a judgment, if it is otherwise sufficient. If the final sentence were omitted from the entry in the judgment book, the appellants' objection to the sufficiency of the entry to constitute a judgment would be squarely met by the decision of this court in Cameron v. Ry. Co., 8 N. D. 124, 77 N. W. 1016. Appellants, however, assert that the final sentence shows that further action was contemplated, and that the recording of this order in the judgment book did not, therefore, "purport to be the final act in the case." They rely upon McTavish v. Ry. Co., 8 N. D. 333, 79 N. W. 443. In that case the question was whether the right to appeal was barred. A previous appeal had been dismissed, with leave to prosecute a second appeal upon condition that the appellant should comply with certain terms imposed. It was discovered that the supposed judgment from which the former appeal had been taken was merely a copy of the order for judgment recorded in the judgment book by the clerk. Moreover, the order for judgment was not drawn in such form as to serve as a judgment. Upon discovering this abortive attempt to enter judgment, the appellant asserted that the first appeal was a nullity, and consequently claimed the right to appeal unconditionally from the judgment subsequently properly entered. The situation with which the court was dealing on the appeal in that case was the same as that which existed in the trial court when the irregularity in question was discovered. The transaction was fresh, and the litigation still in actual progress. It will be readily seen that under such circumstances the propriety and sufficiency of the acts of the clerk to accomplish the intended purpose were to be tested by an entirely different standard from that which must be applied in the case at bar. That case simply involved a question of practice in a pending litigation. In this case we are dealing with rights to property of long standing, acquired or supposed to have been acquired through legal proceedings. Those proceedings are at-

tacked for irregularity of procedure of a purely formal nature which neither denied nor prejudiced any substantial right of any adverse party. Moreover, the procedure followed, although now known to be irregular, was, at the time the transaction took place, very generally considered proper practice. As said by Chief Justice Bartholomew in Rolette County v. Pierce County, 8 N. D. 613, 614, 80 N. W. 804: "All the members of this court know that under the late territorial practice it was a very common matter to draw a paper in form a judgment such as the court desired, and have it signed by the judge. This paper was treated as the judgment, and its subsequent entry by the clerk in the judgment book was regarded as a perfunctory matter. This practice, as this court has repeatedly held, was a misconception of the statute. But the practice prevailed with many practitioners of good standing." Every lawyer familiar with the practice in this jurisdiction in 1892 knows that most, if not all, of the members of the profession in this state at that time would have considered the record of this order in the judgment book to be a perfectly valid judgment. There are doubtless many titles resting upon such judgments. We ought not at this late day declare such judgments invalid for a mere technical irregularity of practice, if that result can be avoided without violating established legal principles. We do not think we are violating any rule of law in holding that the record in this case shows a valid judgment for the personal property tax. The decision of the court fixing the amount of recovery is clearly expressed. That decision is entered in the official record, which was devoted to no other use than the recording of the judgments of the court. Bearing in mind the practice then prevailing, we know that it was considered by the officers of the court and by the public generally to be a judgment, and was so intended; and we also know that, notwithstanding the final sentence, it did in fact purport to be the final act in the case, and did not in fact contemplate further judicial action. We think the document should be taken to be what in fact to all intents and purposes it was intended and generally supposed to be. Under these circumstances we are of the opinion that the final sentence should be treated as surplusage.

2. The judgment was docketed June 21, 1892, and under the provisions of section 57, 58, chapter 132, pp. 398, 399, Laws 1890, became a lien upon the land in question, enforceable by execution to be issued at the request of the state's attorney. That law

was repealed by the Revised Codes of 1895, which went into effect January 1, 1896. Counsel for appellant assert that the repeal of the law by virtue of which the judgment became a lien destroyed the lien. They cite Gull River Lumber Co. v. Lee, 7 N. D. 135, 73 N. W. 430, which supports that proposition. This court there held that the repeal of the 1890 revenue law by the Revised Codes of 1895 destroyed the lien upon personal property which had accrued under the repealed law. In the consideration of that case the court overlooked section 2686 of the Revised Codes of 1899, which reads as follows: " No action or proceeding commenced before this Code takes effect, and no right accrued, is affected by its provisions, but the proceedings therein must conform to the requirements of this Code as far as applicable." The tax was levied and the judgment entered and docketed while the 1890 revenue law was in force. A lien was thereby fastened upon the land, enforceable by execution. In the opinion of the chief justice and the writer, that lien was clearly a "right accrued," which, by the express provisions of section 2686, was not affected by the repeal of the law under which it had been acquired. Lumber Co. v. Hixon, 105 Wis. 153, 80 N. W. 1110, 1135; Smith v. Kelly, 24 Ore. 464, 33 Pac. 642; Water Co. v. Commonwealth (Ky.) 34 S. W. 1064; People v. Ry. Co., 156 N. Y. 570, 51 N. E. 312; Oakland v. Whipple, 44 Cal. 303; Bruce v. Cook (Ind. Sup.) 35 N. E. 992; Danforth v. McCook Co., 11 S. D. 258, 76 N. W. 940, 74 Am. St. Rep. 808; State v. Bank, 68 Me. 515; 24 Am. & Eng. Enc. Law (2d Ed.) p. 746. The majority of the court therefore hold, notwithstanding the views expressed in Lumber Co. v. Lee, that the lien of this tax judgment was not destroyed by the repeal of the law under which the lien was acquired. Justice Young, however, declines to express any opinion on this point.

3. The validity of the sale and assignment of the judgment by the county to the plaintiff is attacked solely on the ground of absence of power in the board of county commissioners to dispose of the judgment. The honesty and fairness of the transaction are not questioned. The appellant denies the existence of any power in the board of county commissioners to either compromise or assign the judgment for personal property taxes under any circumstances. Section 1907, Rev. Codes 1899, vests in the board of county commissioners the general management of the fiscal affairs of the county. Throughout all the changes of the laws relating

to revenue and taxation in this state, the board of county commissioners has always been vested with the power to abate or cancel general taxes, if found to be wholly or partly unenforceable. Comp. Laws 1887, section 1616; Laws 1890, p. 398, c. 132, section 56; Rev. Codes 1895, section 1243; Laws 1897, pp. 279, 280, c. 126, sections 59, 61. This power exists not only as to taxes for county purposes, but also as to those levied for state, township and school purposes. Under all the revenue laws that have been in force in this state the officers of the county have been charged with the duty of collecting all general taxes upon property within its boundaries, and the general supervision of such collection has always been vested in the board of county commissioners. It is a matter of general knowledge that the county commissioners have uniformly exercised the power to adjust and compromise taxes where the collection of them was doubtful. It must be conceded that the board had power to abate or compromise taxes where the collection of them was doubtful. It must be conceded that the board had the power to abate or compromise the tax which became merged in this judgment if, in the fair exercise of its discretion, such action was advisable. Collins v. Welch, 58 Iowa, 72, 12 N. W. 121, 43 Am. Rep. 111; State v. Davis, 11 S. D. 111, 75 N. W. 897, 74 Am. St. Rep. 780. It is clear that this same power continued after the judgment was obtained. The duty of the county commissioners with respect to the collection of the taxes merged in this judgment was the same after as before the entry of the judgment. If they had the power to abate or compromise the claim, we can conceive of no valid objection to their right to effect the same result by selling the claim. No right of the debtor, or of any party interested in the land upon which the judgment was a lien, was impaired or prejudiced. The amount of the judgment and the manner of enforcing it remained exactly as before. The state, county, township and school district received exactly what they would have received had the claim been compromised by accepting the same amount in payment. While we have found no statute specifically conferring upon the board the power to sell such a judgment, neither have we found any law denying the existence of such power. The board has general power to manage the county business, and has power to sell and dispose of its property. The board is also charged with the duty of superintending the collection of all general taxes, and to abate and compromise the

same when the circumstances warrant such action. If a sale of a tax judgment, either for the full amount or less than the full amount, becomes advisable in order to secure the money due for taxes, we think the board has power to adopt that means of obtaining the money. The facts of this case distinguish it from those cases cited by appellant to the effect that a tax cannot be the subject of sale or assignment. McInery v. Reed, 23 Iowa, 410; Hinchman v. Morris (W. Va.) 2 S. E. 863. Assignability is denied because the tax or assessment is not a debt, and because the statutory remedies for enforcing the statutory obligation are exclusively confined to such proceedings as the legislature has devised, and which are of such a nature that the public officials charged with that duty could alone institute and conduct them. Neither of these reasons applies to the judgment in question. The personal property tax, after being placed in judgment, becomes an incontestable evidence of a personal liability of the taxpayer collectible by the ordinary writ of execution out of the debtor's real or personal property. The tax became a judgment enforceable by the same process, by the same officer, and in the same manner as any other judgment of the same court. We are unable to conceive why such judgment should not possess the same attributes, including that of assignability, as any other judgment.

It is finally urged that the county authorities were mere collecting agents, and hence had no authority to sell or compromise the judgment without the consent of the state, township and school district, each of which were part owners thereof. The state, township and school district were not joint owners with the county of this judgment. The relation of the county to the other governmental agencies with respect to this tax judgment is more analogous to that of a trustee clothed with the title to the trust property and vested with discretionary powers to dispose of the subject matter of the trust for the benefit of the beneficiaries.

We have stated all the facts we deem material to this decision. They are all established by uncontroverted documentary evidence. Upon these facts we reach the same conclusion as the trial court, and the judgment is affirmed. All concur.

(103 N. W. 629.)

DANIEL M. ROBBINS AND ELLSWORTH C. WARNER, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF ROBBINS & WARNER, v. JOHN W. MAHER.

Opinion filed May 19, 1905.

Without the Principal's Consent a Broker Cannot Contract in His Own Name.

1. A broker employed to negotiate a sale of grain for future delivery has no authority, without his principal's consent, to make the contract for such sale in his own name.

Where a Broker So Contracts He Can Recover for Neither Services Nor Advances.

2. A broker cannot recover from his principal either for services or for money advanced by reason of a sale of grain negotiated for the principal, where, without the latter's consent, the broker has contracted in his own name.

Custom.

3. The fact that it was the custom of brokers at the place of sale to negotiate sales in their own names, without disclosing their principals, and to assume personal liability for the completion of such sales, is not sufficient to prove authority to sell in the broker's name, if it is not shown that the principal had knowledge of the custom.

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

Action by Daniel M. Robbins and Ellsworth C. Warner against John W. Maher. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Townsend & Denoyer, for appellants.

The subject matter of this controversy occurring in Minnesota, it is governed by the laws of that state, including its statute of frauds. The statute of frauds of that state not being pleaded, and not being a part of the common law, it is not presumed to be a part of our own. 8 Am. & Eng. Enc. Law (1st Ed.) 561; Story on Conflict of Law, section 280; Miller v. Wilson, 34 N. E. 1111; Scudder v. Union Nat'l Bank, 91 U. S. 406, 23 L. Ed. 245; Ellis x. Maxson, 19 Mich. 186, 2 Am. Rep. 81; 9 Enc. Pl. & Pr. 715; 8 Am. & Eng. Enc. Law (1st Ed.) 658; Mathews v. Ansley, 31 Ala. 22; Carrington v. Roots, 1 McLean, 176.

The defense of the statute of frauds cannot be set up against an executed contract. Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct.

Rep. 950; Dodge v. Crandall, 30 N. Y. 294; Brown v. Farmers' Loan & Trust Co., 22 N. E. 952; Madden v. Floyd, 69 Ala. 221; Gordon Rankin & Co. v. Tweedy, 71 Ala. 202; Huntley v. Huntley, 114 U. S. 394, 20 L. Ed. 130; Brown on Statute of Frauds, 160; Newman v. Nellis, 97 N. Y. 285; Brown on Statute of Frauds, section 116; Andrews v. Jones, 10 Ala. 400; Slatter v. Mark, 35 Ala. 522; Langerfelt v. Meker, 100 Ala. 430; Reedy v. Smith, 42 Cal. 245; Buttman v. Nash, 12 Me. 3; Starrett v. Mullen, 20 N. E. 178; Swanzey v. Moore, 74 Am. Dec. 134; Anderson School Tp. v. Milroy Lodge of Free and Accepted Masons, 29 N. E. 411.

The transactions are not within the statute of frauds; they are contracts of agency, not of sale. Sayre v. Wilson, 5 So. 157; Kutz v. Fleisher, 7 Pac. 195; Hatch v. McBrien, 47 N. W. 214; Kelsey v. Henry, 48 Ind. 37; Bird v. Muninbrin, 44 Am. Dec. 247; Baldwin v. Flag, 36 N. J. Eq. 48.

Brennan & Gray, for respondent.

Oral testimony is incompetent to prove an agency to make a contract required by law to be in writing. Rev. Codes 1899, section 3314; McLaughlin v. Wheeler, 47 N. W. 816; Bergtholdt v. Porter Bros. Co., 46 Pac. 738.

Ratification, if any, must also be in writing. Rev. Codes 1899, section 4315; Morris v. Ewing, 8 N. D. 99, 76 N. W. 1047; Fargo v. Cravens, 70 N. W. 1053.

The sale was made in Minnesota and the law of that state applies. The complaint does not allege that the Minnesota law differs from ours, and it will, therefore, be presumed the same. National Ger. Am. Bank v. Lang, 2 N. D. 66, 49 N. W. 414; Marston v. Lash, 61 Cal. 622.

The statute of frauds of Minnesota is presumed a part of the common law of Minnesota, unless the contrary is shown. Coburn v. Harvey, 18 Wis. 147; Spaulding v. Chicago, 30 Wis. 110; Norris v. Harris, 15 Cal. 226; Cent. Dig., volume 10, col. 866 D.

The sale was made in plaintiff's own name and the principal was not disclosed to purchasers nor purchaser to principal. A broker cannot contract in his own name without his principal's consent. Haas v. Ruston, 42 N. E. 298; Ewell's Evans Ag. side, p. 122; Irwin v. Williar, 110 U. S. 499, 29 L. Ed. 225; White v. Chouteau, 10 Barb. 202; Buckbee v. Brown, 21 Wend. 110.

The plaintiffs claim that the sale in their own name was according to the custom in Duluth, but fail to allege that defendant was aware of the custom or that they informed him of their custom. They cannot recover for advancements or commissions under such a state of facts. Haas v. Ruston, supra; Dunn v. Wright, 51 Barb. 244; Pickering v. Demerrit, 100 Mass. 416; Day v. Holmes, 103 Mass. 416; Blacqmore v. Heyman, 23 Fed. 648; Cent. Dig., volume 15, section 23, col. 1244; 1 Am. & Eng. Enc. Law (2d Ed.) 1117, 1118.

ENGERUD, J. This is an appeal by plaintiffs from a judgment of dismissal rendered by the district court pursuant to a directed verdict for defendant. The plaintiffs were brokers engaged in buying and selling grain on commission at Duluth, Minn. They brought this action to recover $5 commission earned and $388 cash advanced in the sale of 2,000 bushels of flax for future delivery on defendant's account and at his request. The allegations of the complaint are substantially the same as the facts set forth in the offer of proof hereinafter referred to. The answer was a general denial, and further pleaded that the alleged transaction was void under the statute of frauds. The only question on this appeal is whether or not the facts upon which plaintiffs offered to prove at the trial were sufficient to establish prima facie a cause of action.

The offer of proof was as follows: "That upon August 30, A. D. 1899, the defendant, John W. Maher, at the defendant's office, in the city of Devils Lake, orally authorized H. M. Creel to sell through the plaintiffs at Duluth, Minnesota, 2,000 bushels of flax to arrive on or before October 30th, and that at the time of that conversation John W. Maher was informed orally by H. M. Creel that he was acting for Robbins & Warner, and was their agent at Devils Lake to solicit orders for them, and that in this oral conversation the defendant authorized Mr. Creel to sell 2,000 bushels of flax through Robbins & Warner, at Duluth, for $1.04 per bushel, or better, and to sell the same to arrive on or about October 30th; that upon October 30th Robbins & Warner purchased other flax to replace flax that they had sold in their own names for Maher, and that they purchased the same at one dollar and twenty-three and a quarter cents per bushel, and in making that purchase they bought the same upon the best terms for him; that it was the custom among brokers to sell flax upon such orders in their own name, and, in the case of the failure of the flax to arrive, to purchase other

flax to replace it; that the reasonable value of their commission in doing this work was five dollars, and that they lost the sum of $388 in the rise of flax, that they had to advance upon Maher's account; that no part of that sum has been repaid to them; and that the same was an oral transaction and an oral sale." It was expressly conceded that defendant signed no written agreement with Creel or the plaintiff, or the party to whom the flax was sold; and it is also conceded that Maher never gave any written authority to any person to make any contract in his behalf. There was also a further offer of proof to the effect that the plaintiffs, after making said sale, sent to defendant, by mail, a written statement of the transaction, but that defendant had never repudiated the transaction or referred to it, and that there had been no correspondence between them in respect to it. The offer did not show the contents of the statement.

We think the trial court rightly held that the facts were insufficient to entitle the plaintiffs to recover, even if it is assumed that the transaction was not affected by the statute of frauds, as to which proposition we express no opinion.

Appellants claim to recover on the theory that defendant requested the plaintiffs to sell the flax for him as brokers or agents, and that, by reason of the custom existing at Duluth in respect to such transactions, they were authorized by him to make the contract in their own name, and to assume personal liability for its fulfillment. The difficulty with that position is that the complaint did not allege, nor did the offer of proof show, that the defendant knew of that custom, or entered into the transaction in contemplation of it. If it were shown that he expressly or impliedly agreed that the transaction should be carried on according to that alleged custom, then the appellants would be in position to claim that the rule laid down in Bibb v. Allen, 149 U. S. 482, 13 Sup. Ct. 950, 37 L. Ed. 819, should apply to the case at bar. In that case the evidence showed that the dealings between the parties contemplated that the brokers should make contracts according to the rules and usages of the New York Board of Trade. It was that fact which, as the court expressly stated in the opinion, distinguished it from the case of Irwin v. Williams, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225. A broker has no authority to contract in his own name in behalf of his principal without authority from the latter, and, if he does so, he has no claim upon his prin-

cipal for services or for loss incurred. Irwin v. Williams, supra; Haas v. Ruston (Ind. App.) 42 N. E. 298, 56 Am. St. Rep. 288. The facts which the plaintiffs offered to prove disclosed that the plaintiffs, without defendant's authority, contracted in their own name, and the loss they have suffered is not chargeable to the defendant. Neither have the plaintiffs any claim for their commission, because they did not, by the offer of proof, show that they had made any contract for their principal which he could enforce.

It is not claimed by the appellants in this court that the offer of proof as to the mailing of the statement was sufficient to establish a ratification by the defendant, and we do not, therefore, discuss that proposition.

The judgment is affirmed. All concur.

(103 N. W. 755.)

JOHN R. JONES v. FERDINAND HOEFS AND THEODORE HELING, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF HOEFS & HELING.

Opinion filed May 19, 1905.

Attachment — Motion to Dissolve — Sufficiency of Notice.

1. Where the defendant gives notice of motion to dissolve an attachment, and the notice recites that the motion will be based upon an affidavit served therewith, which denies the truth of the attachment affidavit, the notice sufficiently shows that the ground for the motion to dissolve is that the attachment affidavit is false.

Denials of Grounds for Attachment — Burden of Proof.

2. Where the defendant denies the existence of the grounds for attachment, and moves to dismiss the attachment for that reason, the burden of proving that one or more of the grounds alleged for the attachment are true is upon the plaintiff, and if the plaintiff fails to prove the existence of such grounds the motion to dissolve must be granted, even though there is no defense to the action on the merits.

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

Action by John R. Jones against Ferdinand Hoefs and Theodore Heling. Judgment for defendants, and plaintiff appeals.

Affirmed.

McCumber, Forbes & Jones, for appellant.

Evidence of threats to transfer property to baffle creditors' efforts to collect their claims, undisputed, warrants the sustaining of the attachment. Livermore v. Rhodes, 27 How. Pr. 506; Chaffee v. Runkel, Rowley & Co., 77 N. W. 583; Nebraska Moline Plow Co. v. Fuehring, 72 N. W. 1003; Reed Bros. v. First Nat'l Bank, 64 N. W. 701; Kingman v. Weiser, 67 N. W. 941.

A preponderance of the evidence is all that is required to sustain the attachment. Tolerton & Stetson Co. v. Casperson, 63 N. W. 908; Symns Grocery Co. v. Snow, 78 N. W. 1066; First Nat'l Bank v. Randall, 37 N. W. 799; Miller v. McNair, 27 N. W. 333; Bowles v. Hunter, 91 Mo. App. 333.

Affidavits, introduced after plaintiff has rested, to the effect that "defendants are straightforward, honest business men, and in affiant's opinion have not dealt dishonestly with their property," are not rebuttal, and are incompetent and should not be received. Section 5376, Rev. Codes 1899; 19 Am. & Eng. Enc. Law (1st Ed.) 1093; 23 Am. & Eng. Enc. Law (2d Ed.) 972; 14 Enc. Pl. & Pr., 161.

J. A. Dwyer and *C. E. Wolfe,* for respondents.

The question of irregularity is reached by motion, which is substantially a demurrer to a pleading. William Deering & Co. v. Warren, 1 S. D. 35, 44 N. W. 1068.

Notice of motion is usually treated as sufficient, notwithstanding defects in respect to some essentials, provided none was misled thereby. 14 Enc. Pl. & Pr. 132. Case will not be reversed because ground of motion is not pointed out in the notice, if such ground was fully stated in the moving affidavit, met by the opposing affidavit and discussed by the court below. Livermore v. Bainbridge, 14 Abbots' Pr. 227 (N. S.).

When the notice is for irregularity, it should set forth the irregularity, otherwise it is sufficient to state generally the ground of the motion. 2 Wait's Pr. 183; Ellis v. Jones, 6 Pr. 296; 4 Wait's Pr. 596.

Good faith as to payment of the claim sued on is not in issue on motion to dissolve attachment. It is the actual fraud and evil intent toward creditors, not refusal to pay debts, that supports an attachment. Durr v. Jackson, 59 Ala. 203; Totle v. Cadwell, 30 Kan. 125; Weare Com. Co. v. Durley, 30 L. R. A. 465, and note.

Burden of proof is upon plaintiff to sustain the attachment affidavit. Noyes v. Lane, 1 S. D. 125, 45 N. W. 327; Wyman v. Wilmarth, 1 S. D. 172, 46 N. W. 190; Jones v. Myers, 7 S. D. 155, 63 N. W. 773.

ENGERUD, J. This is an appeal by plaintiff from an order of the district court vacating a writ of attachment on defendant's motion. The action was brought to recover on a promissory note executed by the defendents as partners. The plaintiff procured the issuance of the writ of attachment upon an affidavit, alleging as grouuds therefor "that the defendants, Ferdinand Hoefs and Theodore Heling, above named, have sold, assigned, transferred, secreted, and mortgaged their property, and are about to sell, assign, transfer, and secrete their property, with intent to cheat and defraud their creditors, and to hinder and delay them in the collection of their debts." The defendants answered the complaint, and at the same time served upon the plaintiff's attorneys a notice of motion to dissolve the attachment. The notice was entitled in the action, and read as follows: "You will please take notice: That the defendants in the above entitled action, by their attorney, will on the first day of April, 1904, at two o'clock p. m. of said day, before the court at the chambers thereof, in the city of Wahpeton, in Richland county, North Dakota, move the court to dissolve and vacate the warrant of attachment issued in the above entitled action; that the said motion will be made upon the affidavit of Ferdinand Hoefs, the answer of the defendants in this action, all of which are hereto attached, and upon all the files and records of the case." The affidavit of Hoefs referred to in the notice and served with it, after setting forth in some detail facts tending to show that the defendants were solvent, and in good financial condition, specifically denied the allegations of the affidavit upon which the attachment was issued.

The first point made by appellant is that the court erred in entertaining the motion to dismiss, because the motion papers did not comply with rule 5 of the district court which provides: "When the notice is for irregularity it shall set forth particularly the irregularity complained of. In other cases it shall not be necessary to make a specification of points, but it shall be sufficient if the notice state generally the grounds of the motion." It is claimed that the notice points out no irregularity, nor does it state generally the grounds of the motion. The fact that no irregularity was mentioned in the notice, and the fact that it was based upon an affidavit which

specifically denied the truth of the attachment affidavit, could not fail to inform the plaintiff that the defendant claimed no irregularity of procedure, but would demand the vacation of the writ on the ground that the alleged grounds for the attachment did not exist. The record discloses that the plaintiff was not misled, and, even if it could be properly said that the rule of court was not complied with, we think it would have been a very proper exercise of its discretion of the trial court to overlook so trivial a departure from the rule. The defendants' affidavit put in issue the facts alleged in the attachment affidavit as grounds for the issuance of the writ. The burden was upon plaintiff to prove that the attachment affidavit was true.

We have examined the record with care and can find no evidence whatever that either of the defendants had in any manner disposed of any property with intent to hinder, delay, or defraud any creditor, or that they were about to do so. Numerous affidavits were read in evidence by the plaintiff, and one of the defendants was at the request of the plaintiff examined and cross-examined at the hearing. The most that the evidence which the plaintiff submitted or offered to submit tended to show was that the defendants were in financial straits; that they had mortgaged or pledged much of their property to secure bona fide debts; that they had been selling property every day, and had offered to sell out their business; that their alleged defense to the note in suit was sham. There is an utter absence of evidence or offer of proof tending to show any disposition of property out of the ordinary course of business, or with fraudulent intent. That was the sole issue before the court, and, unless the plaintiff could prove that the defendants had or were about to make a fraudulent disposition of their property, the court had no other alternative than to vacate the attachment, even though the defense to the action was palpably without merit. There being no evidence or offer of evidence sufficient to support the attachment affidavit, it is unnecessary to discuss the several assignments of error in detail.

The order is affirmed All concur.
(103 N. W. 751.)

CHARLES DE FOE v. ZENITH COAL COMPANY.

Opinion filed May 19, 1905.

Dismissal of Appeal from Justice Court — Failure to File Transcript.

1. Section 6771a, Rev. Codes 1899, which provides that the district court may dismiss an appeal from justice court for failure on the part of the appellant to cause the transcript to be transmitted, does not make it the mandatory duty of the court to order a dismissal for that reason.

Same — Prejudice by Delay.

2. Where the transcript was filed before the motion to dismiss was granted, and the record affirmatively showed that the respondent had not been prejudiced by the delay, it was error to dismiss the appeal for failure to file the transcript in time.

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

Action by Charles De Foe against the Zenith Coal Company and E. A. Lane. Judgment for plaintiff, and defendant appeals.

Reversed.

Campbell & Field, for appellants.

An appeal will not be dismissed where there is no fault or laches on the part of the appellant, but the fault, if any, is with the justice. Jackson v. Haisley, 9 So. 648; Muller v. Humphreys, 14 S. W. 891; Union Pac. Ry. Co. v. Marston, 36 N. W. 153; Gifford v. R. R. Co., 20 Neb. 538; Hagadorn v. Wagoner, 96 N. W. 184; Aldrich v. Circuit Judge (Mich.) 14 N. W. 565; Holmes v. Yoke, 37 S. E. 545; E. B. Fargo & Co. v. Graves, 81 N. W. 291; J. H. Rothman Distilling Co. v. Kermis, 79 Mo. App. 111; Perkins v. Superior Court of Fresno County, 37 Pac. 780; Olson v. Shirley, 12 N. D. 106, 96 N. W. 297; Republican Valley R. R. Co. v. McPherson, 12 Neb. 480; Dobson v. Dobson, 7 Neb. 296.

Appellees had suffered no damage and the matter of dismissal was discretionary, and the discretion was not abused.

McBride & Baker, for respondents.

It was appellant's duty to see that transcript was as provided by law. F. B. Fargo & Co. v. Graves, 81 N. W. 291; Edminister v. Rathburn, 52 N. W. 263.

Notice of motion to dismiss was not required. No objection was made in district court by appellants, but they appeared and argued

the motion. Byington v. Saline Co., 37 Kan. 654; Serviss v. McDonnell, 107 N. Y. 260, 14 N. E. 314; Chicago E. I. Ry. Co. v. People, 9 W. Rep. 741, 120 Ill. 667, 12 N. E. 207; Bedford v. Penny, 65 Mich. 667, 32 N. W. 888.

The statute requiring filing of transcript is directory. Territory v. McKey, 19 Pac. 395; Norden v. Jones, 33 Wis. 600; Demming v. Weston, 15 Wis. 236; Edminister v. Rathburn, supra; Bruins v. Downey, 45 Wis. 496; State v. Campbell, 5 Wash. 517; Drake v Camp, 45 N. J. Law, 230; People v. Elikis, 40 Cal. 642; Garrison v. Nelson, 30 Ark. 268; Hughes v. Wheat, 32 Ark. 292.

ENGERUD, J. Defendants appeal from a judgment of the district court dismissing an appeal to that court from a judgment of a justice of the peace.

On February 9, 1903, defendants appealed to the district court, on questions of law only, from a judgment rendered against them in justice court. It is conceded that the appeal was regular in all respects. On May 27, 1903, the district court was in session, and it was discovered that the justice's transcript had not yet been filed with the clerk of the district court. Thereupon the respondent, without notice, moved in open court for an order dismissing the appeal for want of prosecution. Action on that motion was deferred until next day. The following morning (May 28th) at 9 o'clock the transcript of the justice was filed with the clerk. In the afternoon of that day respondent again moved to dismiss the appeal on the ground that the transcript was not filed in time. The motion was granted.

The order was erroneous. The district court had acquired jurisdiction of the case by a regular appeal, and the transcript upon which the appeal was to be heard was before the court. So far as appears, the respondent had suffered no injury, inconvenience, or delay of hearing by the failure of the transcript to reach the clerk's office at an earlier date. Section 6771a, Rev. Codes 1899, provides, among other things, that the district court "may order a dismissal of the appeal if the same has not been duly perfected, or the record of the justice has not been transmitted and no application is made by the appellant for an order requiring the justice to certify and transmit the proceedings." It is clear that this section does not make it the mandatory duty of the district court to dismiss an appeal for delay in the transmission of the transcript. It simply vests a discretionary power in the court to dismiss

the appeal on that ground if the appellant shall have failed to take steps to compel the transmission of the transcript in case it has not been sent to the clerk within the required time. The discretion is to be exercised in the furtherance of justice. The record affirmatively shows that the respondent had suffered no prejudice by the delay, and, inasmuch as the transcript was filed before the motion was granted, it was unnecessary to apply for an order requiring its transmission. We think it was an abuse of discretion to dismiss the appeal under such circumstances.

The judgment is reversed, and the district court will reinstate the appeal. All concur.

(103 N. W. 747.)

MERCHANTS STATE BANK OF FARGO v. DEWITT CLINTON TUFTS. MARY I. TUFTS, NORTHWESTERN PORT HURON COMPANY, A CORPORATION, AND MCCORMICK HARVESTING MACHINE COMPANY, A CORPORATION.

Opinion filed May 19, 1905.

Deed Absolute as Mortgage — Recording.

1. A deed absolute on its face, but intended to be a mortgage under a parol contract, is properly recorded in a book provided for the record of deeds, and such record is notice to subsequent incumbrancers or purchasers.

State Banks — Real Estate as Security.

2. A bank organized under the state banking act has authority, under section 3230, Rev. Codes 1899, to receive deeds of real property as security for past indebtedness, as well as for contemplated advances agreed upon.

Deed as Mortgage — Future Advances.

3. A deed absolute in terms, but in equity a mortgage under a parol agreement for reconveyance, is security for the present indebtedness for which it was given, as well as for moneys advanced, after its execution, pursuant to a parol contract that such deed should be security therefor; and, before a reconveyance will be decreed, payment must be made, or a willingness to do so shown, of all sums due thereon in accordance with the contract, whether furnished before or after the deed was executed.

Grantee in Deed Held for Future Advances Cannot Make Further Advances After Notice of Accrual of Subsequent Liens, by Innocent Lienors.

4. A grantee in a deed intended as security for a present debt and for future advances, based on a parol agreement, is not permitted to make advances under such parol contract after actual notice that subsequent incumbrancers or purchasers have a lien on the property covered by the deed taken without notice of the parol contract for future advances.

Advances Made Before Notice of Subsequent Judgment, Secured.

5. All advances made under such a deed before actual notice of a judgment obtained against the grantor are secured by such deed as against the judgment lien.

Judgment Creditor Has Same Right to Contest Advances as Grantor.

6. In such a case the judgment creditor stands in the same position as the grantor in the deed, so far as his right to contest the amount secured by the deed or mortgage is concerned.

Deed as Mortgage — Judgment Creditors — Marshaling Securities.

7. In an action brought to have a deed declared to be a mortgage and for its foreclosure, in which judgment creditors are made defendants, and it appears that the grantee in the deed has other security for his indebtedness besides the deed, and that the judgment creditors have security on the land only, a court of equity will, in a proper case, compel the grantee to exhaust his security in the property not covered by the judgment lien.

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

Action by the Merchants State Bank of Fargo against DeWitt Clinton Tufts and others. Judgment for plaintiff, and defendants appeal.

Reversed.

H. R. Turner, for appellant.

Under statutes like chapter 152, Laws of 1903, a judgment creditor is on the same footing as a purchaser. Minneapolis & St. L. Ry. Co. v. Wilson, 25 Minn. 382 (Gil.); Wells v. Baldwin, 10 N. W. 427; Bank of Ada v. Gullikson, 66 N. W. 131; Wilcox v. Loominister Nat. Bank, 45 N. W. 1136.

Judgment creditors, being same as purchasers, and having no notice of parol mortgage conditions relative to a deed of conveyance, are bound only by the constructive notice of the record and

what appears on the face of the deed. Wilcox v. Loominister Nat. Bank, supra; Bailey v. Galpin, 41 N. W. 1054; Bank of Ada v. Gullikson, supra.

An instrument must be recorded as to its real, not apparent, character, and a deed, intended as a mortgage, imparts no notice if recorded in book intended for the recording of deeds. White v. Moore, 1 Paige, 551; Brown v. Dean, 3 Wend. 208; Day v. Dunham, 2 Johns. Ch. 182; Manufacturers' Bank v. Bank of Penn., 7 W. & S. 335; Edwards v. Trumbull, 50 Pa. St. 509; Shaw v. Wittshire, 65 Me. 485.

A parol agreement providing that a mortgage shall secure future advances is contrary to the statute of frauds and void. Crule's Heir and Administrator v. Eddy, 66 Am. Dec. 699.

A mortgage for future advances must express the fact on its face. Crule's Heir and Administrator v. Eddy, supra; Stanford v. Wheeler, 33 Am. Dec. 198; North v. Beldon, 35 Am. Dec. 83; Stover v. Harrington, 21 Am. Dec. 86; Bank of Utica v. Finch, 49 Am. Dec. 175.

A mortgage for future liabilities should describe their nature and amount with reasonable certainty. 20 Am. & Eng. Enc Law (2d Ed.) 197; Union National Bank of Oshkosh v. Milburn & Stoddard Co., 7 N. D. 201, 73 N. W. 527.

In foreclosure, subsequent lienors may demand a marshaling of securities and can compel first lienors to resort first to property on which they have no lien. Section 4690, Rev. Codes 1899; 3 Pom. Eq. Jur., section 1414; Boone v. Clark, 5 L. R. A. 276, and note.

Plaintiff is a state bank. A state bank cannot buy and hold land, except for purposes mentioned in section 3230, Rev. Codes 1899.

Newman, Spalding & Stambaugh, for respondent.

When no written defeasance is executed, the grant absolute in terms is eligible to record as a deed, and is notice of all the rights of the grantee whatever they may be.

A creditor cannot compel his debtor to avoid an oral contract by pleading the statute of frauds, nor can he plead such defense for the debtor. Wright v. Jones, 4 N. E. 281.

Only parties to the agreement can take advantage of such statute. 8 Am. & Eng. Enc. Law, 659.

The defense of the statute is personal. 7 Wait's Actions and Defenses, 2.

Where a mortgage states that it is for future advances, a second lienor, with notice, takes subject thereto, both as to advances already made and all future advances made before notice that another lien has attached. Union Nat'l Bank of Oshkosh v. Moline, Milburn & Stoddard Co., 7 N. D. 201, 73 N. W. 527.

The agreement for future advances need not appear in the instrument, it may be entirely verbal within the terms of the mortgage. 3 Pom. Eq. Jur. 1197, 1198; Omaha Coal, Coke & Lime Co. v. Suess, 74 N. W. 620.

MORGAN, C. J. This is an action to have a deed of real estate declared a mortgage, and for the foreclosure thereof. The facts are that one Tufts was indebted to the plaintiff on and prior to November 10, 1902, in the sum of $7,307.37. On that day Tufts and his wife made and delivered to the plaintiff the deed in suit, for the purpose of securing the payment of a note for that sum, given on that day. This deed was not recorded until October 28, 1903, and was then recorded as a deed, and not as a mortgage. On November 10, 1902, Tufts also made and delivered to the plaintiff a chattel mortgage on property belonging to him to secure the same note. The chattel mortgage was filed on the same day that the deed was recorded—October 28, 1903. The amended complaint alleges the execution and delivery of the note for $7,307.37, and the execution and delivery of the deed to secure the payment of the same, and also to secure the payment of all future indebtedness of said defendants to plaintiff. The complaint further alleges that, upon the payment by defendants of such existing indebtedness incurred after the giving of such deed, the plaintiff was to reconvey the premises to the defendants. It is further alleged that plaintiff advanced to the defendants, after the giving of such deed, the sum of $1,644.46, and paid taxes on the lands amounting to $126.09, and paid interest on a prior mortgage on said land at the request of Tufts, amounting in all to $528.04. Judgment is demanded declaring said deed to be mortgage security for all of said sums. The evidence shows that the plaintiff and Tufts entered into a parol agreement, at the time that the deed was executed and delivered, to the effect that the deed should be security for said amount as a present indebtedness, and for all future indebtedness incurred for advances made by plaintiff to Tufts. Neither the deed nor the note

nor chattel mortgage contain any reference to the indebtedness to be incurred for advances, but the same rests wholly in parol. The defendant Tufts appeared, but interposed no answer or defense. The defendants McCormick Harvester Machine Company and the Northwestern Port Huron Company answered, and alleged that they secured and owned judgments against the defendant Tufts for the purchase price of goods sold to him before the deed and chattel mortgage were given to plaintiff, and prayed that the plaintiff be ordered to forclose the chattel mortgage and apply the proceeds of a sale of the personal property upon the amount due on the $7,307.37 note. The McCormick Harvesting Machine Company procured its judgment against Tufts for $957.89 on December 8, 1903, and the same was docketed on that day. The Northwestern Port Huron Company judgment was docketed on November 12, 1903, and was for $141.92.

There are other material facts shown by the evidence. One Kerr obtained a judgment against Tufts on November 27, 1903, for the sum of $504.96, and execution was by him caused to be issued and levied upon the personal property described in plaintiff's chattel mortgage, and duly sold on execution sale on January 2, 1904, to one Lathrop for the sum of $50, subject to plaintiff's chattel mortgage lien. On January 7, 1904, said Lathrop sold the personal property so purchased by him to the plaintiff for the sum of $600. Thereafter, on April 2, 1904, the plaintiff sold part of the personal property covered by the chattel mortgage to it, and received as proceeds therefrom the sum of $2,369.03. The balance of the personal property covered by that mortgage was not sold for want of bidders. This sale was not made by plaintiff under its chattel mortgage, but was made by it as the owner of the property under the sale of the same to it by said Lathrop. The proceeds of this sale were not applied in payment of the Tufts indebtedness. The value of the unsold property is not given, but it consisted of a threshing machine, separator, some binders, a Plano header and a road grader.

The trial court found that the plaintiff was entitled to judgment for $7,307.37, the original indebtedness, and $1,644.46, the sum advanced under the parol agreement as to future advances, and the sums paid as accrued interest on a prior mortgage, and taxes paid, and decreed a sale of the real estate to satisfy said indebtedness, and adjudged that the deed was a mortgage and secured

these various sums, and was in all respects prior to the judgments owned by the defendants and set forth in their answers. The defendants, as owners of such judgments, appeal from the judgment, and demand a review of the entire case under section 5630, Rev. Codes. 1899.

It is claimed that the recording of the deed in the record for deeds, instead of the record for mortgages, was not notice to the defendants of the fact that the deed was security for future advances. The contention is that the judgment creditors are classed as innocent purchasers under the provisions of section 3594, Rev. Codes 1899, as amended by chapter 152, p. 202, of the Laws of 1903. Conceding, without deciding, such to be the fact, the evidence conclusively shows that no money was paid to Tufts after the judgments were rendered. The deed was properly recorded as a deed, as it was such in form. It was not accompanied by a writing to the effect that it was intended to be a mortgage, hence its recording is not governed by section 4729, Rev. Codes 1899. Section 3570 provides that all "grants absolute in terms are to be recorded in one set of books and mortgages in another." It seems clear, therefore, that the deed was properly recorded, and that its recording is provided for under section 3570, Rev. Codes 1899. This seems to be the only conclusion that can reasonably be reached by construing sections 4729 and 3570 together. See, also, Webb on Record Title, sections 137-139.

It is also insisted that the deed is void for the reason that the plaintiff bank had no authority to receive it under the provisions of the act authorizing the organization of state banks. Section 3230, Rev. Codes 1899, is as follows: "Banking associations formed under this chapter shall have power to purchase, hold and convey real estate for the following purposes and no other. * * * (2) Such as shall be mortgaged to it in good faith by way of security for loans or for debts previously contracted. (3) Such as shall be conveyed to it in good faith in satisfaction of debts previously contracted in the course of its dealings." The deed in question was given for loans previously contracted and for loans made. We deem the transaction within the terms of the statute. It would be extremely technical to hold that the bank had no right to take a deed in form, but a mortgage in equity, to secure a past indebtedness as well as contemplated advances.

It is contended by the appellants that the deed found to be a mortgage gave the plaintiff no lien upon any property for advances

made to Tufts after its execution and delivery. The claim is made that a mortgage for future advances is not operative as a lien therefor unless the mortgage is given for a fixed sum, which may include future advances, or the mortgage recites that it is given to cover future advances. This would be true of a mortgage in form and terms. Union National Bank v. Moline, Milburn & Stoddard Co., 7 N. D. 201, 73 N. W. 527. This principle is not applicable to the case at bar. The plaintiff had a deed absolute in form, but intended by the parties to be a mortgage only. The deed was recorded as a deed, and taken by plaintiff as security for all existing debts and future advances. It was taken in good faith, and the advancements made under it in good faith in reliance on the deed as security. The plaintiff made no advancements after it had notice that appellants had a judgment against Tufts, hence the appellants have not been damaged in any way nor misled in the matter. They obtained their judgments after the deed was recorded, and until they obtained their judgments the plaintiff was under no obligation to them. Such a transfer of real property is not fraudulent as a matter of law. The transaction involved no secret trust in favor of the grantor. It was not an absolute sale or transfer under which Tufts was to benefit as against his creditors. It was a good faith agreement under which he was to be paid money as he needed it, for which the deed was to remain as security. There is no evidence in the case showing the value of the section of land conveyed, and therefore nothing to show what Tuft's equity in the land was after payment of the prior mortgage of $8,000, and what was due the plaintiff. The deed is not attacked as fraudulent as a matter of fact or as a matter of law by pleading or assignments. The great weight of authority sustains the proposition that a deed or mortgage given to cover future advances is not fraudulent as a matter of law. The case of Newell v. Wagness, 1 N. D. 62, 44 N. W. 1014, is not in point under the facts of this case. In that case a bill of sale of a large stock of goods was sold to the plaintiff by a bill of sale absolute on its face. The facts showed that the buyer and seller had secretly agreed that the buyer should dispose of the stock of goods and turn over the proceeds after repayment of the plaintiff's indebtedness to the seller. The necessary and inevitable tendency of that transaction would be to delay the other creditors of the financially embarrassed seller. In the case at bar there was so secret reservation on behalf of the mortgagor, except as to reconveyance after the indebtedness was

paid, and that will not avoid the conveyance as constructively fraudulent. As said in McClure v. Smith, 14 Colo. 297, 23 Pac. 786: "But if there be a bona fide debt for which the security is given; if there be no understanding with the mortgagee to hold the overplus, or to hold the property after payment of his debt, secretly, for the benefit of the mortgagor; if there be no collusion on the part of the mortgagee with the mortgagor in keeping the defeasance unrecorded, or in keeping secret the exact nature of the transaction, for the purpose of deceiving creditors; in short, if the mortgagee is simply endeavoring in good faith to obtain that precedence in the security of his debt which the law permits—the mere isolated fact that he takes an absolute deed instead of a mortgage will not, in and of itself alone, render his lien nugatory. The law prescribes no absolute and inflexible form for mortgages upon realty." See, also, Jones on Mortgages, section 243; Wilson v. Russell, 13 Md. 494, 71 Am. Dec. 645; Dummer v. Smedley, 110 Mich. 466, 68 N. W. 260, 38 L. R. A. 490; Clement v. Hartzell, 57 Kan. 482, 46 Pac. 961; In re Johnson (R. I.) 37 Atl. 531.

It follows, therefore, that the plaintiff, as between it and Tufts, would be entitled to enforce its mortgage lien for all advances made pursuant to the agreement for such advances. The defendants, appearing as judgment creditors of Tufts, are entitled to no more rights than would be accorded to Tufts. Their liens are subsequent to the mortgage liens. It is well established that before a grantor of a deed absolute on its face, but intended as mere security, can compel a reconveyance to him, he must pay all of the indebtedness due the grantee pursuant to the agreement made for such reconveyance. Such reconveyance is decreed upon equitable grounds and in a court of equity. Having asked a court of equity to decree a reconveyance, he must himself do equity, and pay all that he contracted to pay when the conveyance was made. 11 Am. & Eng. Enc. Law, p. 330; Jones on Mortgages, sections 336, 1079 and cases cited; Carpenter v. Plagge, 192 Ill. 82, 61 N. E. 530; Mahoney v. Bostwick, 96 Cal. 53, 30 Pac. 1020, 31 Am. St. Rep. 175; Upton v. National Bank of South Reading, 120 Mass. 153; Brooks v. Brooks, 169 Mass. 38, 47 N. E. 448. Before the lien of the judgment creditors can be realized upon out of the land, they must do what Tufts would have to do, and are in no better position than he would be in were he asking for a reconveyance.

We now come to the question, raised as an issue by the pleadings, as to whether the judgment creditor can compel the plaintiff to exhaust its chattel security and apply the proceeds thereof in satisfaction of its entire indebtedness. The facts as hitherto outlined show that the plaintiff had chattel security and real estate security for the same indebtedness. The judgment creditors have a lien upon the real estate only. The evidence does not show the value of the land nor of the chattel security. This is immaterial in this case, as the judgment creditors are asking only that the proceeds of the chattel security be applied on the indebtedness. Plaintiff resists this claim upon the ground that it had purchased the property on which it held the chattel mortgage, and that it had the right to dispose of the personal property without regard to the rights of the judgment creditors. It will be observed that the plaintiff purchased this property after this suit was commenced, and after the judgment creditors had answered and set forth their judgments and prayed that the plaintiff be compelled to satisfy its claim out of the chattel security. In place of so doing, as far as it could be done, the plaintiff has ignored its chattel mortgage, and purchased the personal property mortgaged and sold it at private sale, and has not accounted for the proceeds in satisfaction of the indebtedness. It is clear to us that such a proceeding cannot be sustained as against the rights of the judgment creditors. It would be inequitable to deprive these creditors of the right to participate in the just distribution of the Tufts property in satisfaction of the liens thereon in the order of their priority. It is generally established that a creditor holding liens on different property will not be permitted to satisfy his lien out of the property to the prejudice of a creditor having a lien on part of that property only after actual or constructive notice of such inferior lien. In this case actual notice of the lien of the judgment creditors was imparted by the answer in this case. This principle is not to be applied if the senior lienholder will be prejudiced in any manner. The general principle is well stated in Burnham v. Citizens' Bank, 55 Kan. 545, 40 Pac. 912: "The general rule enforced in equity is that where one creditor is secured by mortgage on several pieces of property, while another creditor is secured by a junior mortgage on only a part of the property, the prior creditor, when chargeable with actual notice of the rights of the junior creditor, is bound to exhaust his security on the property not covered by the junior lien, and that he must account to the junior

lienholder if he releases his security on or pays over to the mortgagor the proceeds of the property not covered by the lien of the junior mortgagee after actual notice of the junior lien." Section 4690, Rev. Codes 1899, announces in explicit terms the same principle. See, also, Pomeroy's Equity Jurisprudence, section 1414, and cases cited; Meacham v. Steele, 93 Ill. 135; Dewey v. Ingersoll, 42 Mich. 17, 3 N. W. 235; Jordan v. Hamilton County Bank, 11 Neb. 499, 9 N. W. 654; Kendall v. Woodruff, 87 N. Y. 1; Ingalls v. Morgan, 10 N. Y. 178.

In this case the defendants have asked only that the proceeds of the sale of the mortgaged chattels be applied on plaintiff's debt, and not that the plaintiff's lien on the land be postponed to the extent of the money realized on the sale of the chattels. Their contention that such money should be applied as a payment on the debt is equitable, and is allowed at the sum of $2,369.03. The property covered by plaintiff's mortgage not sold as herein stated, should also be sold under foreclosure proceedings, and the proceeds applied on plaintiff's debt, less costs and expenses of foreclosure.

Plaintiff contends that it is entitled to be allowed a deduction on the $2,369,03 of the sum of $600 paid to Lathrop for the property. In view of defendants' rights, as known by plaintiff, the payment of this sum as purchase money was unauthorized and in defiance of defendants' equitable rights, and should not be allowed as a credit.

It is also claimed by plaintiff that it is entitled to an allowance of the expense of keeping the chattel mortgaged property. It did not foreclose under its mortgage. It simply purchased the property and ignored its mortgage, and is not entitled to any expenses upon any ground.

Plaintiff paid taxes on the land to protect its lien, and also paid interest on the $8,000 prior mortgage for the same purpose. The trial court allowed it credit for such payments, and such action was proper under the statute and upon equitable principles. Sections 1277, 4676, Rev. Codes 1899. This was beneficial to the defendants, and they have no just grounds for complaint on that ground. Foster v. Furlong, 8 N. D. 282, 78 N. W. 986.

In this case the defendants ask that the proceeds of the sale of the property be applied on Tuft's indebtedness. They thereby acquiesced in that sale, so far as the amount realized therefrom, and are content with credit for that sum on the total of Tuft's indebtedness, found by the court to be $10,549 in the aggregate. The

sum of $2,369.03 will be allowed as a payment on the total indebtedness as of the day of the sale. Were it not for the fact that part of the personal property is still subject to plaintiff's chattel mortgage, final judgment would be ordered by this court. But the case must be remanded for further proceedings in reference to the property undisposed of.

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion; costs to be in favor of the appellants. All concur.

(103 N. W. 760.)

J. K. SONNESYN v. L. W. AKIN AND G. M. BABCOCK.

Opinion filed May 20, 1905.

Contract — Fraudulent Representations — Option to Rescind.

1. One who is defrauded by a false statement, which is made to induce and does induce the execution of a contract, has a choice of remedies: (1) To affirm the contract and take its benefits, so far as obtainable, and recover any damages sustained by the false statement; or (2) to rescind the contract and recover any moneys paid or property delivered under it.

Fraud — False Statements.

2. A false statement, to be actionable, must be attended or followed by injury.

Same—Evidence of Damages.

3. The plaintiff made a written contract to purchase certain real estate from the defendants. One of the inducements to make the contract was their false statement that they had the legal title to the land. Defendants perfected their title and tendered proper conveyances of title at the time and place fixed by the contract. At the trial of plaintiff's action to recover damages for the false statement the jury returned a verdict in his favor, general in form, but without fixing any sum as damages. They also made certain special findings. These were also silent as to the amount of damages. The trial judge thereafter awarded a recovery to plaintiff. Defendants moved, upon the minutes, to vacate the verdict and judgment upon the ground that (1) the verdict and damages were excessive, (2) that the evidence is insufficient to justify the verdict, and (3) that the verdict is against and contrary to law. *Held,* (1) that there is no evidence that the false statement was attended with or followed

by injury or damage; (2) that the record presents a case of mistrial, and that the motion was properly granted and must be affirmed.

Fisk, district judge, dissenting.

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

Action by J. K. Sonnesyn against L. W. Akin and G. M. Babcock. Judgment for defendants, and plaintiff appeals.

Affirmed.

Morrill & Engerud and *Frich & Kelly,* for appellant.

The fifth ground for a motion for a new trial, viz: "Excessive damages appearing to have been given under the influence of passion or prejudice," is available only where, though the case may be properly submitted, the jury have given damages in an unreasonable amount on account of passion or prejudice. 14 Enc. Pl. & Pr. 886; Hayne on New Trials, 563, section 3; Mechelke et al. v. Bremer, 17 N. W. 682; Pratt v. Pioneer Press Co., 18 N. W. 836.

It is not claimed that the specifications of error did not justify the findings of fact made by the jury, and no other grounds under the statute can be considered. Section 5467, Rev. Codes 1899; Baumer v. French, 8 N. D. 319, 79 N. W. 340; Parrot v. Hot Springs, 68 N. W. 329; Gould v. Elevator Co., 2 N. D. 216, 50 N. W. 969; McKenzie v. Bismarck Water Co., 6 N. D. 361, 71 N. W. 608; Ilstad v. Anderson, 2 N. D. 167, 49 N. W. 659; Flugle v. Henschel, 6 N. D. 205, 69 N. W. 195.

False representation as to title is fraud. 14 Am. & Eng. Enc. Law (2d Ed.) 130.

In case of fraud the party defrauded can recover what he has parted with or its value by reason of the fraud. 6 Wait's Ac. & Def. 132-133; 14 Am. & Eng. Enc. Law (2d Ed.) 165; Nichols v. Michaels et al., 23 N. Y. 264.

By exercising this right the contract was extinguished, and the position of the parties became the same as if there had never been such a contract. Section 3931, Rev. Codes 1899; 14 Am. & Eng. Enc. Law, 158.

Party who fraudulently obtained possession of the property, could be sued in replevin or conversion, or the tort could be waived and suit be brought on implied contract. See authorities supra.

Instead of rescinding, the defrauded party could affirm, and if he eventually suffered any detriment by the fraud, he could recover

whatever damages he could show he had suffered by the deceit. 3 Wait's Ac. & Def. 452-454.

Pierce & Tenneson, and *Ball, Watson & Maclay,* for respondents.

Representations concerning ownership are generally material, but not always. Huffman v. Long, 42 N. W. 355.

Misrepresentations, which are material when made, may become immaterial, because no damage is suffered on acount of them, and the reason that they are immaterial may be because no damage has followed. Wiley v. Howard, 15 Ind. 169; Barber v. Kilbourn, 16 Wis. 485; Beard et al. v. Bliley, 34 Pac. 271; Armstrong v. Breen, 69 N. W. 1125; Davidson v. Moss, 5 How. 673; Johnson v. Seymour, 44 N. W. 344; Hunt v. McConnell, 1 T. B. Mon. 222.

Fraud without damage gives no cause of action. Marriner v. Denison, 20 Pac. 386; Purdy v. Bullard et al., 41 Cal. 444; Freeman v. Venner, 120 Mass. 424; Bartlett v. Blaine, 85 Ill. 25.

In case of an executory contract for the sale of land, if the vendor sells it to a third person prior to the time for the consummation of the contract, this does not constitute a ground for rescission, for the vendor may reinvest himself with the title. Joyce v. Shafer et al., 32 Pac. 320; Garbirino v. Roberts, 41 Pac. 857; Royal v. Dennison et al., 42 Pac. 39.

The party rescinding a contract must inform as to whom he rescinds as soon as possible, so that both parties may be put in statu quo. Section 3934, subdivision 1, Rev. Codes 1899; Snow v. Alley, 11 N. E. 764.

Plaintiff's action is an action upon the case for damages for fraud and deceit, and it goes upon the theory of the continued existence of the contract which was induced by the fraud complained of. Whiteside v. Brawley, 24 N. E. 1088; Heastings v. McGee, 66 Pa. St. 384; Kimball v. Cunningham, 4 Mass. 502, 505; Johnson v. Cookerly, 33 Ind. 15; Wheeler v. Dunn, 22 Pac. 827; Stuart v. Hayden, 169 U. S. 1, 18 Sup. Ct. Rep. 274; Chilson v. Houston, 9 N. D. 498, 503, 84 N. W. 354.

One seeking rescission must put him as to whom he rescinds in statu quo. Hammond v. Pennock, 61 N. Y. 145.

When the complaining party seeks to compel the other to buy his property, whether he will or not, his conduct is an affirmance of the contract. Hendricks v. Goodrich, 15 Wis. 679; Daly v. Brennan, 57 N. W. 963.

In an action of fraud and deceit, the cause of action requires damages as one of the essential elements, and without it there is no right even to nominal damages and no cause of action. Alden v. Wright et al., 49 N. W. 767.

The motion for a new trial was properly granted upon the statutory ground, "insufficiency of the evidence to justify the verdict." 14 Enc. Pl. & Pr. 782, 783, and cases cited; 14 Enc. Pl. & Pr. 776; Algeo. v. Duncan, 39 N. Y. 313; Richardson v. Van Voorhees, 3 N. Y. Supp. 399.

Granting a new trial on above grounds, or that the verdict is contrary to the evidence, is discretionary, and such action will be reversed only for manifest abuse. 14 Enc. Pl. & Pr. 983, 981, 978, 976, 975; Gull River Lbr. Co. v. El. Co., 6 N. D. 276, 69 N. W. 691; Pengilly v. J. I. Case Thresher Co., 11 N. D. 249, 91 N. W. 63.

YOUNG, J. This is an action to recover damages for fraud. The plaintiff has appealed from an order of the district court vacating the verdict and judgment entered therein in his favor and granting a new trial. The defendant's motion for a new trial was made upon the minutes. The granting of the motion is assigned as error. It is essential to a correct understanding of the questions presented upon this appeal to set out the material allegations of the complaint and answer, and also the verdict upon which the judgment vacated was based.

The complaint alleges "that on the 30th day of September, 1902, the defendants, with intent to deceive and defraud the plaintiff, then and there falsely and fraudulently pretended and represented to the plaintiff that they were the owners and legally entitled to enter into a contract to sell and convey to the plaintiff the following described real estate [describing 960 acres of land situated in Ransom county], and could give a contract for a good and perfect title thereto, and would furnish the plaintiff with an abstract of title, which abstract of title would show that the defendants were the owners of said described land and premises and had the legal right to enter into a contract to sell and convey the same; that the plaintiff, relying upon such representations, entered into a contract to purchase the said described premises and land of the defendants, and paid the defendants thereunder, in merchandise and cash, the sum of $12,857.33; that the defendants were not the owners of said described lands and premises, and were not legally entitled to enter into a contract to sell and convey the same, and could not and have not furnished the plaintiff an abstract of title

of said land and premises showing that they were the owners of the same; that at the time plaintiff made the contract with the defendants to purchase said lands and made said payments thereon, said lands were owned by others; * * * that by reason of the premises the plaintiff has been damaged in the sum of $12,857.33" —for which sum he demands judgment.

The defendants, in their answer, admit the execution of the written contract referred to in the complaint, and attach a copy of the same to their answer as an exhibit; this being known in the record as "Exhibit A." They also admit the receipt of a $2,500 cash payment upon the contract, and a further payment by the delivery of the stock of merchandise as alleged in the complaint. But they deny that they stated or represented that they were the owners of the land, and "especially deny that by reason of any of the facts set forth in the complaint plaintiff has been damaged in the sum of $12,857.33, or in any other sum or amount whatever," and allege "that the defendants have duly complied with all the terms and conditions of said written contract, and have tendered to the plaintiff an abstract of title to said premises, and that they are now ready, able and willing to convey, or cause to be conveyed to the plaintiff, by good and sufficient deeds of conveyance, all the lands in said contract mentioned, in accordance with the terms and conditions of said contract, and conveying to the plaintiff full title to all of said lands, as therein mentioned, upon the full performance by the plaintiff of the other terms and conditions of said contract, and that the defendants herewith tender and offer full and complete performance of the terms and conditions upon their part to be performed."

The contract was signed by the plaintiff and by the defendants. By the terms of this contract the plaintiff agreed to purchase the lands in question at an agreed price of $25,920. The contract describes the land, and fixes the terms of payment and rate of interest on deferred payments. Under it $2,500 was to be paid upon its execution, and $10,320 was to be paid by the delivery to the defendants of a certain stock of merchandise, located at Ormsby, Minn., at wholesale price, the taking of the inventory to begin on October 3, 1902. A further payment of $2,500 was to be made on January 1, 1903, when the deal was to be completed. Plaintiff assumed a mortgage upon the land, and was to pay the remainder of the purchase price in five equal annual installments. The contract makes no reference to the ownership of the land or

the condition of the title, but provides that: "An abstract of title is to be furnished to me (Sonnesyn) by you when $2,500 of the purchase money is actually paid, and if such abstract of title is objectionable you are to have until January 1, 1903, after its return to you, with such objections noted, within which to supply any deficiency or make a good merchantable title."

This action was commenced November 26, 1902. The record shows that at the close of the testimony "counsel for the plaintiff moved the court that the case be submitted to the jury upon a list of special questions covering the issues in the case." This motion was granted. Before the proposed questions were submitted to the jury counsel for defendants requested that "questions numbered 3 and 4 be answered 'No,' in order that there may be no confusion arising in the minds of the jury," and the answers were inserted in accordance with such request. Thereafter the jury returned the following verdict:

"We, the jury impaneled and sworn to try the above-entitled action, do find for the plaintiff.

"Dated May 23, 1903.

"[Signed] A. H. BARNES, Foreman.

"Question 1. Did the defendants or either of them, at or before making the contract, 'Exhibit A,' state to or willfully lead the plaintiff to believe that they or either of them owned the lands which they had agreed to sell him? Answer. Yes.

"Question 2. If you answer the above question 'Yes,' did the plaintiff believe and rely upon such statements and representations, and was such belief and reliance one of the inducements that caused him to enter into said contract, and to part with his money and property? Answer. Yes.

"Question 3. Did the defendants or either of them own the lands described in said contract on the 30th day of December, 1902? Answer. No.

"Question 4. Did the defendants or either of them own all of the lands described in said contract at the time this action was commenced, to wit, November 26, 1902? Answer. No.

"Question 5. What was the value of the goods and fixtures delivered to the defendants by the plaintiff? Answer. $10,000.

"Question 6. If plaintiff is entitled to recover, should interest be computed on the damages? Answer. Yes.

"Dated May 23, 1903.

"[Signed] A. H. BARNES, Foreman."

On May 25, 1903, the trial judge directed the entry of judgment against the defendants for $13,052.52; the order therefor reciting that, "the jury having returned a verdict in favor of the plaintiff generally, and having been required to make special findings, which special findings and the answers thereto were as follows [setting out a copy of the above verdict], and the court having, upon said special findings, concluded that the plaintiff is entitled to judgment against the defendants and each of them" for the above sum, orders, etc.

Thereafter the defendants moved, upon the minutes of the court, to vacate and set aside the verdict and judgment and for a new trial. The notice of intention specified the following grounds: "(1) That the verdict and damages are excessive, appearing to have been given under the influence of passion or prejudice. (2) That the evidence is insufficient to justify the verdict in the following particulars, viz.: That the undisputed evidence shows that the plaintiff suffered no loss, damage or injury by reason of the alleged fraud, deceit and false representations made by the defendants; that the undisputed testimony shows that, at and prior to the time of the making of the contracts between plaintiff and defendants, the defendants had agency contracts or other contracts with the owners of the land in question, empowering defendants to purchase said lands or to cause them to be conveyed to others, including the plaintiff; that the undisputed evidence shows that on the 1st day of January, 1903, upon which date the contract between plaintiff and defendants was to be consummated, and long before the trial of this action, the defendants had obtained title in fee to all of said lands, excepting the so-called 'Frey quarter section,' title to which was vested in the defendants upon January 15, 1903; that the undisputed evidence shows that at and prior to the time of the trial of this action the defendants were clothed with the title to all of said lands in fee; that the undisputed evidence shows that the defendants always intended to comply with all the terms of said contract upon their part to be kept and performed from the time said contract was made; that they were at all times from a date prior to the making of said contract in position to acquire title to all said lands; that they did acquire title to said lands prior to the trial of this action; and that, if plaintiff suffered any injury owing to said alleged fraudulent representations, it was a nominal injury only, and that he suffered no real, substantial injury or damages. (3) That the verdict is against and contrary to the law, in that the

undisputed evidence shows that the material allegations contained in the complaint, to the effect that the defendants did not own said lands, were substantially untrue, for the reason that during all times mentioned in the complaint the defendants were the owners of contracts which enabled them to acquire or to have conveyed title to said lands; that said verdict is against law in this: That the undisputed evidence shows said contract between the plaintiff and the defendants was during all the time after it was made, down to and during the trial of said action, a valid, subsisting contract; and that the evidence upon the trial failed to show any breach of said contract on the part of the defendants, or any damage suffered thereunder by the plaintiff."

There is no dispute as to the vital facts upon which the motion for new trial was based. They are substantially as stated in the notice of intention. The defendants made no default in the performance of their obligations under the contract. The trial judge caused the entry of a judgment against the defendants for $13,052.52. This he vacated upon the defendants' motion. The question on this appeal is whether it appears that he abused his discretion in vacating the verdict and judgment and granting a new trial. We are of the opinion that he did not, and that the order must therefore be affirmed. "Where a verdict is vacated and a new trial granted by a trial court upon the ground of insufficient evidence, the court in so doing is acting within judicial discretion, and such discretion will not be disturbed in a court of review, except in cases of manifest abuse." Dinnie v. Johnson, 8 N. D. 153, 77 N. W. 612; Patch v. Railway Co., 5 N. D. 55, 63 N. W. 207; Gull River Lumber Co. v. Osborne, 6 N. D. 276, 69 N. W. 691; Pengilly v. Case Mach. Co., 11 N. D. 249, 91 N. W. 63.

The action is based upon fraud. The fraud alleged consists of the defendant's false statements as to the title and ownership of the land. It seems to have been the theory of plaintiff's counsel, and one adopted by the court in ordering judgment for the plaintiff, that, if the defendant in fact falsely stated that they had the legal title, this statement of itself constituted an actionable wrong, for which the defendants must respond in damages. This is erroneous. It is a well-settled maxim that fraud without injury is not actionable. "The law takes no cognizance of a fraud which does not in fact work some injury." People v. Cook, 8 N. Y. 67, 59 Am. Dec. 451; Eastwood v. Bain, 3 H. & N. 738; Hemingway v. Hamilton, 4 M. & W. 115. "It has been very justly remarked that to sup-

port an action at law for misrepresentation there must be a fraud committed by the defendant and a damage resulting from such fraud to the plaintiff." "Courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations or correcting unconscientious acts which are followed by no loss or injury." 1 Story's Equity Jurisprudence, section 202; Vernon v. Keys, 12 East. 637; 9 Cyc. 431, and cases cited. It is accordingly well settled that false statements of a vendor of real estate in procuring the execution of a written contract for the purchase and sale thereof, which are neither attended nor followed by injury, will not sustain an action for deceit. As to this action it is said that "there must not only be a false representation made with intent to deceive, but the representation must be relied on and cause damage to a party before an action will lie." Barber v. Kilbourn, 16 Wis. 485; Castleman v. Griffin, 13 Wis. 535; Freeman v. Venner, 120 Mass. 424; Ide v. Gray, 11 Vt. 615; Randall v. Hazelton (Mass.) 12 Allen, 412; Fuller v. Hogdon, 25 Me. 243. In Alden v. Wright, 47 Minn. 225, 49 N. W. 767, the court states that one of the essential elements which constitutes a cause of action for deceit is "that the party induced to act has been damaged. He must have acted on the faith of the false representation to his damage. The party cannot sustain an action of this character when no harm has come to him. Deceit and injury must concur"—citing numerous cases. And it is equally well settled that a court of equity will not adjudge a rescission of a contract for the purchase and sale of real estate on account of fraudulent representations in procuring its execution, unless damage or injury is shown. Marriner v. Dennison, 78 Cal. 202, 20 Pac. 386; Bailey v. Fox, 78 Cal. 389, 20 Pac. 868; Morrison v. Lods, 39 Cal. 381; Purdy v. Bullard, 41 Cal. 444; Wainwright v. Weske, 82 Cal. 193, 23 Pac. 12; Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; Smith v. Richards, 13 Pet. (U. S.) 26, 10 L. Ed. 42; Wainscott v. Occidental, etc., Ass'n, 98 Cal. 253, 33 Pac. 88; Huffman v. Long (Minn.) 42 N. W. 355; Johnson v. Seymour (Mich.) 44 N. W. 344; Armstrong v. Breen (Iowa) 69 N. W. 1125; Beard v. Bliley (Colo. App.) 34 Pac. 271; Nelson v. Grondahl, 12 N. D. 130, 96 N. W. 299, and cases cited.

If one is actually defrauded by a false statement which induced him to enter into a contract, he has his remedy for the injury. The contract thus procured is not void, but voidable. 9 Cyc. 431; 14 Am. & Eng. Enc. Law, 156, and cases cited. He may either

rescind the contract and recover any sums paid upon it, or property delivered pursuant to it, or he may affirm the contract, take such benefits as are obtainable under it, and recover damages for the injuries sustained by reason of the false statement. Tice v. Zinsser, 76 N. Y. 549; Krumm v. Beach, 96 N. Y. 398; Gifford v. Carvill, 29 Cal. 589; Herrin v. Libbey, 36 Me. 350; Burton v. Stewart (N. Y.) 3 Wend. 236, 20 Am. Dec. 692; Purdy v. Bullard, 41 Cal. 444. These alternative remedies, it will be seen, are inconsistent, and are not available in the same action; for one is based upon a rescission of the contract and the other upon an affirmance of it—one upon a contract implied by law obligating the wrongdoer to restore whatever of value he has received; the other in tort for damages for the injury done by the false statement. When the person injured elects the latter remedy, i. e., to sue for the tort, he affirms the contract, thus continuing it as a binding obligation. Heastings v. McGee, 66 Pa. 384; Kimball v. Cunningham, 4 Mass. 502, 3 Am. Dec. 230; Whiteside v. Brawley (Mass.) 24 N. E. 1088; Johnson v. Cookerly, 33 Ind. 151; Wheeler v. Dunn (Col.) 22 Pac. 827; Stuart v. Hayden, 72 Fed. 402, 411, 18 C. C. A. 618; Chilson v. Houston, 9 N. D. 498, 84 N. W. 354. And "it is the rule that the defrauded party to a contract has but one election to rescind, that he must exercise that election with reasonable promptitude after the discovery of the fraud, and that, when he once elects, he must abide by his decision." Dennis v. Jones, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899; Bigelow on Fraud, 436. In this case the plaintiff elected to sue for damages for the alleged fraud. In doing so he affirmed the contract. It stands undisputed in this case that the defendants were prepared and offered to convey the land when performance was due under the contract. Plaintiff was thus tendered the full fruit of his bargain in accordance with the terms of his contract of purchase. The false representation was, therefore, without injury or damage; for there has been no failure of title, and no other cause for damage is alleged, or even suggested. Upon this state of facts it is apparent that the verdict is without support in the evidence. Plaintiff alleges that he was damaged by the false statement. The fact that the evidence fails to show that the false statement was followed by injury is fatal to a recovery. Plaintiff's counsel properly concede that the verdict has no support in the evidence if the action be treated as one for deceit, because there is no evidence that any injury or damage resulted from the false statement, and

admit there has been no default under the contract. They seek to sustain their recovery, upon the theory that the action is based upon a rescission of the contract.

Upon a former appeal from an order dissolving an attachment in this case, we construed the complaint as stating a cause of action for deceit. Sonnesyn v. Akin, 12 N.D. 227, 97 N. W. 557. This construction of the complaint was not then challenged. Neither was it challenged in the plaintiff's petition for rehearing or in the brief upon the rehearing, both of which were filed after the trial of the action. His counsel now contend, however, that the action rests upon a rescission of the contract. Their present position, as stated in their brief, is as follows: "The alleged fraud vitiated the contract. * * * Our case is based upon the theory that the contract was disaffirmed by bringing the action. * * * Our claim is that the fraud destroyed all of the contract. Our cause of action is not based upon the contract, but is founded on the fraud, and assumes that there never was any contract. * * * It has been disaffirmed for fraud, and thereby utterly destroyed." This theory of the action is not sustained by the pleadings. Neither does the evidence or findings afford grounds for sustaining a recovery, either upon the ground that the contract was void without disaffirmance or that it was avoided by disaffirmance. That the contract was not void, but at the most voidable, has already been stated. The complaint does not allege that the contract was disaffirmed, and there is no evidence of a disaffirmance. On the contrary, the complaint states a cause of action for deceit, and prays for damages therefor, and states no other cause of action, and, so far as the bringing of the action is notice, it is notice that the plaintiff would not waive the tort and rely upon the implied contract which would arise upon a disaffirmance, but would rely upon the tort and recover his damages resulting therefrom and affirm the contract. There is an entire absence of both allegation and proof of rescission. It is not claimed that the contract has been rescinded by the judgment of any court. Neither can it be contended that it has been rescinded by mutual consent, for the defendants have steadfastly insisted upon performance, and they tendered performance when performance was due. Neither can it be said that the plaintiff has rescinded by his own act; for to disaffirm a written contract "the law requires some positive act by the party who would rescind which shall manifest such intention and put the opposite party on his guard." Higby v. Whit-

taker, 8 Ohio, 198; Walters v. Miller, 10 Iowa, 427; Melton v. Smith, 65 Mo. 315. "A contract for the conveyance of real estate cannot be rescinded by the vendee without the performance of some act which will give the vendor notice of his intention and put him upon his guard." Mullin v. Bloomer, 11 Iowa, 360. See, also, American Wine Co. v. Brasher (C. C.) 13 Fed. 595, 603; Carney v. Newberry, 24 Ill. 203; Gaty v. Sack, 19 Mo. App. 470; Davis v. Read (C. C.) 37 Fed. 418, 424; Grymes v. Sanders, 93 U. S. 55, 23 L. Ed. 798; Ayres v. Mitchell, 3 Smedes & M. 683; Lawrence v. Dale, 3 John. Ch. 23. And as a condition to a recovery of the consideration paid by a defrauded vendee, as upon a disaffirmance, he "must demand the money he has paid or the property he has delivered to such other party before suit brought in order to recover the same." Weeks v. Robie, 42 N. H. 316; Swazey v. Choate Mfg. Co., 48 N. H. 200; Corse & Co. v. Minnesota Grain Co. (Minn.) 102 N. W. 728, and cases cited. And it is necessary, in an action to recover payments upon a contract obtained by fraud, to "aver facts showing a rescission of the contract of purchase. * * * Until the contract is rescinded in some manner, an action to recover such payment cannot be maintained." Herman v. Gray, 79 Wis. 182, 48 N. W. 113. "An action at law to recover back that which has been paid upon a contract void for fraud supposes a precedent rescission of the contract by the act of the plaintiff." Ludington v. Patton, 111 Wis. 208, 86 N. W. 571; Potter v. Taggart, 54 Wis. 395, 400, 11 N. W. 678; Bostwick v. Mutual Life Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705.

Some courts have held that a vendor of personal property, when the sale has been induced by fraud, may sue in replevin or trover, without previous notice, tender or demand, treating the acceptance of the property by the fraudulent vendee as a tortious taking and upon the ground that no title passes. Thurston v. Blanchard (Mass.) 22 Pick. 18, 33 Am. Dec. 700; Wood v. Garland, 58 N. H. 154, and Carl v. McGonigal (Mich.) 25 N. W. 516, are of this class. Other courts hold in such cases that the title passes, and that a rescission is essential before the defrauded vendor can reclaim the property. Farwell v. Hanchett (Ill.) 11 N. E. 875; Doane v. Lockwood (Ill). 4 N. E. 500. See, also, cases cited in note to Sisson Potter Co. v. Hill (R. I.) 21 L. R. A. 206. Whatever may be the correct rule as to a sale of personal property in-

duced by fraud, it is apparent that it does not apply to the case at bar. The sale in this case was of real estate. The action is not brought by a defrauded vendor of personal property, but by a purchaser of real estate, who alleges that he was fraudulently induced to make the contract of purchase to his damage. If it were possible to change the action from one ex delicto to recover damages to an action ex contractu as upon a rescission, still the situation would not be the same as in a sale of personal property; for this action is not brought by the vendor to recover personal property which he has sold. It was brought by the purchaser of real estate, and would in that event be brought, not to recover property sold, but to recover payments made upon a voidable contract. Under such circumstances it will be seen that the right of recovery is entirely dependent upon a precedent rescission, and so the cases hold.

Finally it is contended that, even if the theory upon which the plaintiff recovered was erroneous, the error could not be corrected upon defendants' motion. This conclusion is based upon the claim that the instructions given by the judge to the jury authorized the recovery which the plaintiff now seeks to sustain, and that the instructions were not excepted to by the defendants. The point urged is that the jury were authorized to apply an erroneous rule of law, which was not excepted to, and that under this erroneous rule the evidence is sufficient to sustain the verdict, and that the recovery must therefore stand. This contention cannot be sustained. The rule thus invoked has no application to this case, and for the reason that the jury did not return a general verdict. It will be seen, by reference to the statements of the proceedings above set out, that the law of the case was not applied by the jury, but by the trial judge. The damage and the amount thereof were awarded, not by the jury, but by the trial judge, after the jury was discharged and after a review of the special findings. Upon this state of facts the trial court "is free to consider and should consider what the law is, and is not bound by its instructions previously given to the jury. It is true a jury must take instructions as to the law, whether right or wrong; * * * but the court does not instruct itself and does not bind itself." Baird v. C., R. I. & P. Ry. Co., 61 Iowa, 359, 31 N. W. 733. That the verdict is not a general verdict is apparent, for it does not pass upon all of the issues. It wholly omits the vital issue, the amount of dam-

ages sustained by the plaintiff. Section 5446, Rev. Codes 1899, provides that, "when a verdict is found for the plaintiff in an action for the recovery of money, * * * the jury must also find the amount of the recovery." The jury found no amount. It is silent upon this issue. "A verdict in an action in which a money judgment is sought, whether by way of liquidated or unliquidated damages, which does not state specifically the amount to which the jury deem the plaintiff entitled, is not a verdict on which a valid judgment can be entered." Van Benthuysen v. DeWitt (N. Y.) 4 Johns. 213; Cates v. Nickell, 42 Mo. 169; Burghart v. Brown, 60 Mo. 24; Gerhab v. White, 40 N. J. Law, 242; Gaither v. Wilmer, 71 Md. 361, 18 Atl. 590, 5 L. R. A. 756, 17 Am. St. Rep. 542; L. & N. Ry. Co. v. Hartwell, 99 Ky. 436, 36 S. W. 183, 38 S. W. 1041; Bartle v. Plane, 68 Iowa, 227, 26 N. W. 88; Fryberger v. Carney, 26 Minn. 84, 1 N. W. 807; Mayor v. Calhoun, 103 Ga. 675, 30 S. E. 434; Watson v. Damon, 54 Cal. 278; Taylor v. Hathaway, 29 Ark. 597; Abbott's Trial Brief, 515; 28 Am. & Eng. Enc. Law, 303, 307, and cases cited. And in this case the omission is fatal, and cannot be supplied by reference to the pleadings.

It is also equally essential that the jury shall assess the damages in a special verdict. "A special verdict should leave to the decision of the court only questions of law." Morrison v. Lee, 13 N. D. —, 102 N. W. 223; Wainright v. Burroughs, 1 Ind. App. 393; 27 N. E. 591; Mitchell v. Geisendorff, 44 Ind. 358; Dawson v. Shirk, 102 Ind. 184, 1 N. E. 292; City of Ft. Wayne v. Durnell, 13 Ind. App. 669, 42 N. E. 242; Cole v. Powell, 17 Ind. App. 438, 46 N. E. 1006. In this case the special findings do not cover all of the issues and are not equivalent to a special verdict. Whether, if the verdict had been general, it would have been necessary to except to the instruction stating an improper rule of damages, the motion being upon the court's minutes, in order to set aside the verdict upon the ground that the amount awarded was excessive and unauthorized, we need not determine. On this point see Baylie's New Trials and Appeals, 545, 546, and cases cited.

Aside from the merits, the order must be affirmed for another reason. The record presents a case of mistrial. The jury did not return a general verdict, and the special findings do not cover all of the issues so that they can be treated as a special verdict. The jury found that the defendants made a false statement, that the plaintiff relied upon it as one of the inducements to enter into the

contract to purchase the land, that the value of the goods delivered upon the contract was $10,000, and that the plaintiff should have interest on his damages. There is entire silence as to the amount of damages, or as to whether the plaintiff suffered any damages. The fact that the defendant delivered $10,000 worth of goods as payment upon the contract merely establishes the fact that he made a payment of property of that value upon the contract. It does not show that he was damaged in that sum, or in any other sum, by so doing. The question of damages would turn upon the question of whether the obligation of the defendants to convey the title was of any value, and whether it failed in whole or in part. The answer alleged full performance, and the evidence established it without dispute. The special findings wholly ignored this issue, and, like the so-called general verdict, did not find that the plaintiff had been damaged in any sum. "It is a mistrial where, no general verdict being returned, the answers of the jury to specific questions do not cover the whole case like a special verdict." Manning v. Monaghan, 23 N. Y. 539. "And until all the issues of fact are decided no final judgment can be entered." Kiel v. Reay, 50 Cal. 61; Kintz v. McNeal, 1 Denio, 436; Chamberlain v. Dempsey (N. Y.) 14 Abb. Prac. 241; Fisk v. Henarie (C. C.) 32 Fed. 417, 427.

The order appealed from should be affirmed, and it is so ordered.

MORGAN, C. J., concurs. ENGERUD, J., having been of counsel in the court below, did not sit in the above case; HON. C. J. FISK, Judge of the First Judicial District, sitting by request.

FISK, District Judge. I am unable to concur in the foregoing opinion. It seems to me that the same is the result of a misapplication of well-settled legal principles. I do not question the soundness of most of the propositions advanced in said opinion. They are well settled, and no one can question their soundness. These propositions are, briefly stated, as follows: (1) Fraud without injury is not actionable, and hence damages must be shown in order to sustain an action for deceit. (2) A court of equity will not rescind a contract induced by fraudulent representations, in the absence of a showing of damage or injury. (3) A contract procured by fraud is not void, but merely voidable. (4) A person defrauded has an election to disaffirm or rescind the contract and recover back what he has parted with or its value, or he may affirm the contract, take such benefits as are obtainable under it, and re-

cover damages for the injury sustained by reason of the false statement. These remedies are inconsistent, and an election to pursue either remedy includes the exercise of the other. Such election must be exercised promptly upon discovering the fraud, and, when once made, it is final. (5) Except in cases of manifest abuse of discretion, a court of review will not disturb an order of the trial court granting a new trial upon the ground of insufficiency of the evidence to sustain the verdict. (6) A verdict must respond to the issues, and the jury must assess the damages, whether the verdict is a general or a special one, and a special verdict should leave to the court only questions of law. I maintain that these well-settled principles have no proper application in the disposition of this appeal.

I disagree with the majority opinion as to the nature and effect of this action, and also as to how, under the facts, plaintiff could assert his election to affirm or disaffirm the contract. The facts as disclosed by the evidence and as settled by the jury, or alleged in the complaint and admitted in the answer, are, briefly: That on September 30, 1902, the plaintiff entered into a written contract with the defendants, whereby the plaintiff made application to purchase certain real property described in the complaint for the consideration of $25,920; $500 was paid in cash, $2,000 was paid on October 7th, and on October 8th a stock of merchandise was turned over to defendants in part payment for said land. Such sale was to be consummated on January 1st following by the payment of the balance of the consideration and the delivery of title deeds to the plaintiff. In the negotiations leading up to and preceding the making of this contract defendants falsely and fraudulently represented to plaintiff that they were the owners of the land and legally entitled to enter into a contract to convey the same to plaintiff; that such representations were made to deceive and defraud him; that, relying thereon, he was induced to make the contract and the payments aforesaid, which payments in the aggregate, including the merchandise, amounted to $12,857.33; that defendants did not own said land, and had no right or authority to make the contract aforesaid. Subsequently plaintiff learned that said representations were unqualifiedly false, and he immediately, and on November 26, 1902, without notifying defendants of his intention to rescind, and without demanding a return of the money and personal property, commenced this action, and caused a writ of attachment to be issued therein and levied upon the personal property of the defendants. The com-

plaint sets forth the fact that said contract was entered into in reliance upon such false representations, and that said cash and stock were turned over in reliance upon the same; that said representations were false, and known to be false by the defendants at the time they were made; and that the plaintiff was thereby damaged in the said sum of $12,857.33. The complaint contains no averment of an election to rescind the contract, nor does it allege that a previous demand for the return of said money and personal property was made, nor does it allege a conversion of said money and personal property. It does, however, allege that the plaintiff was damaged in the sum of $12,857.33, being the exact sum parted with by the plaintiff under said contract, and prayed judgment for this sum, with interest. The defendants did not challenge the sufficiency of the complaint as stating a cause of action for the damages claimed. The entire range of proof, offered by plaintiff and received without objection by defendants, as well as the amount of damages demanded in the prayer for relief, unmistakably indicated, both to opposing counsel and the court, that plaintiff was seeking to recover the value of the goods and the money which he had delivered to defendants pursuant to said contract. Under no possible theory could such recovery be had, except the single one that plaintiff had rescinded the contract on account of the fraud inducing it, and that thereby he was entitled to recover as damages the value of what had been wrongfully obtained from him and converted by defendants.

The majority opinion proceeds upon the theory that this is an action to recover damages for deceit, and therefore an affirmance of the contract. The complete answer to this contention is the fact that no such cause of action existed on the date this action was commenced. The contract was not to be fully performed until the following January, and hence, in the nature of things, no damage had accrued for deceit at the date this action was commenced, and none would accrue until performance was due under the contract. There was no way of determining at that time whether or not defendants, on January 1st thereafter, would be able to make good their agreement to transfer title to the land, and hence no way of determining any damages on the theory that it is an action for fraud and deceit. If such theory is correct, the plaintiff is in the ridiculous attitude of asking for relief which, under the very facts alleged in the complaint, he is not entitled to, for the very apparent reason that no damage had accrued prior to the commencement of this action, and none

could, in the nature of things, accrue until several months thereafter. It is clear, therefore, to my mind, that the complaint not only does not state a cause of action for deceit, but it could not have been made to state such cause of action, as none existed, and the complaint was clearly demurrable as a complaint for damages for deceit. Plaintiff, by the fraud, was induced to part with property, and the object of the action clearly was, as it seems to me, not to ask for something which he clearly could not get—i. e., damages for deceit on the theory of an affirmance of the contract—but he was seeking to recover such an amount as would equal the value of what he had parted with on account of the fraud. He asks for this exact sum to a cent. The plaintiff had the undoubted right to take the position that defendants wrongfully, through the fraud and deceit, obtained his property and converted it to their own use, and it is apparent to my mind that this was the plaintiff's attitude in bringing this action. The action was similar to that of Thurston v. Blanchard, 22 Pick. 18, 33 Am. Dec. 700, which seems to be the ruling case, as the courts of many states have since its decision cited and followed it, and I find no court which has repudiated its soundness. It was an action of trover to recover the value of certain goods alleged to have been obtained by defendants from plaintiff by means of false and fraudulent representations. Shaw, C. J., said: "We are now to take it as proved in point of fact, to the satisfaction of the jury, that the goods for which this action of trover is brought were obtained from plaintiff by a sale, but that this sale was influenced and effected by false and fraudulent representations of the defendant. Such being the case, we think the plaintiffs were entitled to maintain their action without a previous demand. Such demand and refusal to deliver are evidence of conversion, when the possession of the defendant is not tortious; but, when the goods have been tortiously obtained, the fact is sufficient evidence of conversion. Such a sale, obtained under false and fraudulent representations, may be avoided by the vendor, and he may insist that no title passed to the vendee, and, in such case the seller may maintain replevin or trover for his goods." In Farwell v. Hanchet (Ill.) 11 N. E. 875, which was an action of replevin for goods obtained by fraud by a vendee, it was held: "It is well settled that, when goods have been obtained by fraud by a vendee, or otherwise unlawfully obtained, the vendor or true owner may, without previous demand, maintain trover or replevin for the goods

against any person not holding them as an innocent purchaser for value. The fraudulent vendee is not considered as a purchaser of the goods, but as a person who has tortiously got possession of them." To the same effect see Doane v. Lockwood (Ill.) 4 N. E. 501; Ryan v. Brant, 42 Ill. 78; Nichols v. Michael, 23 N. Y. 272, 80 Am. Dec. 259; Carl v. McGonigal (Mich.) 25 N. W. 516.

The majority opinion cites the case of Farwell v. Hanchett and Doane v. Lockwood, supra, as holding that a rescission is essential before the defrauded vendor can institute an action to reclaim the property; but I do not so understand these decisions. Both of said cases hold that, where the vendor has received the consideration for the sale, it is necessary, in order to effect a rescission, to restore the same to the fraudulent vendee, and that until such rescission is effected the title is in the fraudulent vendee. Where, however, nothing is necessary to be done by the vendor in order to place the fraudulent vendee in statu quo, the bringing of the suit is sufficient rescission. In the case of Oswego Starch Co. v. Lendrum (Iowa) 10 N. W. 900, 42 Am. Rep. 53, which was an action by a vendor to recover property parted with through fraud, it was contended by the defense that the plaintiff should allege and prove notice of rescission of the sale before the action was commenced. The court held otherwise, saying: "Counsel for defendant cite no case which holds a notice to be necessary. We know of no principle of law which requires it. We know that such a rule would practically defeat the remedy the law secures to vendors by recovering the property when the sale is induced by the fraud of the vendees. The thought is ridiculous that the the rule should be applied to 'lightning-rod men,' to the vendors of patent rights and patented articles, to those who travel over the state appointing agents for the sale of agricultural implements, 'hog cholera cure,' etc., and to other like adventurers. They are usually far beyond the reach of notices, or become invisible immediately after perpetrating their frauds. It would be quite as wise to require a thief to be notified that a warrant will be issued for his arrest as to require notice to swindlers before instituting proceedings to recover the property which they have acquired by their frauds." and they approvingly quote from the Supreme Court of Illinois the following language: "It could scarcely be insisted that if one to whom a horse had been loaned, instead of returning him according to contract, should attempt to run him from the country, and the first intelligence received

by the owner should be that he was actually absconding with his property, such owner would be bound, before he could properly secure a writ of replevin upon which to retake the same, to follow and overtake the wrongdoer and formally demand his property." The service of the summons and complaint upon defendants in this action, and the attachment levied on their property, was all the notice defendants were entitled to that plaintiff elected to rescind the contract. By this action defendants were advised that plaintiff claimed to recover of them the money and the value of the property which they had obtained from him. This could only be done upon the theory that the contract had been repudiated by plaintiff. Thompsonson v. Peck (Ind.) 18 N. E. 16, 1 L. R. A. 201; Laboyteaux v. Swigart (Ind.) N. E. 373; Smith v. Smith, 19 Ill. 351; Huey v. Grinnell, 50 Ill. 179; Thompson v. Fuller (Sup.) 16 N. Y. Supp. 486; State v. Davis (N. J.) 20 Atl. 1080. The notice of rescission need not be conveyed in express terms, but the intention to repudiate sufficiently appears where the party seeking to rescind institutes against the other legal proceedings based upon a disaffirmance of the contract. Plaintiff had a legal right to treat such taking of his property from him as a conversion thereof; and this, without any demand for possession prior to suit. Thurston v. Blanchard, 22, Pick 20, 33 Am. Dec. 700; Strayhorn v. Giles, 22 Ark. 517; Buffington v. Gerrish, 15 Mass. 156, 8 Am. Dec. 97; Waters v. Van Winkle, 3 N. J. Law, 567; Farwell v. Hanchett (Ill.) 11 N. E. 875; Weed v. Page, 7 Wis. 503; 14 Am. & Eng. Enc. Law, 165, and note; 24 Am. & Eng. Enc. Law, 645; Bigelow on Frauds, p. 77 et seq.

It is stated in the majority opinion that the doctrine announced in Thurston v. Blanchard and similar cases does not apply to the facts in this case for the reason that those were cases brought by the vendor of personal property, while it is stated that this involves the rights of a vendee of real property. I can discover no difference on principle. In both cases the plaintiff has been defrauded out of personal property, and it cannot possibly make any difference in the rule how such fraud was perpetrated. The defendants are in the position of fraudulent vendees of plaintiff's property. Whether they are vendees or not is wholly immaterial. The fact remains that they came into possession of plaintiff's property tortiously, and this is the essential basis upon which rests the said doctrine as announced in the foregoing authorities. If defendants,

as consideration for plaintiff's property, had agreed to pay cash on January 1st, instead of deeding lands to him, and had falsely stated that they had the cash deposited in a bank with which to make such payment, instead of falsely stating, as they did, that they had title to these lands, would not plaintiff's remedy be just the same? In Thompson v. Peck (Ind.) 18 N. E. 16, I L. R. A. 201, Mitchell, J., used this language: "It is well settled that, even though a sale of property be induced by fraud, the contract is not void but only voidable. The title to the property passes to the fraudulent vendee, subject to the right of the vendor, upon discovering the fraud, to elect whether he will rescind the contract by returning, or offering to return, whatever of value he may have received, and reclaim his property, or whether he will retain the consideration and treat the bargain as subsisting. Until the vendor makes his election, the contract continues, and the title to the property remains in the purchaser as against all the world. Where the possession of property has been wrongfully obtained by means of a voidable contract, and the vendor has received nothing of value, the bringing of an action to reclaim the property is, ordinarily, a sufficient disaffirmance of the contract."

The plaintiff's theory clearly is that it was an action to recover damages as for a conversion of the property parted with by him on account of the fraud, and with full knowledge of this theory the defendants tried the case to a finish in seeming acceptance of it, and the trial court instructed the jury in harmony with such theory, and I contend that after verdict rendered it is too late to challenge the correctness of such theory, even if the same was wrong, which I most emphatically deny. The plaintiff proved that the lands he contracted to purchase were not owned by the defendant at the time the contract was made. He also proved the other facts alleged in the complaint, and the value of the stock of merchandise transferred to defendants. The trial court fully instructed the jury upon plaintiff's theory of recovery, and, among other instructions, the jury were told: "If you find from the evidence that the defendants, or either of them, stated to the plaintiff that they were the owners of the land described in the contract, and the plaintiff believed and relied upon such statements, and was thereby induced to make the contract and to pay the money and deliver the goods, and you further find that such statements as to this title were false, then the plaintiff is entitled to a verdict." Also: "If you find that

the plaintiff was induced to make the contract and pay the money and deliver the goods by reason of and in reliance upon the statements or representations made by defendants that they were the owners of the land to be conveyed, the plaintiff had the right, upon discovering the falsity of such statements and representations, to declare the contract void and recover from defendants the damages suffered by him." And again: "If you find the issues of this case in favor of the defendant, the measure of his damages would be the actual detriment caused by the wrongful acts of defendants, and the cash value of the stock of merchandise at Ormsby which was delivered to defendants. In estimating the value of such stock, you are not bound by the inventoried price, nor by the receipt which was made on behalf of defendants when the same was turned over to them. You must ascertain what was the actual cash value of such stock at that time, and you cannot render a verdict for any larger sum than such actual cash value, together with the $2,500 cash payment." These instructions were clearly improper upon the theory that the action is one for deceit. Still they were not excepted to by defendants, and hence they must be accepted as applicable to the cause of action being tried.

The position taken in the majority opinion that the plaintiff did not by some affirmative act, other than bringing this action, rescind the contract prior to commencing the action, it seems to me, is erroneous. If plaintiff had received anything under the contract which it was his duty to return in order to place the defendants in statu quo, then such position would be sound; but he had received nothing under the contract, and therefore no duty rested upon him to do any act prior to commencing his action. The complaint sets forth sufficient facts to entitle plaintiff to recover the money and the value of the property obtained from him through the fraud and unlawfully converted by defendants to their own use, without the averment of facts showing a rescission, and without any allegation of a demand or refusal for the money and property before suit. The failure to set forth these facts did not render the complaint bad, in view of the fact that opposing counsel made no point as to the form of the action or the sufficiency of the complaint, but tried the case to a verdict upon the theory that the contract had been rescinded for the fraud, providing the false representations were in fact made, and that plaintiff's right was to recover what he had parted with through the fraud. In fact, the answer of

defendants shows that such a demand prior to suit would have been unavailing, and hence such a demand was unnecessary, even if otherwise required. The measure of damages claimed in the complaint, and which the court instructed the jury to give in case they found for the plaintiff, and the amount of the verdict, are all limited to the value of what the defendants obtained from plaintiff through the fraud—a measure of damage only applicable in a conversion case or in an action of assumpsit proceeding on the theory that the contract was void. "Where the demand for damages indicates that the plaintiff is proceeding for a measure of recovery adapted to only one form of action, it is strong evidence that the action is in that form, whether it be ex contractu or ex delicto." 21 Enc. Pl. & Pr. 660, and cases cited. And the theory of the trial is shown by the instructions to the jury, to which no exception was taken. 21 Enc. Pl. & Pr. 669; Peteler Ry. Co. v. Mfg. Co., 60 Minn. 127, 61 N. W. 1024; Davis v. Jacoby, 54 Minn. 144, 55 N. W. 908; Crawford v. Pyle (Pa.) 42 Atl. 687; Harper v. Morse (Mo.) 21 S. W. 517. Evidence was received in the case, without objection from defendants' counsel, showing that defendants had disposed of a large part of the Ormsby stock before this action was commenced. This evidence was competent, and only competent, as tending to show a conversion of the property, and no objection was made or exception taken to the instruction as to the measure of damage—a tacit consent by defendants to the case being tried and submitted on plaintiff's theory. Holman v. Land Co. (Colo. App.) 45 Pac. 519; Denver, etc., Ry. Co. v. Ditch Co. (Colo. App.) 52 Pac. 224. Counsel having tried the case upon such theory, and the court having instructed the jury in accordance therewith, and the complaint and evidence being amply sufficient to sustain the verdict upon this theory, defendants cannot, after being defeated upon the theory upon which they tried the case without objection, claim to set aside the recovery upon a point which was not raised on the trial. In determining the nature of this action, we are not restricted to the face of the complaint, as the court was upon the former appeal, because the parties, as well as the trial court, at the trial of the case upon the merits, most effectually put at rest any question there might have been as to the character of the action. They treated the case as an action to recover the $2,500 cash payment and the value of the stock of merchandise. If it had been tried upon the theory now contended for by the defend-

ants, and so held by the majority opinion, all the testimony relating to damages, or of the value of the stock of merchandise, would have been improper, and why? Because under such theory the contract was affirmed, and therefore in full force and effect, and the value of the merchandise and money paid under the contract would have had absolutely nothing to do with the extent of plaintiff's detriment caused by such fraud. But testimony was introduced, without objection, as to the value of the property parted with by plaintiff, and the value of such property at the time of its delivery, together with the cash paid, was accepted by all as the true measure of plaintiff's recovery. The trial court instructed the jury in harmony with this theory. Not an objection or exception was taken to any ruling or to any instruction, and I contend that after thus trying a case, and a verdict having been rendered, which is in conformity with the evidence and the law as given by the court, it is too late for defendants to challenge the correctness of the theory upon which the case was tried. Logan v. Freerks (recently decided by this court) 103 N. W. 426; Giffert v. West, 33 Wis. 622. In the latter case the language of Dixon, C. J., is pertinent: "It frequently happens, as was held in Neff v. Clute, 12 Barb. 466, that the same state of facts will support an action in either of two or more different forms, as in that case one for the original consideration, or one for the damage sustained by the fraud. But if, in such or a supposed similar case, the plaintiff fails to make the proofs, or is mistaken about the facts, and so does not establish his right in the form of action adopted, yet if he is permitted to proceed with his evidence, and, without objection, to a verdict upon a good cause of action shown in some other form arising out of the facts set forth in the complaint, or the transaction complained of, no good reason is seen why said verdict should be set aside or the judgment arrested."

Defendants centered their defense upon a denial of the representations alleged and in an endeavor to show that on January 1st and on the date of the trial they were able to furnish title to plaintiff of the land in question. Their testimony upon the latter question was wholly immaterial. The contract was null and void on account of plaintiff's election to treat it so by bringing the action, and nothing which defendants could or did do thereafter towards getting title could be of any concern to plaintiff. It cannot be doubted that the representations as to defendants' ownership

of the land were material false representations. Defendants knew they were false, and made them for the purpose of inducing plaintiff to enter into the contract of purchase. Defendants were strangers to the plaintiff. The deal which was negotiated contemplated his paying in cash and merchandise nearly $13,000 to them ninety days before he could get anything in return. Plaintiff had no security for the payments made, excepting the naked promise of defendants to transfer him the land, unless the defendants owned the lands they contracted to sell him, in which event he would have the security of the land itself. No sane man would make such a contract unless he had been led to believe that the other party to the contract owned the land or was in every way solvent. That this fraud of defendants would vitiate and annul the contract at plaintiff's election is clear, and it was not necessary that he should wait until January 1st, when full performance was due under the contract, before bringing his action, nor that he should have suffered any pecuniary damages before exercising the right of rescission. In Williams v. Kerr, 152 Pa. 565, 25 Atl. 618, 619, it is said: "It is such injury as will be redressed to obtain from an owner, by a false representation of a fact which he deems material, property which he would not otherwise have parted with upon the terms which he was thus induced to accept." In Stewart v. Lester, 49 Hun, 63, 1 N. Y. Supp. 700, it is said: "Either party to a contract may make a collateral statement made by the other party during the negotiations as to the existence or nonexistence of a particular fact, a material one in his judgment, so, if it turns out to be untrue, and was falsely and fraudulently made, it will vitiate the contract, if he relied upon the same as true, and would not have entered into the contract but for the statement." To the same effect are Valton v. Insurance Co., 20 N. Y. 32; Kelly v. Railway Co., 74 Cal. 557, 16 Pac. 386, 5 Am. St. Rep. 470; McLaren v. Cochran, 44 Minn. 255, 46 N. W. 408; Harlow v. La Brum, 151 N. Y. 278, 45 N. E. 859; Id., 82 Hun. 292, 31 N. Y. Supp. 487; 2 Warvelle on Vendors, 752. A false statement as to title and ownership of land is such fraud as will entitle the party deceived to rescind. Watson v. Atwood, 25 Conn. 313; Singleton v. Houston (Tex. Civ. App.) 79 S. W. 98; Slingluff v. Dugan (Md.) 56 Atl. 837; Claggett v. Crall, 12 Kan. 393. So, by statute in this case, a party to a contract may rescind the same when his assent was given by mistake or produced through fraud of the opposite party. Section 3932,

Rev. Codes 1899. Mistake of fact may consist in the belief in the present existence of a thing material to the contract which does not exist. Section 3853, Rev. Codes 1899. Actual fraud consists in the suggestion as a fact of that which is not true, made by a party to the contract who does not believe it to be true, and with intent to deceive another party thereto or to induce him to enter into the contract. Section 3848, Rev. Codes 1899.

In the majority opinion numerous cases are collated upon the proposition that no relief can be had for fraud in the absence of proof of damage or injury. I do not challenge the correctness of this doctrine, but I do assert that no court has gone to the extent of denying the right of rescission under the facts in this case. None of the authorities hold that it is necessary to show actual pecuniary damage. In 14 Am. & Eng. Enc. Law, pp. 139, 140, the correct rule is asserted as follows: "A suit cannot be maintained for equitable relief by way of rescission or cancellation of a contract on the ground of fraud, unless it is shown that damage or prejudice has resulted therefrom. If any damage or prejudice is shown, however slight, the party is entitled to relief. Pecuniary damage is not necessary to entitle a person to relief by way of rescission; but it is enough for him to show that he has been induced by material false and fraudulent representations to enter into a contract which he would not have entered into but for such representations." In McLaren v. Cochran, 44 Minn. 255, 46 N. W. 408, it is said: "If a party is induced to enter into a contract by fraudulent representations as to a fact which he deems material, and upon which he has a right to rely, he may rescind the contract upon discovery of the fraud, and the party in the wrong should not be heard to say that no real injury can result from the facts misrepresented." The majority opinion reads: "It stands undisputed in this case that the defendants were prepared to convey, and offered to convey, the land when performance was due under the contract. Plaintiff is thus tendered the full fruit of his bargain in accordance with the terms of his contract of purchase. The false representation was, therefore, without injury or damage; for there has been no failure of title, and no other cause for avoiding the contract is alleged, or even suggested." I think the foregoing is clearly unsound. Of course, in order for fraud to be actionable in an action for deceit, there must have been injury or damage; but this is not an action for deceit. It is an action, as I said before, based upon a rescis-

sion of the contract. Under the conceded facts in this case, can it be seriously contended that, upon discovering the fraud, it was not plaintiff's right to at once disaffirm the contract and bring suit, as he did, to recover back his payments? It would be a strange rule to require plaintiff to delay bringing his action, yet this is the inevitable effect of such holding. If he had a right to rescind upon discovering the fraud, then his action in so doing would put an end to the contract, and defendants could thereafter assert no rights under it. The correct rule is that, if a person induces another to enter into a contract by fraudulent representations or concealment, he cannot defeat the other's right to rescind by offering to make his representations good. For fraud avoids the contract ab initio, and the party committing it can take no advantage of it, and acquires no right or interest by means thereof. 14 Am. & Eng. Enc. Law, p. 158. The logic of the doctrine announced in the majority opinion leads to this absurd result, as stated by appellant's counsel, that, inasmuch as defendants had, after the fraud was discovered and after the contract was rescinded and this action commenced, placed themselves in a position to complete the title, therefore Sonnesyn suffered only nominal damages, and must for that reason be defeated in this action. It also leads to the result that the contract, notwithstanding the fraud and the rescission consequent upon such fraud, remained in full force until January 1, 1903; and this leads to the further result that fraud does not vitiate a contract or give right of rescission; and, finally, if this is true, then the complaint does not state a cause of action.

Plaintiff did not discover that defendants were not the owners of the land until just before the commencement of this action on November 26th. As I said before, plaintiff had nothing to restore to defendants in order to place them in statu quo. He did not attempt a rescission of the contract by consent, and, from plaintiff's standpoint, he could not be expected to do so. Defendants had failed to furnish him the abstracts of title as stipulated in the contract, although assured when he made the contract that Akin had them at home and it would take only a few days to have them ready. Plaintiff at the time of transmitting the $2,000 cash payment, on October 7th, asked for his abstracts, and again he wrote, before October 19th, requesting them. No answer was made to these letters. On October 20th he demanded to know why they had not been delivered, and was told that Akin had them at home.

On October 21st he again asked to have them sent him at once, and was promised by Babcock that he would be at plaintiff's home town in Minnesota with the abstracts when plaintiff got there. He did not come, and the abstracts were not furnished at all. Plaintiff's suspicions becoming excited, after investigation he ascertained that defendants owned none of the lands that they had contracted to sell him, but that, immediately after taking his Ormsby stock and while keeping from him the information the abstracts would have supplied, a large part of the stock had been sold and delivered by defendants to good faith purchasers. Fair dealing did not require of plaintiff, under these circumstances, that he attempt a rescission by consent with persons who had been false to him in so many particulars.

The majority opinion is based upon the theory that this action is for deceit, and hence is an affirmance of the contract, instead of a disaffirmance thereof. I contend that, even so, the verdict cannot be disturbed, and for the very apparent reason that said verdict was arrived at under a rule for measuring damages laid down by the trial court and acquiesced in by defendants' counsel, and. whether right or wrong, is immaterial, as the correctness of such rule was not and is not challenged, and it became the law of the case, the same as though the parties had expressly stipulated thereto. Evidence was introduced upon this theory of the measure of damage, and upon none other, and I insist that after verdict rendered it is too late for defendants to challenge the correstness of such rule of damage. Even if defendants had laid a proper foundation for attacking the correctness of such rule, by excepting to the instruction embodying the same, still it would not avail them, as they cannot, after verdict rendered, change the theory pursued by all during the trial without objection. But defendants are not attacking the correctness of the rule by which the jury was bound in fixing the damages, but they attack the verdict for insufficiency of the evidence, and I maintain that under this ground defendants cannot be heard to say that the rule of law by which the verdict was determined was erroneous. They cannot do indirectly what they could not do directly. In determining whether the evidence is sufficient to sustain the verdict, the evidence will be considered in the light of the instructions actually given, and not in the light of instructions which should have been given. In other words, the instructions given must, when not at-

tacked directly, be deemed conclusively to state the law correctly. See Bergh v. Sloan (Minn.) 54 N. W. 943, and numerous cases cited, which is squarely in point. The court says: "The appellant contends that the evidence did not support the plaintiff's claims as to the nature of the agreement. In this the appellant cannot be sustained. The evidence fully and beyond any reasoable question justified the verdict in favor of the plaintiff so far as concerned the facts in issue. But it is said that the agreement, even according to plaintiff's proof of it, did not constitute a partnership agreement, and was void under the statute of frauds. This point is not available to the appellant. The court instructed the jury, in substance, that if the agreement was as claimed by the plaintiff, and if the property was purchased in accordance therewith, and the purchase price advanced by the plaintiff, * * * the plaintiff would be entitled to recover. No exception was taken to this as being the law of the case by which the jury should be guided in the discharge of their duties. The appellant must be deemed to have acquiesced in this statement of the law as applied to the case. The verdict was rightly founded upon that proposition, and a contrary theory of the case cannot now be advanced as a reason for avoiding the result of the trial." See, also, Davis v. Jacoby, 5 Minn. 144, 55 N. W. 908; Peteler, etc., Co. v. Manufacturing Co., 60 Minn. 127, 61 N. W. 1024.

It is not contended that the evidence is not amply sufficient to sustain the verdict, when tested in the light of the rule of damage announced in the instructions to the jury; but it is asserted in the majority opinion that the rule thus invoked has no application to this case, for the reason that the jury did not return a general verdict. Said opinion states that the damage and the amount thereof were awarded, not by the jury, but by the trial judge, and that therefore the court is free to consider, and should consider, what the law is, and is not bound by its instructions previously given to the jury; and, finally, it is asserted in the majority opinion that the record presents a case of mistrial on account of the defective verdict. This holding is, I think, based upon an erroneous premise. The verdict, while irregular, was not a nullity, and it responded to all the issues. It is not a special verdict, but a general one with special findings, and, while the general verdict is irregular in not assessing the damage, it is clearly, in my opinion, sufficient when aided by the special findings. It was admitted in

the answer that plaintiff parted with $2,500 in cash and the stock of merchandise. Under the special findings the jury found the value of the stock of merchandise to be $10,000, and under the instruction of the court the damage would be $12,500, with interest, and it was a mere matter of computing the interest to determine the amount of plaintiff's recovery under the law as laid down by the trial court. In English v. Goodman, 3 N. D. 129, 54 N. W. 540, this court held it not prejudicial error for the court to order judgment under a verdict omitting to assess damages, where the amount of the damage was admitted in the answer. The court said: "The trial court would have been fully warranted in instructing the jury that, in case they found the plaintiff entitled to recover, they should fix the amount of his recovery at $50, or the court might, upon the return of the verdict, have ordered it amended in that respect. Under these circumstances the court might well treat the verdict as amended and order judgment. Such action in no manner prejudiced appellants. To put these parties to the expense of a new trial for so harmless an irregularity would be a reflection either upon legislation or judicial wisdom." In the case at bar the court instructed the jury that, if they found for the plaintiff, the damages would be the value of the stock of merchandise, together with the $2,500 cash payment, with or without interest. The jury in the special findings found the value of the stock of merchandise, and found that interest should be allowed; hence, as I said before, all that remained was to compute the interest. Of course, were it not for the special findings, the general verdict would fail, as the damages were unliquidated to the extent of the value of the merchandise. In Hodgkins v. Mead, 119 N. Y. 166, 23 N. E. 559, a similar verdict was sustained; the court saying: "In such a case of absolutely uncontradicted facts, where a certain, definite, conceded amount follows a verdict for the plaintiff as certainly as the night follows the day, it seems to me a mere travesty or mockery of justice to hold that no legal verdict has been arrived at, that the court is powerless to aid, and that the plaintiff must lose the benefit of the trial and the verdict actually agreed upon, and both parties must be put to the expense of proceeding de novo to a trial of the cause." Furthermore, the question of the sufficiency of the verdict was not raised or suggested by counsel either in the trial court or in this court, and hence it ought not at this time to be noticed.

The rule invoked in the majority opinion that, where a verdict is vacated and a new trial granted by the trial court upon the ground of insufficient evidence, the court in so doing is acting within its judicial discretion, and such discretion will not be disturbed, except in case of manifest abuse, has no application in this case. The order granting a new trial was not based upon this ground, and, furthermore, the evidence upon the theory upon which the case was tried, the correctness of which theory was not challenged, is concededly amply sufficient to sustain the verdict.

For the foregoing reasons, I firmly believe that the order appealed from should be reversed.

(104 N. W. 1026.)

LEONARD WEICKER v. JOSEPH A. STAVELY.

Opinion filed May 22, 1905.

What Constitutes Usury.

1. Where the parties agreed upon a lawful rate of interest for the forbearance of a money demand, but the debtor was induced, either by the fraud of the creditor or by mutual mistake of the parties, to unintentionally pay in satisfaction of the debt a sum greater than the debt and accrued interest, computed at the maximum lawful rate, the transaction was not usurious, because there was no agreement to pay the excessive charge.

Appeal — Review.

2. The defendant demurred to the complaint for misjoinder of causes of action, claiming that the plaintiff had improperly joined with a claim for money had and received a claim for the statutory penalty for the exaction of usury. The allegations of the complaint affirmatively showed that there was no usurious transaction, but both parties agreed in the argument before this court that the allegations of one of the causes of action were intended, and should be construed, to sufficiently allege the taking of usury. *Held,* that this court will not pass upon a question not presented by the record.

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

Action by Leonard Weicker against Joseph A. Stavely. Judgment for plaintiff, and defendant appeals.

Affirmed.

Ball, Watson & Maclay, for appellant.

The causes of action are different, one being to recover a statutory penalty, the other to recover an over payment made by mistake. The transactions out of which they arose are different, one being an ordinary loan of money, the other the purchase of grain and other commodities. Wiles v. Suydam, 64 N. Y. 173; First National Bank v. Miltonberger, 51 N. W. 232; Braithwaite v. Akin, 3 N. D. 365, 56 N. W. 133; People v. Dennison, 84 N. Y. 272.

The causes of action were improperly joined. Actions to recover penalties for usury, in two separate transactions, cannot be properly joined. Brown v. Rice, 51 Cal. 489; Railway v. Commonwealth, 43 S. W. 458; White v. Comstock, 6 Vt. 406.

S. G. Roberts and *Taylor Crum,* for respondent.

The evident purpose of the statute, and the courts so hold, is to adopt a rule of action under the code system, the rule formerly prevailing in equity proceedings, and include in one complaint as many causes of action as may arise out of the same transaction or transactions, connected with the same subject of action, including legal or equitable, ex contractu and ex delicto. Bliss on Code Pleading, section 125; Maxwell on Code Pleading, p. 344, n; Pearkes v. Freer, 9 Cal. 642; Jones v. Steamship Cortes, 17 Cal. 485; Bailey v. Dale et al., 11 Pac. 804; Bush v. Froelick, 66 N. W. 939; Ry. Co. v. Cook, 37 O. St. 265; Hamlin v. Tucker, 72 N. C. 502.

Actions to recover penalties given by statute and express contract are causes of action arising on contract and may be joined. 3 Enc. Pl. & Pr. 191, and note.

Actions sounding in tort may be joined with those sounding in contract, when they arise from the same transaction or transactions connected with the same subject of action. Badge v. Benedict, 4 Abb. Pr. 176; Par. 3 Vol. 1 Enc. Pl. & Pr. 191; Harris v. Avery, 5 Kan. 146; Paddock v. Somes, 10 L. R. A. 254; Craft Refrigerating Co., v. Q. Brewing Co., 25 L. R. A. 856.

ENGERUD, J. Defendant has appealed from an order of the district court overruling a demurrer to the complaint for misjoinder of causes of action. The complaint purports to state three causes of action. In the first cause it is alleged: That on March 7, 1903, the plaintiff was indebted to the defendant in the sum of $600, which he agreed to pay November 1, 1903, with interest at 10 per cent per annum. In evidence of said debt the plaintiff executed to the defendant a note dated March 7, 1903, and due October 1,

1903, for $641, and bearing interest from its date at 10 per cent per annum. The plaintiff paid the note in full according to its terms November 7, 1903, including the sum of $41.73, "being interest on said $641 from the 7th day of March, 1903, to the 7th day of November, 1903, at the rate of ten per cent per annum, which interest is excessive and usurious, and contrary to the laws of the state of North Dakota." It is further alleged "that at the time of the making of said note as aforesaid, and the payment of the same and the interest thereon, the plaintiff, being a German by birth, could not read or write the English language, and understood it only imperfectly, and, relying on the good faith and the representation then made by the defendant, signed and delivered said note, not understanding that it contained a provision for the payment of additional interest." For a second cause of action it is alleged that on April 13, 1903, the plaintiff bought from the defendant seed grain at the agreed price and value of $640.75, in evidence of which debt he was to give his promissory note due October 1, 1903, for said sum and the interest thereon to the maturity of the note at the rate of 10 per cent per annum, and the payment of the note to be secured by a seed lien and chattel mortgage; that the plaintiff signed a note and chattel mortgage and a statement annexed to the seed lien, which, as he supposed and understood, were for the correct amount, and in accordance with the terms of his bargain; that the note and chattel mortgage, so signed by him, were made out by the defendant for the sum of $1,250, and interest thereon at 10 per cent per annum from its date; that plaintiff, by reason of his ignorance of the English language, and his reliance on defendant's representations, executed said instruments, and subsequently paid the defendant the full amount of the note, including $70.25 interest thereon, according to its terms. In the third cause of action it is alleged that on November 7, 1903, the defendant presented to the plaintiff a statement of account, which is copied into the complaint, and which purported to state the amount of plaintiff's total indebtedness to defendant, and plaintiff then and there paid to defendant the amount shown by said statement, to wit, $2,588.70. This statement included, besides three other notes, the notes and interest referred to in the preceding causes of action, and also a book account for $384.10. It is alleged that, besides the overcharge of $609.25 in the note mentioned in the second cause of action, the book account charged in the statement was excessive in

the sum of $219.10; and it is further alleged that the items of $42.73 and $70.25 for interest on the two notes referred to in the first and second causes of action are usurious. This cause of action concludes with a repetition of the averments found in the preceding causes—that plaintiff, by reason of his ignorance of English and his reliance on defendant's representations, was unable to, and did not, discover until after payment that the notes were made out for excessive amounts, or that the amount charged in the statement was more than the true indebtedness. Judgment is demanded for twice the amount of the alleged usurious interest paid on the notes described in the first and second causes of action, and for the further sum of $825.33 alleged to have been paid in excess of the true indebtedness.

In the briefs and arguments of counsel for both parties the only question discussed was as to whether or not, under the circumstances of this case, the plaintiff can join in one action his claims for usury and for the overpayment. It was assumed by both counsel, and in fact expressly conceded in argument, that the first and second causes of action stated facts sufficient to entitle the plaintiff to recover the penalty for usury, and that any technical insufficiency in that respect should be disregarded. If the allegations of the complaint were such that they could be said to state, however defectively, a cause of action for usury, we would accept and adopt for the purposes of this appeal the construction which counsel have agreed upon. We have not, however, such a case. The complaint not only fails to state facts sufficient to show any liability for taking usury, but affirmatively shows that there was no usurious transaction upon which a claim for the statutory penalty for usury could be predicated. A transaction involving the loan of money or forbearance of a money demand is not necessarily usurious because the creditor has secured to himself a profit exceeding the amount of lawful interest. To constitute usury in such a transaction, there must be an agreement between the parties that the one shall receive and the other pay the sum which constitutes the excessive charge for the loan or forbearance, and that the creditor at least intends to exact the usury. Tyler on Usury, c. 17, and cases cited. In this case the complaint explicitly alleges, in effect, that there was no such agreement. If the allegations of the complaint are true, the parties agreed upon a lawful rate; but the plaintiff was induced to unintentionally pay sums much greater

than the actual debt, with the agreed interest. The allegations show either a mutual mistake of parties or a fraud by the creditor, but do not show any intent to exact usury. To assume counsel's construction of the pleading, and overlook the facts it alleges, would necessitate the assumption that several explicit and important allegations of the complaint are false. The court would be placed in the absurd position of disregarding the record before it, and deciding a hypothetical case in advance of real contest. It is clear that the action must be held to be one simply for the recovery of money had and received. Whether the complaint states one cause of action or three, we are not called upon to determine. It is clearly not vulnerable to demurrer on the grounds urged by appellant.

As to whether it would have been a misjoinder to unite a claim for usury with a claim for money paid by mistake or fraud, we express no opinion.

The order is affirmed. All concur.

(103 N. W. 753.)

MILBURN-STODDARD COMPANY v. C. J. STICKNEY.

Opinion filed May 23, 1905.

Clerk of District Court Can Satisfy Judgment Only as Authorized by Statute.

1. A clerk of the district court has no authority to satisfy a judgment upon a deposit with him of the full amount of the judgment. He has authority to satisfy judgments only in the cases where the statute gives him authority so to do.

Receipt of Money by Clerk, Except as Provided by Law, Not an Official Act.

2. The receipt of money by a clerk of the district court for the satisfaction of a judgment, except as provided by law, is not an official act of the clerk.

Amercement.

3. A clerk of the district court cannot be amerced under sections 5555 and 5556, Rev. Codes 1899, for failure to pay over money paid him for the satisfaction of a judgment on file in his office except in cases where such money is paid him under the terms of a statute.

Appeal — Affirmance.

4. Failure to comply with rules of court in reference to appeals under section 5630, Rev. Codes 1899, is not ground for affirming the judgment or dismissing the appeal in case of an appeal from a judgment rendered pursuant to section 5555, Rev. Codes 1899.

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

Action by the Milburn-Stoddard Company against C. J. Stickney. Judgment for plaintiff, and defendant appeals

Reversed.

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

Clerk can satisfy a judgment only as provided by section 5497, subdivisions 1 and 2, Rev. Codes 1899, and chapter 112, Laws of 1901. Payment of a judgment must be made to the judgment creditor, his agent or attorney. Freeman on Judgments (3d Ed.) section 462.

It is not the clerk's duty to receive money in payment of judgments. If he does, his bondsmen are not liable if he appropriates it. He is not the agent of litigants, and his duties are fixed by law. Matusevitz v. Hughes, 68 Pac. 467; Hendry v. Benlisa, 20 So. 800, 34 L. R. A. 283; Hawkeye Ins. Co. v. Luckow, 39 N. W. 923.

A public officer can be amerced under the statute only in case of an intentional delinquency. If there is a well grounded doubt of his liability, or whether the money received has been lost without his fault or negligence, he is entitled to have such questions tried in a civil action. Wilson v. Broder, 10 Cal. 487; Hull v. Chapel, 74 N. W. 156, 77 Am. St. Rep. 666; In re Randall, 76 N. W. 1020.

R. P. Allison and *Maddux & Rinker,* for respondent.

District court has jurisdiction to order clerk to pay over money collected by him upon a judgment. Peterson v. Hays, 51 N. W. 1143; Elliott v. Jones, 47 Iowa, 124.

Where a clerk holds money and manifests by some plain, unequivocal act that he holds it in his official capacity, the payment is good. 38 Ala. 252.

Payment to the attorney of record of the amount of the judgment by the clerk would have constituted an absolute satisfaction. Henry & Coatsworth Co. v. Halter, 79 N. W. 616.

His receipt of money upon a judgment in his office, whether made voluntarily or upon execution, is an official act. McDonald v. Atkins, 14 N. W. 532.

MORGAN, C. J. A preliminary motion was made in this case to strike out the abstract, or to dismiss the appeal and affirm the judgment. We find none of the grounds of the motion tenable. One of them is based upon the supposition that the rules of this court applicable to appeals under section 5630, Rev. Codes 1899, have not been complied with. But, as the appeal is not made under that section, and the proceeding was not tried under that section, the contention must necessarily fail.

It is further alleged that defendant has not shown such interest in the subject-matter of the cause as will sustain an appeal by him. The appeal is from a judgment against him; hence the contention cannot be sustained.

The other grounds are equally untenable. No useful purpose will be subserved by mentioning them, as they involve no points of practical benefit to practitioners. The appeal is from a judgment rendered against the defendant for the sum of $164.40. The defendant was clerk of the district court in and for Eddy county. One Putnam, an abstractor of titles, sent him $147, the full amount due upon a judgment against one George D. Setz and in favor of the Milburn-Stoddard Company, and requested that said judgment be satisfied of record. Putnam was acting on behalf of one Jones, who was to make a loan to Setz on mortgage security. The defendant received the money on this check from the bank, and thereafter made an entry on the judgment docket that said judgment was fully satisfied. Later one P. M. Mattson, representing himself to be the attorney for Setz, the judgment debtor, informed the defendant that the entry of the satisfaction of the judgment on the docket was erroneously made, as such money had not been sent to satisfy said judgment. Thereupon the defendant made an entry on the judgment docket that the entry previously made that the judgment was satisfied was inadvertently made. He thereupon turned over the money received by him to Mattson. The plaintiff, upon learning that the money had been paid to defendant, made demand for its payment to it, and the demand was refused. The plaintiff then instituted this proceeding to compel the defendant to pay the money to it. The proceeding is based upon sections 5555, 5556, Rev. Codes 1899, providing for the amercement of public

officers, and are as follows, so far as applicable: "If any sheriff or other officer shall refuse, * * * on demand, to pay over to the plaintiff * * * all moneys by him collected or received for the use of said party at any time after collecting or receiving the same, except as otherwise provided, shall, on motion in court and two days' notice thereof in writing, be amerced in the amount of said debt, damages and costs, with ten per cent thereon to and for the use of said plaintiff," etc. Section 5556: "If any clerk of court shall neglect or refuse on demand made by the person entitled thereto, his agent or attorney of record, to pay over all money by him received in his official capacity for the use of such person, every such clerk may be amerced and the proceedings against him and his sureties shall be the same as provided for in the foregoing section against sheriffs and their sureties." It is not necessary to determine whether the defendant acted in good faith in paying the money to Mattson. The facts do not warrant the amercement of the defendant for the reasons hereinafter stated. The defendant, as clerk of the district court, had no authority to receive the money in satisfaction of the judgment, and had no authority to enter satisfaction of the judgment by virtue of having received the money. The statute gives the clerk no authority to receive money for such purposes except in certain cases, and the facts of this case do not bring it within any of the exceptions. A clerk has no authority to satisfy a judgment except: (1) When a duly acknkowledged satisfaction thereof is filed in his office. (2) When an execution is returned to his office with a return thereon that the judgment is wholly satisfied. (3) Upon the filing with him by the judgment debtor of an affidavit setting forth that he desires to pay the same, and that he has, after diligent effort, been unable to find any person having authority to satisfy the same, or in case the judgment creditor refuses to satisfy the judgment. Section 5497, Rev. Codes 1899, and chapter 112, p. 141, Laws 1901. Neither of the conditions specified in the statute existed authorizing the clerk to satisfy the judgment. His pretended satisfaction thereof was a nullity, and the judgment creditor was not necessarily bound by it. Black on Judgment, section 462; Irwin v. McKee, 25 Ga. 646; Hendry v. Benlisa (Fla.) 20 South. 800, 34 L. R. A. 283; Governor v. Read, 38 Ala. 252; Hawkeye Ins. Co. v. Lucknow (Iowa) 39 N. W. 923. The money was not therefore received by the clerk as an official act, or in an official capacity. His duties and authority are defined by statute. Unless authorized by statute, his acts are

not official, but individual, acts. The amercement of an officer is a proceeding penal in its nature, and the statute authorizing it must be strictly pursued, both in regard to the proceedings and the facts authorizing it. Murfree on Sheriffs, section 1101b, and cases cited; Custer v. Agnew, 83 Ill. 194; Conkling v. Parker, 10 Ohio St. 28. In this case the money was received by the defendant not in pursuance of any duty imposed upon him by law. He could not be compelled to receive the money. Refusal to receive it would not be misconduct in office. He did not receive the money by virtue of his duties as an officer. Section 5556, supra, is directed towards delinquencies in performance of duties authorized by law. Before the penalty can be imposed there must be a violation of official duty in matters imposed upon him by law. That he pretends to act as such officer is not enough. There must be authority to receive and failure to pay over money coming into his hands in the performance of some official act which he has authority to do. "It is no part of the duty of a clerk of the district court to receive money in payment of judgments entered in the records of the court of which he is an officer." Matusevitz v. Hughes (Mont.) 68 Pac. 467. As said in People v. Cobb, 10 Col. App. 478,, 51 Pac. 523: "He could receive money as clerk only in the discharge of some duty imposed upon him by law. Now, no authority to receive the money deposited with him by Howard can be found in the statutes prescribing and defining the duties of clerks of the district court. * * * Payment to a clerk of money which he is not by law or some order of the court authorized to receive is not a payment into court." See, also, Bowers v. Fleming, 67 Ind. 541. An act is done by an officer in an official capacity when he performs duties devolving upon him by law. The summary remedy provided by section 5555, supra, cannot be applied under the facts of this case.

The judgment is reversed, and the proceedings dismissed. All concur.

(103 N. W. 752.)

DOLLY A. TRACY CLARK v. J. P. BECK AND J. H. AHMAN.

Opinion filed May 23, 1905.

Mortgage — Foreclosure.

1. Rev. Codes 1899, section 5200, subdivision 2, limiting to ten years the time for commencing an action to foreclose a real estate mortgage, had no application to a proceeding to foreclose by advertisement, before the amendment of that section by chapter 120, p. 152, Laws 1901.

Limitations.

2. The time that had run since the accrual of the right to foreclose by advertisement before the taking effect of chapter 120, p. 152, Laws 1901, is not to be computed as part of the time limited by that amendatory act for commencing a proceeding to foreclose by advertisement.

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

Action by Dolly A. Tracy Clark against J. P. Beck and J. H. Ahman. Judgment for defendants, and plaintiff appeals.

Affirmed.

E. E. Cassels, for appellant.
S. G. Cady, for respondents.

ENGERUD, J. This is an appeal by plaintiff from a final judgment in an action to quiet title, wherein the trial court held that the plaintiff's former title to the land had been divested by a sheriff's sale of the land made on November 23, 1901, in proceedings to foreclose a mortgage thereon by advertisement under the power of sale contained in the mortgage. The defendants have succeeded to the rights of the purchaser at said sale. It is conceded that the foreclosure proceedings were in all respects regular, and were sufficient to pass the title, unless the right to foreclose by advertisement had been barred because more than ten years had elapsed since the maturity of the mortgage debt. Before the enactment of chapter 120, p. 152, Laws 1901, there was no law limiting the time within which the right to foreclose by advertisement could be exercised. Such a foreclosure is not an action, and hence was not affected by section 5200, subdivison 2, Rev. Codes 1899, which limited the right to foreclose by action to ten years from the time the cause of action accrued. That section of the Code of Civil Procedure was amended by chapter 120, p. 152, Laws 1901, so as

to include in the limitation prescribed thereby "any proceeding by advertisement or otherwise for the foreclosure of a mortgage upon real estate." The act was passed with an emergency clause, so that it took effect on the day of its approval by the governor, February 27, 1901. This amendment must be construed to be prospective only in operation. The time already elapsed before the passage and approval of the act cannot be taken as any part of the time limited by the amendment for commencing proceedings to foreclose by advertisement. The act does not expressly so declare, and, if it did, it would be unconstitutional as to those whose rights to invoke that remedy had accrued ten years or more before the act took effect. While the legislature has full power to enact limitation laws, and even to frame them in such a way that the time already elapsed before the law takes effect shall be computed as part of the time limited by the new act, yet its power in this respect is subject to the condition that it must allow a reasonable time after the new law becomes operative in which persons affected by it may resort to the remedies to which the law applies. Osburne v. Lindstrom, 9 N. D. 1, 81 N. W. 72, 46 L. R. A. 715, 81 Am. St. Rep. 516. The law in question makes no provision in this respect and the courts have no power to supply the omission. Osborne v. Lindstrom, supra.

The judgment is affirmed. All concur.

(103 N. W. 755.)

STATE OF NORTH DAKOTA v. T. E. JOHNSON.

Opinion filed May 24, 1905.

Witnesses — Credibility.

1. An instruction given to a jury in the following language: "If you find from the evidence that any witness has sworn falsely as to any material fact or issue in this case, you should receive the testimony of such witness with caution. You have a right to reject the statement of such witnesses, excepting in so far as they may be corroborated by other credible evidence"—is error warranting the granting of a new trial.

Instruction — Reasonable Doubt.

2. An instruction in the following words: "On the other hand, the rule of law requiring the jurors to be satisfied of the defendant's guilt beyond a reasonable doubt, in order to warrant a conviction,

does not require that you should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient if, taking the testimony together, you are satisfied beyond a reasonable doubt that the defendant is guilty"—is erroneous. State v. Young, 82 N. W. 420, 9 N. D. 165, followed.

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

T. E. Johnson was convicted of willfully killing a horse, and appeals.

Reversed.

C. E. Gregory and *Morrill & Fowler,* for appellant.

The evidence was wholly circumstantial, and such that each circumstance depends for its probative value and effect upon the existence of other circumstances in the evidence. The charge of the court was erroneous. State v. Young, 9 N. D. 165, 82 N. W. 420.

The instruction reverses the rule, that the jury must be satisfied beyond a reasonable doubt of defendant's guilt before they can convict him. State v. Young, supra; State v. Evans, 81 N. W. 893.

The court cannot charge, if you find from the evidence that any witness has sworn falsely as to any material fact or issue in this case * * * you have the right to reject the statements of such witnesses excepting in so far as they are corroborated by other credible evidence. This was clearly error. McPherrin v. Jones, 5 N. D. 261, 65 N. W. 685; State v. Campbell, 7 N. D. 58, 72 N. W. 935; 2 Enc. Pl. & Pr. 340.

Carl N. Frich, Attorney General, for the state.

No brief filed by respondent.

MORGAN, C. J. The defendant was convicted of willfully and unlawfully killing a horse, contrary to the provisions of section 7506, Rev. Codes 1899, and sentenced to one year's imprisonment in the penitentiary. He assigns as error, among others, the giving of certain instructions, one of which was in the following language: "If you find from the evidence that any witness has sworn falsely as to any material fact or issue in this case, you should receive the testimony of such witness with caution. You have a right to reject the statement of such witnesses, excepting in so far as they may be corroborated by other credible evidence." This in-

struction authorized the jury to reject the testimony of any witness because of the falsity of some of it. The fact that a witness gives testimony that is false is not ground for entirely disregarding his testimony. A witness' testimony should not be wholly disregarded because he has innocently made a mistake as to a material fact. The testimony must be willfully and intentionally false, before the jury may disregard it unless corroborated. A similar instruction has been twice condemned by this court, and the giving of it held prejudicial error. McPherrin v. Jones, 5 N. D. 261, 65 N. W. 685; State v. Campbell, 7 N. D. 58, 72 N. W. 935. The correctness of these prior decisions cannot be successfully assailed, and they are decisive of this appeal.

The court further instructed the jury as follows: "On the other hand, the rule of law requiring the jurors to be satisfied of the defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that you should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt." This court passed upon an instruction in substantially the same language in State v. Young, 9 N. D. 165, 82 N. W. 420, and held the same prejudicially erroneous. In that case the court said: "The vice of the instruction is manifest. Where a conviction is sought upon circumstantial evidence, and the circumstances are interdependent, and the relevancy and probative force of each circumstance depends upon the truth of one or more other circumstances, so that the metaphor of a chain can with any propriety be used, then it is clear that each circumstance must be established beyond a reasonable doubt, because, if any link or circumstance be lacking, the evidence ceases to be a chain, and is simply fragments of a chain. If any one circumstance or link be weak, the whole chain must be weak, because a chain cannot be stronger than the weakest link. The instruction in such a case could not be otherwise than prejudicial. If the circumstances relied upon by the prosecution are independent, each depending for its force upon its own truth, and only that, then the chain metaphor is entirely inapplicable, and its only effect must be to confuse and mislead a jury." The authorities bearing upon the correctness of this instruction are collected in the opinion in that case. Under the holding of that case, we have no hesitation in holding that the instruction was misleading and prejudicial.

It follows that the judgment must be reversed, a new trial granted, and the cause remanded for further proceedings.

YOUNG, J., concurs.

ENGERUD, J., having been of counsel, did not sit on the hearing of the above-entitled action, nor take any part in the decision.

(103 N. W. 565.)

THE STATE OF NORTH DAKOTA v. ROBERT MOMBERG AND FRANK BAUER.

Opinion filed May 24, 1905.

Intoxicating Liquors — United States License as Evidence — Instructions.

1. Construing section 7614, Rev. Codes 1899, which makes the fact that one has or keeps posted in or about his place of business a United States revenue receipt or license for the sale of distilled malt or fermented liquors prima facie evidence that he is selling and keeping for sale intoxicating liquor contrary to law, it is *held*, that by prima facie evidence is meant competent evidence, and evidence which is legally sufficient to justify the jury in finding the fact of unlawful sales, provided it satisfies them beyond a reasonable doubt, but not otherwise. It is not conclusive, and to so instruct is error.

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

Robert Momberg and Frank Bauer were convicted of keeping a liquor nuisance, and appeal.

Reversed.

V. G. Noble, E. B. Goss, H. S. Blood and *G. A. Bangs*, for appellant.

The court erred in this instruction: "By prima facie evidence is meant evidence which you must receive as conclusive unless the same is explained by the defendants by other evidence produced before you in this case." State v. Barry, 11 N. D. 428, 92 N. W. 809.

Prima facie evidence only means that such evidence is competent and sufficient to justify a verdict of guilty, if the jury is satisfied of the defendant's guilt beyond a reasonable doubt. State v. Liquors and Vessels, 12 Atl. 794; State v. O'Connell, 19 Atl. 86.

A. G. Burr, State's Attorney, for respondent.

The jury may have the right to reject the testimony of a witness, but they have no right to reject anything that the law says is

prima facie evidence, when no attempt is made to disprove it, and the defense is called upon to explain away this prima facie evidence. The finding of the United States license, which unexplained and uncontroverted, would be sufficient in itself to justify a verdict of guilty in the charge as to the effect of finding a United States license.

YOUNG, J. The defendants were tried and convicted under an information charging them jointly with keeping and maintaining a common nuisance, and they have appealed from the judgment.

The record shows that at the trial the state, in support of its allegations that the defendants kept and maintained a place where intoxicating liquors were sold, introduced, in connection with the testimony of one Daley, a deputy sheriff, a United States government license for the sale of malt liquors, which he had taken from the walls of the building in which it is alleged the defendants maintained the nuisance. The trial judge instructed the jury as to the legal effect of the license, as follows: "I charge you that the finding of a United States license for the sale of malt liquors on these premises and in the possession of these defendants is prima facie evidence of their guilt, if you find proof, to your satisfaction beyond a reasonable doubt, as to that and as to the other material allegations. By prima facie evidence is meant evidence which you must receive as conclusive, unless the same is explained by the defendants by other evidence produced before you in the case." That part of the foregoing instructions in which the court defined the legal effect of the term "prima facie evidence" is assigned as error.

The instruction attempts to give effect to that part of section 7614, Rev. Codes 1899, which provides that "in all cases, other than those when intoxicating liquor is sold by virtue of the provisions of this chapter, the fact that any person engaged in any kind of business has or keeps posted in or about his place of business a receipt or stamp showing payment of the special tax levied under the laws of the United States upon the business of selling distilled, malt or fermented liquor, or the holding of a license from the government of the United States in the name of any person, persons or corporation to sell intoxicating liquor shall be held and deemed prima facie evidence against such person, persons or corporation, that he or they or it are keeping for sale and selling intoxicating liquors contrary to law." In our opinion the instruction

complained of was erroneous and prejudicial. The jury was instructed, in effect, that the finding of a United States license on the premises and in the possession of the defendants was evidence of their guilt, which the jury "must receive as conclusive, unless explained by the defendants by other evidence." In other words, if unexplained, they were required to find the defendants guilty, whether convinced of their guilt or not. This was error. This statute, in declaring that the possession of the license shall be prima facie evidence, means that such evidence is competent and sufficient to justify a jury in finding a defendant guilty, provided it does in fact satisfy them of his guilt beyond a reasonable doubt, and not otherwise." State v. Liquors, 80 Me. 57, 12 Atl. 794; State v. O'Connell (Me.) 19 Atl. 86. "These statutes, it is said, are merely declaratory of the common law, and are valid. But they do not raise a conclusive presumption against the defendant. It is error to instruct the jury that they must find him guilty on proof of such facts alone, for such evidence is competent and sufficient to justify a verdict only if the jury are satisfied of defendant's guilt beyond a reasonable doubt." Black on Intoxicating Liquors, section 509. Indeed, the true rule in all criminal cases is that, "before a conviction can be had, the jury must be satisfied from the evidence beyond a reasonable doubt of the affirmative of the issue presented in the accusation that the defendant is guilty in the manner and form as charged in the indictment or information." 3 Rice on Evidence, section 259, and cases cited. And it is error for the court to instruct the jury that evidence, even though uncontradicted, is conclusive. See State v. Barry, 11 N. D. 428, and cases collected on pages 449 to 451, inclusive, 92 N. W., pages 817 to 819.

Judgment reversed and new trial ordered. All concur.

(103 N. W. 566.)

STATE OF NORTH DAKOTA v. GEORGE L. VIRGO.

Opinion filed May 25, 1905.

Intoxicating Liquors — What Constitutes.

1. The definition of "intoxicating liquors," contained in section 7598, Rev. Codes 1899, includes liquors or liquids "that will produce intoxication," and not those which will not intoxicate. It was error, therefore, to instruct the jury in this case that "any liquors which contain any percentage of alcohol, if sold as a beverage," are intoxicating liquors under our law.

Former Acquittal.

2. To sustain a plea of former acquittal, it must appear that the offense for which the defendant was acquitted was the same offense as that for which he is being tried.

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

George L. Virgo was convicted of keeping a common nuisance, and appeals.

Reversed.

H. S. Blood and *Geo. A. Bangs,* for appellant.

Former acquittal, by reason of variance between the information or indictment and the proof, is not an acquittal of the same offense. See sections 8235 and 8106, Rev. Codes 1899.

In the absence of evidence an acquittal will be presumed to be upon the merits, and it is upon the state to show otherwise. Croft v. Peo, 15 Hun. 484; State v. Maxwell, 51 Iowa, 314, 1 N. W. 666; Moore v. State, 71 Ala. 307; State v. Clenny, 1 Head. 270.

Parol evidence of the identity of the offense is admissible. Swally v. Peo, 116 Ill. 247, 4 N. E. 379; Duncan v. Com., 6 Dana, 295; Marshall v. State, 8 Ind. 498; State v. Andrews, 27 Mo. 267; Porter v. State, 17 Ind. 415; State v. Maxwell, 51 Iowa, 314, 1 N. W. 666.

Allegation of place within the county and state is all that is required as far as the guilt or innocense of the defendants is concerned. The allegation of particular lot and block may be regarded as surplus. State v. Kraig, 13 Iowa, 462; State v. Shilling, 14 Iowa, 455; State v. Freeman, 27 Iowa, 333; State v. Waltz, 38 N. W. 494; 2 Bishop Crim. Proc. 111; State v. Rozum, 8 N. D. 548, 80 N. W. 477; State v. Thoempke, 11 N. D. 386, 92 N. W. 480.

The court erred in its charge: "Any liquors which contain any percentage of alcohol, if they are sold as a beverage, are intoxicating." Const. N. D., article 20, section 7598, Rev. Codes 1899.

YOUNG, J. The defendant was tried and convicted upon an indictment charging him with keeping and maintaining a common nuisance upon lots 11 and 12, in block 12, in the original townsite of Richburg, in Bottineau county, and he appeals from the judgment.

The trial judge, in his instructions to the jury, after stating that the indictment alleged three methods of keeping and maintaining the nuisance, i. e., by keeping a place (1) where intoxicating liquors

were sold, bartered or given away as a beverage, (2) where intoxicating liquors were kept for sale, etc., and (3) where people were permitted to resort for the purpose of drinking intoxicating liquors as a beverage, used the following language, which is assigned as error: "Intoxicating liquors, gentlemen of the jury, under our law, are liquors: First, of the nature of malt, or spirituous or vinous liquors which will intoxicate, or any preparation or concoction thereof which will produce intoxication; second, any liquors which contain any percentage of alcohol, if they are sold as a beverage." Counsel for defendant contend that the latter part of the instruction is erroneous upon any state of facts, and we agree with the contention. The instruction complained of informed the jury that all liquors which contain any percentage of alcohol and are sold as a beverage are intoxicating liquors under our law. The statute defining intoxicating liquors furnishes no warrant for this instruction. All liquors containing alcohol are not intoxicating, and the statute of this state only prohibits the sale of intoxicating liquors; that is, liquors which will produce intoxication. The legislature has defined intoxicating liquors three times. In the original prohibition law, chapter 110, p. 309, Laws 1890, in section 6 (page 316), they were defined as liquors "that will produce intoxication." This section was amended by section 1, c. 74, p. 111, Laws 1895 (section 7598, Rev. Codes 1895), and among other things a proviso was added to that section "that fermented and alcoholic liquors and mixtures thereof shall not be deemed intoxicating if they contain less than two per cent of alcohol by volume." The latest definition is contained in chapter 96, p. 156, Laws 1897 (section 7598, Rev. Codes 1899), which reads as follows: "All spirituous, malt, vinous, fermented or other intoxicating liquors or mixtures thereof, by whatever name called, that will produce intoxication, or any liquors or liquids which are made, sold or offered for sale as a beverage and which shall contain coculus indicus, copperas, opium, cayenne pepper, picric acid, Indian hemp, strychnine, tobacco, darnal seed, extract of logwood, salts of zinc, copper or lead, alum or any of its compounds, methyl alcohol or its derivations, amyl alcohol or any extract or compound of any of the above ingredients, shall be held to be intoxicating liquors within the meaning of this chapter." Under this section "intoxicating liquors" include spirituous, malt, vinous, fermented or other intoxicating mixtures thereof "that will produce intoxication;" also all liquors or liquids, sold as a beverage, which are compounded

from the drugs enumerated, that will produce intoxication. The requirement that they will produce intoxication is common to both classes, as plainly as though the description clause was repeated in the latter part of the section. This construction is required by the act of which this section is a part, and is entirely consistent with the language of the section. The foregoing error requires a reversal of the judgment.

The record presents a further question which will arise upon the new trial, and will therefore be considered. The defendant, in addition to his plea of not guilty, interposed a plea of former acquittal. To sustain this plea, he introduced in evidence an information, which had previously been filed in the district court of that county by the state's attorney, which charged the defendant with maintaining a liquor nuisance on lot 12 in block 11, in the original townsite of Richburg; also a general verdict of not guilty. Upon cross-examination of several of the state's witnesses, the fact was developed that their testimony was the same in substance as upon the former trial. At the close of the case defendant's counsel moved the court to advise the jury to return a verdict "that the defendant had once been acquitted of the same offense." This was denied, and the question as to whether the defendant had been once acquitted of the offense for which he was being tried was submitted to the jury, and they returned a separate verdict that he had not. The refusal of the trial court to grant the above request is assigned as error. The assignment is without merit. The offense for which the defendant was being tried was not the offense for which he had been acquitted. Upon the former trial he was charged with keeping a liquor nuisance upon block 11, and in the present indictment with keeping a nuisance upon black 12. The accusations charge different offenses, and it was not possible to make them the same, even by averment and oral evidence. The plea of formal aquittal "is only available in cases where the transaction is the same, and the two indictments are susceptible of and must be sustained by the same proof." Wright v. State, 17 Tex. App. 158. The rule of the cases is stated in Hite v. State, 9 Yerg. 357, 375, as follows: "To entitle a prisoner to the benefit of the plea of autrefois acquit, it is necessary that the crime charged in the last bill of indictment be precisely the same with that charged in the first, and that the first bill of indictment is good in point of law. 1 Chittty's Crim. Law, 453; 1 East's Pleas of the Crown, 522. The true test by which the question

whether such a plea is a sufficient bar may be tried is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. Archb. Crim. Pl. 88; Rex v. Emden, 9 East. 437. If the crimes are so distinct that evidence of the one will not support the other, it is as inconsistent with reason as it is repugnant to the rules of law to say that they are so far the same that an acquittal of the one shall be a bar to the prosecution of the other. Vandercomb's Case, 2 Leach's r. Law, 717." The keeping of a liquor nuisance on block 11 is not the same offense as keeping one on block 12, and the evidence which would establish one would not be sufficient to establish the other. The offenses were distinct. This appeared upon the face of the defendant's plea of former acquittal, and it was not necessary to submit the question to the jury. See Wright v. State, supra.

Judgment reversed, and new trial ordered. All concur.

(103 N. W. 610.)

THE STATE OF NORTH DAKOTA v. HANS NELSON.

Opinion filed May 26, 1905.

Intoxicating Liquors — Illegal Sale.

1. The defendant and another procured two kegs of beer, without previous arrangement with any one as to the conditions under which it was to be disposed of. All who came to the place where it was kept were permitted to drink all they desired of it. Those drinking paid for what they drank—generally 40 cents. The price was fixed by defendant, and he generally requested pay for it. *Held,* that the facts are sufficient to show, as a matter of law, that there was an unlawful sale of the beer.

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

Hans Nelson was indicted for selling liquors unlawfully, and from an order advising an acquittal the state appeals.

Reversed.

J. B. Wineman, State's Attorney, and *B. G. Skulason,* Assistant State's Attorney, for appellant.

The subterfuge of collecting the money in a cap or a keg or otherwise, does not alter the true nature of the sale of intoxicants, it is still a sale, and a violation of the law. State v. Wiggin, 20 N.

H. 449; Black on Intox. Liquors, section 405; 17 Am. & Eng. Enc. Law, 299; State v. McMinn, 83 N. C. 668; Grant v. State, 13 S. E. 554.

It is presumed that defendant owned the beer from the fact of his possession and control of it, and no previous arrangement for procuring it. If he was disposing of it for someone else he was guilty. State v. Wadsworth, 30 Conn. 55; Paschal v. State, 10 S. E. 821; Hartgraves v. State, 43 S. W. 331.

One who solicits others to join him in the purchase of whiskey, receives from each pay for the share each person wants, and afterwards buys and distributes it among them is guilty of selling liquors without a license. Hunter v. State, 30 S. W. 42.

A mere volunteer who assists in making sales is criminally liable. State v. Herselus, 86 Iowa, 214, 53 N. W. 105; State v. Bugbee, 22 Vt. 32.

Tracy R. Bangs, for respondent.

A person who procures liquors at the request of an assembled party for their common refreshment, all, he among the others, contributing to the expense is not a seller; and it makes no difference that after the liquor is procured other members of the party are taken into the arrangement, contributing their share and drinking their proportion. Hogg v. People, 15 Ill. App. 288; Commonwealth v. Peters, 2 Pa. Sup. Ct. 1, 38 W. N. C. 511; Cressey v. Commonwealth, 76 S. W. 509; Miller v. Commonwealth, 76 S. W. 515; Trueue v. State, 44 S. W. 829; Reed v. State, 44 S. W. 1093; Johnson v. State, 63 Miss. 228.

MORGAN, C. J. The defendant was informed against for unlawfully selling four glasses of beer to one Lars Isaacson. The trial court advised the jury to acquit the defendant, on motion made by him after the state had rested, and a verdict of not guilty was accordingly returned by the jury. The state appeals from the order advising an acquittal. Whether the making of that order was error is the sole question raised on the appeal.

The facts presented on the trial are as follows: The defendant and one Tigen went to the railway depot on July 4, 1904, and each carried therefrom an eight-gallon keg of beer to a place under an elevator bridge on the east side of the railroad track at Northwood, in Grand Forks county. After reaching this point, the defendant and Tigen tapped one keg, and those that had come there

drank some of the beer. Others came afterwards and drank. Those that came there and drank were not there by any previous invitation of the defendant or Tigen, or through any understanding with them. Every one who came there was permitted to drink, and to drink all that he desired. At least the evidence does not show that any one was not permitted to drink. The number that participated in the drinking of the beer is not given, but it is shown that there were at least twelve, and some witnesses say that there was a big crowd. The gathering was not pursuant to a previous understanding or arrangement, nor was the beer brought there pursuant to any understanding between the defendant and Tigen and either of those that drank the beer. It does not appear from whom or how the defendant and Tigen got the beer at the depot, nor who paid for it, nor how much was paid. The first keg opened was all drank, after which the other was tapped, and the drinking continued. The beer was not paid for by the glass, but those that drank paid lump sums to the defendant or Tigen; some paying 40 cents and some paying 50 cents. The price to be paid was fixed by the defendant, and its payment requested by him generally, but in one or two instances by defendant and Tigen. In some instances the money was paid to the defendant, the proper change being made, and the price reserved by him. At one time defendant passed around the hat, each throwing 40 cents into it. In another instance one person left 40 cents on the keg. It does not appear that any drank without paying.

Under these facts, is it shown, as a matter of law, that the defendant was not guilty of selling beer contrary to the provisions of section 7593, Rev. Codes 1899? We think not. It is uncontradicted that the defendant and Tigen got the beer of their own accord, without previous arrangement with any member of the party. What their intention in so doing was between themselves is a matter of conjecture only. It does not appear that the persons who drank the beer were friends of the defendant or Tigen, acquaintanceship being the most that appears from the evidence. This fact does not warrant any inference that providing the beer for them was done as their agent. If he was their agent, he was self-constituted, and his agency included all who came there and desired beer on that day at terms fixed by him. The contention that this was a purchase of the beer by the whole party, and that there was no sale by the defendant, as each was drinking only what was his own, is not sustained upon any theory of the evidence.

The fact that the defendant and Tigen furnished the beer at that place without communicating with any other persons as to the matter renders it impossible to find, under the evidence, that these two were acting for the others. The evidence is sufficient to sustain a verdict that the beer was unlawfully sold by the defendant. The beer was procured by him and was in his possession. He exercised acts of ownership over it by selling it and collecting the price for it. His possession of the beer, unexplained, is presumptive proof of his ownership thereof. He had possession of it in connection with Tigen, and delivered the beer to others for a price, and this constituted a sale. It is true that some of the witnesses stated that the cost of the beer was paid for by a collection or contribution. If this were material, their conclusion cannot alter the facts as they transpired. The mere fact that a hat was passed, and each contributed his share by placing it in the hat, the sum being fixed by the defendant, would not make the transaction any different than if each had paid the money separately to the defendant.

The facts do not bring the case within the principle contended for—that parties may associate themselves together, and buy intoxicating liquors and drink them, and not be guilty of a violation of law, although the liquors are purchased by one of them, to whom each pays his proportionate share. In such a case, it is contended, the person to whom the money is paid is the agent of the others, and the liquor belonged to one as much as to the others. In this case the defendant and Tigen procured the beer without solicitation or arrangement with the others, and all who desired were permitted to drink it, and thereafter paid the price. The facts would warrant the conclusion that the defendant and Tigen got the beer for sale, and sold to those present so much thereof as they desired, for a sum of money fixed by defendant. The fact that it is not shown that the defendant made any profit is immaterial. That a profit is made is not a necessary ingredient of a sale.

The respondent cites many cases to support his contention that the facts do not constitute a sale. We have examined each of the cases, and they are not in point. They turn upon a fact not found in the present case—that the defendant was the agent of the party, and that there was a joint interest in the liquors furnished. Among the cases cited and relied upon are Creasy v. Commonwealth (Ky.) 76 S. W. 509, and Hogg v. People, 15 Ill. App. 288.

We conclude that the case should have been submitted to the jury.

The order is reversed. All concur.

(103 N. W. 609.)

MARTIN MARTINSON v. GEORGE MARZOLF AND MILLIE MARZOLF.

Opinion filed May 31, 1905.

Judgment By Default — Notice.

1. A judgment taken by default, without notice, in an action for equitable relief, after the defendant had appeared, is irregular, but is not void.

Answer to Amended Complaint — Default.

2. Where, after an answer has been served, the complaint is amended, but the amendment is merely formal, and does not make any substantial change in the facts alleged as grounds for relief, it is not necessary to serve another answer, and the defendant is not in default for failure to do so.

Homestead Filing — Possession not Granted by Injunction Although Defendant Is Insolvent.

3. Where the plaintiff claims the right to possession of land under a homestead filing, and the land is in the actual adverse possession of the defendants, he cannot resort to equity to recover possession by means of an injunction, even though the defendants are insolvent.

Vacating Temporary Injunction Superseded by Judgment — Irregular Judgment.

4. Where a temporary injunction pending the action had been ordered, and the injunction had been superseded by a judgment which was irregular, but not void, a motion to vacate the injunction was ineffectual, unless it was coupled with a motion to vacate the judgment for irregularity.

Vacating Judgment for Irregularity — Lapse of Time.

5. A motion to vacate a judgment for irregularity may be heard and granted, even though more than one year has elapsed since notice of the entry of judgment.

Vacating Irregular Judgment — Discretion — Waiver of Irregularity.

6. In granting or denying a motion to vacate a judgment for irregularity, the court exercises a discretion governed by equitable principles; and the relief will not be granted if the moving party has, by conduct or otherwise, waived the irregularity, or if his conduct has been such as to render it inequitable to grant relief.

Homestead Contest — Effect of Executive Department's Decision Upon Courts.

7. While this action was pending there was a contest in progress before the federal land office between the same parties, involving the validity of the conflicting homestead filings, under which the respective parties claimed the right to occupy the land. The contest had resulted in a decision by the secretary of the interior in favor of defendants, but there was a petition for reveiw of that decision still pending and undetermined. *Held,* that if the petition for review resulted in a decision for plaintiff, the judgment should not be vacated, except as to costs, but, if the secretary affirmed the decision under review, then the judgment ought to be vacated.

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

Action by Martin Martinson against George Marzolf and Millie Marzolf. Judgment for defendants, and plaintiff appeals.

Reversed.

Hanchett & Wartner, for appellant.

Equity will protect entryman's possession by injunction. Reaves v. Oliver, 41 Pac. 353. Injunction can only be dissolved at any time before trial, not after judgment is entered. Rev. Codes 1899, section 5350. The decision of the Department of the Interior, allowing a homestead entry upon public lands, is binding upon the courts. Reservation State Bank v. Holst, 95 N. W. 931.

State and territorial courts have no jurisdiction to litigate the title to a homestead entry; such jurisdiction belongs to the land department of the federal government. But a homesteader's right to possession during the life of such entry will be protected by the courts. Sproat v. Durland, 35 Pac. 682.

A homestead entry being a purely equitable interest, and not a legal title, equity will protect the possession, use and occupancy by injunction. Sproat v. Durland, 35 Pac. 682; Reaves v. Oliver, 41 Pac. 353; Calhoun v. McCornack, 54 Pac. 497.

Preliminary injunction is merged in a final judgment, and liability upon preliminary injunction bond ceases when such judgment becomes final. Webber v. Wilcox, 45 Cal. 301; Lambert v. Haskell, 80 Cal. 611, 22 Pac. 327.

A perpetual injunction is coterminous with the life of the homestead entry and has no force or effect upon the cancellation thereof. Shinn v. Young, 57 Cal. 525.

Gooler & Goer, for respondents.

The court could modify and dissolve a temporary injunction. Mayne v. Griswold, 3 Sandf. 484; Bertine v. Varian, 1 Edg. Ch. 343, 6 N. Y. Ch. L. Ed. 165; Morgan v. Tener, 83 Pa. 305; Mfgs. Nat. Bank v. Perry, 3 New Eng. 927, 144 Mass. 313, 11 N. E. 81.

The court could do no more than issue a temporary restraining order to protect rights previously determined. Forbes v. Driscoll, 31 N. W. 633.

By an injunctional order defendants were deprived of their property and restrained from entering thereon. Such order was void. Forman v. Healy, 11 N. D. 563, 93 N. W. 866; Dickson v. Dowe, 11 N. D. 404, 92 N. W. 797.

The court below had no jurisdiction to enter the judgment that was rendered in the case at bar. Grandin v. LeBar, 3 N. D. 446, 57 N. W. 241; Adams v. Couch, 26 Pa. 1009; Commager v. Dix, 28 Pa. 864; Marquez v. Frisbie, 101 U. S. 473, 25 L. Ed. 800; Johnson v. Towsley, 80 U. S. 72, 13 Wal. 72, 20 L. Ed. 485; Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424; Empey v. Plugert, 64 Wis. 603, 25 N. W. 560.

The court had jurisdiction to maintain by injunction the statu quo until the land department had determined the right to the land in controversy. Wood v. Murray, 52 N. W. 356; Caldwell v. Robinson, 59 Fed. 653; Coldwell v. Smith, 1 Wash. 92; Woodsides v. Rickey, 1 Ore. 108; McQuiston v. Walton, 69 Pa. 1048; Mathews v. O'Brien, 84 Minn. 505, 88 N. W. 12; Hastay v. Bonness, 84 Minn. 120, 86 N. W. 896; Fulmele v. Camp, 20 Col. 495; Atherton v. Fowler, 96 U. S. 513, 24 L. Ed. 732; Marquez v. Frisbie, 101 U. S. 473, 25 L. Ed. 800.

Courts have no jurisdiction as long as title remains in the general government, and will not enforce a contract for sale of growing timber upon the land involved. Sims v. Morrison, 100 N. W. 88.

ENGERUD, J. In November, 1901, the plaintiff made application at the United States land office at Devils Lake to enter the land in question as a homestead. The application was accepted, and in the following May the plaintiff attempted to take possession of the land under such homestead claim. The defendants (husband and wife) were in possession of the land, living upon it and farming it. They had ninety acres planted to crop. They

refused to yield possession, and forcibly resisted plaintiff's attempts to obtain possession. The plaintiff thereupon commenced this action in June, 1902. The original complaint purported to set forth two causes of action. The first stated merely a cause of action at law for the recovery of the possession of the land, basing the plaintiff's right upon his homestead filing, and concluding with a prayer appropriate to such an action. The second cause realleges the allegations of the first and further alleges that there were ninety acres of growing crops on the land, which the defendants threatened and intended to harvest and remove for their own use; that the defendants were attempting and threatening to destroy a house plaintiff had erected on the premises, and were also threatening to resist with violence any attempt by plaintiff to enter or live on the land. It was further alleged that the defendants were insolvent, and that their acts were such as to cause the plaintiff irreparable damage, and to jeopardize his right to hold the land under the federal homestead laws. This second cause of action concludes with a prayer for judgment "perpetually restraining and enjoining the defendants, and each of them," etc., "from further trespassing upon plaintiff's said premises, and from in any manner interfering with or disturbing plaintiff, or any dwelling house which he has or may hereafter erect upon said premises, and from interfering with the growing crop on said premises, or harvesting, cutting or removing same therefrom." On this complaint, supported by the affidavits of the plaintiff and others, the plaintiff applied for and obtained from the district court an injunctional order prohibiting the defendants, and each of them, during the pendency of the action, from doing any of the acts which the plaintiff in his prayer for judgment sought to have perpetually enjoined. This order was applied for upon notice. The hearing was had July 2, 1902, but the order is dated September 5, 1902. The defendants appeared in the action by their attorney, Geo. P. Gibson, and served an answer which put plaintiff's alleged right to possession in issue, and set forth that the defendants had been in the possession of the land, living upon it and farming it, for several years, claiming it under the homestead laws of the United States, and that a contest concerning it was then pending. This answer was served July 2, 1902. On the same day the plaintiff's attorney served upon defendants' counsel an amended complaint. The only change effected by the amendment was to state substantially the same facts as the original complaint in one cause of

action, instead of two. The prayer for judgment was substantially unchanged, except that, instead of demanding a judgment for the recovery of possession, as in the first cause of action in the original complaint, there was added to the former prayer for equitable relief a prayer for a "mandatory injunction requiring and compelling the defendants, and each of them," etc., "to remove from said premises, and deliver possession of the same, and the whole thereof, to plaintiff." On November 12 1902, one of plaintiff's attorneys made an affidavit "that the above-entitled action was commenced by the service of a summons and complaint upon each of the defendants; that to said complaint the defendants answered; that thereafter, on the 2d day of July, 1902, the plaintiff served his amended complaint upon each of the defendants; that the defendants nor either of them has appeared, answered or demurred to said amended complaint, or in any manner appeared in opposition thereto, nor have the plaintiff's attorneys, or either of them, been served with an answer or demurrer in said action, nor have the defendants appeared in any manner in opposition to said complaint; that more than thirty days have elapsed since the service of said amended complaint." On the same day, without notice, the plaintiff's attorneys applied to the court to submit proof in support of the amended complaint, and for an order for judgment by default. The application was granted by an order as follows: "The above-entitled case having been commenced by the service of a summons and complaint on the defendants, and each of them, and by the service of an amended complaint on the 2d day of July, 1902, and the plaintiff having filed his affidavit with the clerk of this court that no answer, demurrer or appearance has been made in opposition to his amended complaint, and having moved in open court to be allowed to prove his case, and the defendants' counsel, George P. Gibson, being present and having stated that he did not appear any further in the case, and thereby having made default, and the case being a proper case for the court to decide, and the plaintiff having offered in open court his evidence, and after hearing Hanchett & Wartner for the plaintiff, and the court being fully advised in the premises, and having fully determined the same, now, on motion of Hanchett & Wartner, attorneys for the plaintiff, it is ordered that judgment be entered herein as follows: (1) That the injunctional order granted herein pending this action, bearing date the 3d day of September, 1902, be, and it is in all things ratified and affirmed. (2) That the defendants,

George Marzolf and Millie Marzolf, and their agents, servants and employes, be, and they are hereby, perpetually enjoined and restrained from farther trespassing upon the premises described in the complaint in this action, to wit, the south half of the southeast quarter of section two, and the south half of the southwest quarter of section one, in township one hundred forty-nine north, of range seventy-four west, in McLean county, state of North Dakota, and from in any manner interfering with or disturbing Martin Martinson, or any dwelling house which he has or may hereafter erect upon said premises. (3) That the defendants, George Marzolf and Millie Marzolf, with their agents, servants and employes, remove from and vacate said premises, and deliver the possession thereof, and the whole thereof, to the plaintiff, Martin Martinson. (4) That the plaintiff recover from the defendants, and each of them, his costs and disbursements in this action, to be taxed by the clerk. Let judgment be entered accordingly, and execution issued thereon to enforce the provisions of the same." Judgment was entered in accordance with this order on March 17, 1903. The abstract recites that notice of the entry of this judgment was given defendants March 28, 1903, but we find nothing in the record warranting that statement.

On July 21, 1904, the defendants, by their present counsel, served upon plaintiff's attorneys a notice of application to the court for an order to "vacate and set aside the injunction now existing" in said action. The evidence submitted in support of the application shows that, before the action was commenced, Marzolf had instituted a contest in the United States land office against Martinson's entry on the ground that the latter's entry was improperly allowed, and should be canceled, because the land at the time that entry was filed was occupied as his homestead by Marzolf, and had been so occupied since 1898 by virtue of a homestead entry which had been erroneously canceled, without Marzolf's knowledge; that that contest had been pending in the land office since June 6, 1902, and had resulted in a decision by the secretary of the interior, of date June 15, 1904, canceling Martinson's entry, and reinstating the entry of Marzolf. In opposition to the motion, the plaintiff's attorney presented an affidavit showing that the decision of the secretary of the interior was not final, because a petition for review of that decision had been presented, and was still undetermined. It was also urged that the motion came too late, because more than one year had elapsed since notice to the de-

fendants of the entry of the judgment in the action. The affidavit, however, does not set forth any evidentiary facts to support the affiant's conclusion that the defendants had notice of the entry of judgment. On August 5, 1904, the district court ordered "that said injunction be, and the same is hereby, in all things dissolved, as against the defendants, and each of them, and that the defendants have and recover costs of this motion, taxed at $20, and that the undertaking upon such injunction be and remain in full force and effect, and amenable to the defendants, as provided in the same." The plaintiff appealed from this order.

It is very clear that the injunctional order was improvidently granted, and that the complaint showed no cause of action justifying equitable relief. There was an ample remedy by an action at law to recover possession, and damages for the withholding thereof, if the plaintiff was wrongfully excluded from the land. The mere fact that the defendants were insolvent, and that the plaintiff might not be able to collect his damages, is no sufficient reason for the interference of a court of equity in a controversy which involves only the right to possession. Poverty should not deprive an adverse occupant of the right to defend his possession, and have his defense heard and determined in the ordinary way. We do not think that it could be seriously contended that the inability of the entryman to make settlement on the land within six months after his filing would jeopardize his entry, where he is prevented from taking possession through no fault of his own, and hence the alleged jeopardy to his homestead right was no ground for resorting to an injunction as a means of securing possession. The impropriety of the whole proceeding is still more glaring in view of the fact, not disclosed by the moving papers upon which the injunction was obtained, that when the action was commenced a contest was pending in the federal land department, directly involving the validity of the conflicting claims of the parties to this lawsuit. We have no hesitation in saying that the injunctional order would never have been granted, had the action been properly defended, and it would have been a proper exercise of discretion for the trial court to set the same aside, had application been properly made in due season.

In this case final judgment was entered on March 17, 1903. Unless that judgment was void, the order was merged in and superseded thereby. For the reasons hereinbefore stated, that judgment was erroneous in substance, in so far as it granted equitable re-

lief; and in that respect it was subject to reversal on appeal, but was not invalid or even irregular on that account. State v. Donovan, 10 N. D. 203, 86 N. W. 709.

It was also improperly rendered, for two reasons: First, the defendants were not in default; second, because it was ordered on an ex parte application of the plaintiff, without notice to the defendants. The defendants were not in default by failing to serve a new answer after the complaint was amended. The amendment was merely formal, and did not make any substantial change in the allegations of the facts which plaintiff claimed entitled him to relief. Those facts had already been put in issue by the answer, and it was not necessary to repeat the denials of those facts, or renew the allegations of defensive matter by serving a new answer. Enc. Pl. & Pr. vol. 1, p. 628, and cases cited.

But even if the defendants were in default, the plaintiff's position is little better. The defendants had appeared in the action, and were entitled to eight days' notice of the application for judgment. Rev. Codes 1899, section 5413, subdivision 2. The fact that Mr. Gibson, who had been defendants' attorney of record, happened to be present in court when the application was made, is of no consequence. He was not there pursuant to notice, nor was he there in the capacity of attorney for defendants. He expressly disclaimed any authority to act in that capacity, and hence his acquiescence could not be construed as a waiver of notice, or a consent to judgment by default. His withdrawal from the case did not withdraw the answer. Nichells v. Nichells, 5 N. D. 125, 64 N. W. 73, 33 L. R. A. 515, 57 Am. St. Rep. 540. The judgment by default was unwarranted, but it cannot be said to be a nullity, and hence be disregarded. The judgment was rendered and entered pursuant to the order of the district court, which at the time had complete jurisdiction of the parties and subject-matter of the action. Such a judgment is not void, but is irregular, and must be dealt with as a valid judgment until vacated by direct proceedings. Salter v. Hilgen, 40 Wis. 363; Freeman on Judgments, c. 8. The moving party has not asked, nor has the court ordered, that the judgments be set aside. It might be said that the injunction is embodied in the judgment, and that the order vacates the judgment pro tanto. That argument, however, involves us in the absurdity of allowing the judgment to stand as a conclusive adjudication that the plaintiff was entitled to the possession of the premises from the time of the commencement

of the action, and that the defendants were trespassers, and yet in form, at least, declare the plaintiff liable on the injunction bond for having ousted them. The proper procedure was either to appeal from the judgment, if the time for that remedy had not expired, or to seek relief from the judgment, or both the judgment and order, by motion to vacate.

Appellant contends that both these remedies have been lost, because more than one year has elapsed since notice of the entry of judgment. As stated before, the record furnishes no evidence that the defendants had notice. The bare statement of that fact in the counsel's affidavit is not evidence. It is a mere conclusion. The time for appeal does not expire until the expiration of one year after written notice of the entry of judgment. Rev. Codes 1899, section 5605. The year within which to move for relief under section 5298, Rev. Codes 1899, by reason of the moving party's mistake, inadvertence, surprise or excusable neglect, begins to run from the date of actual notice. Mfg. Co. v. Holz, 10 N. D. 16, 84 N. W. 581. A motion to vacate a judgment for irregularity such as exists in this case does not come under that section. That section limits the time within which a party may apply for relief from a judgment, order or other proceeding taken against him by reason of some default of his own. It does not apply to cases not in that category. Ladd v. Stevenson, 112 N. Y. 325, 19 N. E. 842, 8 Am. St. Rep. 748; Garr, Scott & Co. v. Spaulding, 2 N. D. 414, 51 N. W. 867; Enc. Pl. & Pr. vol. 15, p. 266. The power to vacate or modify its judgments, orders and proceedings for the reason stated in section 5298, or for irregularity, or any other proper reason, is inherent in every court of record. In those jurisdictions where the functions of the court can be exercised only in term time, its power and control over its judgment ceased, in general, with the term at which the judgment was rendered. There are many exceptions to that general rule, and it is unnecessary to determine whether this case presents such an exception or not. In this state there are no terms of the district court, in the common-law sense of that word. The district court is always open, and its functions are exercised by a single judge, whose every act as a judge is deemed to be the act of the court. Rev. Codes 1899, section 5176, 5178. There are times and places fixed by law for the trial of cases, and no issue of fact can be forced to trial except at such times and places. These sessions for the trial of cases are called "terms," but that word, as applied to the sessions of

the district courts of this state, has lost its common-law meaning. It follows that the district court can exercise its inherent power to grant relief, on motion, from an irregular judgment or order, at any time, unless the time for so doing has been limited by law. We can find no statute limiting the time within which the district court may relieve from a judgment irregularly entered. It is therefore merely a question of whether or not, in the exercise of sound discretion, the relief ought to be granted, having due regard for the rights of all persons that may be affected by the proposed action. In granting relief of that nature, the court is governed to some extent by equitable principles. In this case the defendants were deprived of a trial of the issues by the improper entry of a judgment. Ordinarily they would have the right to have the same set aside, so as to leave the action at issue without showing merits, provided they had not waived or lost that right by conduct on their part rendering it inequitable to grant relief. Enc. Pl. & Pr. vol. 15, p. 241; Id. p. 278; Black on Judgments, sections 307, 326a. In this case the question upon which the right to the possession of this land depends is in contest before the federal land department. The decision of that tribunal is conclusive on the question of the rights of these contesting entrymen. If the secretary of the interior shall finally adhere to the decision now before him for review, then it follows that Marzolf has been wrongfully deprived of the use of the land by the order and judgment in this action, and they ought to be vacated.. On the other hand, if Martinson shall ultimately prevail, and his entry be held valid, then, although the order was improvident, and the judgment erroneous and irregular, yet no actual wrong has been done to Marzolf, and there would be no good reason to disturb the judgment, except as to the provisions for the recovery of costs.

The order appealed from will be reversed, without costs to either party, and the cause remanded to the district court, with leave to the defendants to take such further proceedings for relief from the judgment or order as they may be advised. All concur.

(103 N. W. 937.)

CHARLES S. ROBERTS v. GEORGE G. BOPE.

Opinion filed May 31, 1905.

Australian Ballot Law — Printed Stickers.

1. Under the Australian ballot law of this state an elector may indicate his choice by writing or pasting the name of a candidate in the space provided for that purpose, and over the name of an opposing candidate, even though the name so written or pasted on is printed on the official ballot in another column, and it must be counted.

Indicating Choice.

2. Where the voter indicates his choice by writing the name upon, or by pasting a printed sticker containing the name upon, the official ballot, a cross-mark after the name, so written or pasted is not necessary to entitle it to be counted.

Official Ballot.

3. Official ballots upon which the elector has placed printed stickers in the manner provided by statute are not rendered unofficial by that fact, and must be received and counted.

Combination of Stickers Does Not Invalidate Ballot.

4. The fact that the voter has attached a combination of stickers, covering the names of several candidates, and substituting the names of those upon the stickers, without severing the stickers and attaching them separately, does not render the ballot invalid.

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

Action by Charles S. Roberts against George G. Bope. Judgment for defendant, and plaintiff appeals.

Affirmed.

Knauf & Knauf, for appellant.

Elector must express his choice of candidates by mark made by himself. Vallier v. Brakke, 64 N. W. 180; Fletcher v. Wall, 40 L. R. A. 617; McKittrick v. Pardee, 65 N. W. 23.

Other than official ballot shall not be cast or counted in any election. Re Contested Election School Directors, 27 L. R. A. 234.

Candidate's name must appear in one column only. Laws of 1901, p. 60; section 491, Rev. Codes 1899; Parmley v. Healy, 64 N. W. 186; McKittrick v. Pardee, supra; State ex rel Fisk v. Porter, 13 N. D. 406, 100 N. W. 1080.

The provision for leaving space to write or paste a name does not warrant use of paster tickets over a large portion of ballot. Re Contested Election School Directors, supra.

This would abrogate the purpose and object of the law. Fletcher v. Wall, supra.

A paster or sticker ticket is not one prepared by the county auditor nor the elector, but by an electioneerer of the paster ticket. Re Contested Election School Directors, supra.

The elector must prepare his ballot uninfluenced. McSorley v. Schroeder, 63 N. E. 697.

J. W. Walker and *S. E. Ellsworth,* for respondent.

Only irregularities indicating fraud, or being the means of preventing a full and fair expression of the popular will, or calculated to defeat the purpose of the election law, will render the ballot void. Perry v. Hackney, 11 N. D. 148, 90 N. W. 483.

The ballot had no "distinguishing marks" so as to render it void. Howser v. Pepper, 8 N. D. 484, 79 N. W. 1018.

The use of the sticker is favored by the legislature. Section 491 Rev. Codes 1899; section 15, chapter 66, Laws of 1891.

The portion of the official ballot covered by sticker is not material. The voter is authorized to "erase" or "paste over" the name of any candidate, and this does not render the ballot any less "official." While the law provides for official ballots, it does not provide for official candidates. People v. Shaw, 19 N. Y. S. 302, 31 N. E. 512.

Written or pasted names shall be counted, whether marked or not. Section 491, Rev. Codes.

As marks are not necessary, further marks will not affect the ballot unless they are marks for identification of the voter. Howser v. Pepper, supra.

The use of pasters which practically cover the face of the ballot is sanctioned in New York. People v. Shaw, supra.

YOUNG, J. This is an election contest. The appellant and contestant, Charles S. Roberts, and contestee, George G. Bope, were rival candidates for the office of county auditor of Kidder county at the November, 1904, election. The county board of canvassers found that the contestant had received 235 votes, and the contestee 260 votes, and the county auditor issued a certificate of election to the latter in pursuance of such finding. The trial court sustained the action of the board of canvassers, and the right of the contestee to the office. Contestant appeals from the judgment.

The question involved is whether certain ballots on which the voters indicated their choice by the use of stickers were rightfully counted for the contestee. It was stipulated at the trial that at least twenty-six of these ballots were cast and counted for the contestee, being a sufficient number to change the result if they are rejected. A copy of the official ballot as prepared and distributed by the county auditor to the various precinct officers is contained in the record; also a copy of the stickers which were used by the voters in preparing the ballots which are in dispute. The official ballot, which was in the usual form, was eight columns wide, with the following headings in order from left to right: (1) "Office to be voted for." (2) "Republican." (3) "Democratic." (4) "Independent and Democrat." (5) "Socialist." (6) "Prohibition." (7) "Populist." (8) "Individual Nominations." The republican column contained the names of a full set of county officers, except for state's attorney. The contestant's name was printed in this column as candidate for county auditor. The "Independent and Democrat" column contain the names of candidates for county officers. The other party columns were blank as to county officers. The contestee's name appeared in the column headed "Individual Nominations," as a candidate for county auditor. This column contained the names of a candidate for each county office, except for the office of sheriff, surveyor and public administrator. The stickers or pasters, as they are called, were procured by the contestee and other candidates whose names appeared in the same column upon the official ballot, and were distributed by them and their supporters to the electors in the various precincts for use in preparing their ballots. The paster was about nine and a half inches in length and three inches in width, and there were printed upon it the names of the contestee and the other candidates for county offices whose names appeared in the "Independent Nominations" column. The names were separated from each other by lines and spaces corresponding with those upon the official ballot, so that in form the paster was made up of thirteen separate stickers, separated by black lines, each perfect in itself, had it been severed, but all joined together on one paper, with adhesive paste upon the back. On each separate sticker above the name of the candidate was printed the name of the county office, and to the right of each name a square containing a cross (X) mark. On three of the stickers no name was printed below the name of the office. The names were so arranged upon the paster that they corresponded with the order

in which the names of the opposing candidates were printed in the republican column.

It is stipulated that at least twenty-six of the ballots counted for the contestee were prepared by the electors by pasting the combined sticker or paster in the republican column over the names of the republican candidates. On each of these ballots that part of the combination sticker or paster containing the name of the contestee exactly covered the space in the republican column in which the contestant's name appeared, and was directly opposite the words "County Auditor," in the first column of the official ballot. What we have said as to the position of the sticker for county auditor is true as to the position of the stickers for the other county officers in reference to the republican candidates. In other words, the paster covered the names of all the republican candidates, from sheriff down to and including superintendent of public schools, and substituted in their place the names upon the combination sticker. The paster was of the exact width of the party column, and covered no part of the first column of the official ballot..

Counsel for contestant contends that the trial court erred in holding that these ballots were properly counted for the contestee. Several objections are urged against their validity. All of the objections are, in our opinion, without merit.

It is urged that, inasmuch as the contestee's name already appeared upon the official ballot in the column of "Individual Nominations," the electors could not lawfully indicate their choice by writing or pasting his name upon the ballot elsewhere, but must mark it in the column where it was printed. Parmley v. Healy, 7 S. D. 401, 64 N. W. 186, and McKittrick v. Pardee, 8 S. D. 39, 65 N. W. 26, are cited to sustain this view. The cases are not in point. The South Dakota statutes under consideration in the cases referred to, unlike our own, did not authorize the electors either to write or paste a name upon the ballot. The prohibition of our statute against the name of a candidate appearing more than once upon the ballot refers to the official ballot as printed and delivered to the elector, and not the ballot as marked and returned by him to the election officer.

The appellant also contends that the ballots in question are not in fact ballots printed by the county auditor, because of the addition of the printed stickers, and urges their rejection under section 490, Rev. Codes 1899, which provides that "ballots other than those printed by the respective county auditors shall not be cast

or counted in any election." This objection is sufficiently answered by the succeeding sentence of the same section, which broadly declares that "nothing in this chapter shall prevent any voter from writing or pasting on his ballot the name of any person for whom he desires to vote and such vote shall be counted the same as if printed on the ballot and marked by the voter."

It is also contended that these ballots should not be counted because the cross (X) mark after the contestee's name was printed on the stickers, and was not placed there by the voters. This contention is also without merit. If a cross (X) mark were necessary, the voter, by affixing the sticker, adopted the cross-mark upon it as his own. But as we have seen, under section 490, supra, a cross-mark was not necessary, for that section requires that names written or pasted on the ballot "shall be counted the same as if printed on the ballot and marked by the voter." The declaration of this section in favor of the right of electors to write or paste on the official ballots the names of their choice of candidates is re-enforced by section 491, Rev. Codes 1899. That section prescribes the mechanical arrangement of the ballot, and declares that the voter may, by a mark in the square at the head of a party column, "declare that he votes for all names printed in that column except such as are erased or pasted or written over as hereinafter specified," and then provides that "there shall be left under the name of each candidate sufficient space to write or paste a name therein in lieu of the one printed on the ticket," etc., and declares that "the fact that a name has been written or pasted opposite the office to be voted for shall be deemed sufficient evidence that the person depositing such ballot intended to vote for the person whose name he has written or pasted therein and not the person whose name was originally printed on the ballot whether he shall make a mark or cross opposite such written or pasted name or not." Express authority for writing in names or pasting on names is also given by section 516, which, among other things, provides that "the elector may write in the blank space or paste over any other name the name of any person for whom he wishes to vote."

Finally it is urged that to hold that an elector may prepare his ballot by the use of stickers, or by a combination of stickers, as was done in this case, would violate the general spirit of the Australian ballot law, and be in effect a return to the old system of voting. This argument can have no weight in construing and applying a statute clothed in language as plain as that under con-

sideration. It goes to the question of the policy of the statute, and should be addressed to the legislature, and not to the courts. The views of other courts under statutes which in terms establish a different policy can have no weight in construing the statutes of this state. The legislature has seen fit to adopt a liberal policy in favor of the voters' exercise of their choice, by authorizing them to write or paste the names of their choice over the names of the candidates printed upon the official ballot. It is our duty to give effect to this intent, and not to nullify it. There is no restriction as to the number of names the voter may erase, write or paste over. He may write or paste a new name over every name on the official ballot, and, inasmuch as he can do this, we can discover no valid objection to his using the stickers in combination, if he chooses that method, so long as he confines himself to merely making the changes which he is authorized to make, and in the manner he is authorized to make them, and does not destroy or impair in other respects the official ballot delivered to him by the election officers.

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

(103 N. W. 935.)

THE STATE OF NORTH DAKOTA v. WILLIAM BARRY.

Opinion filed May 31, 1905.

Statute — Permissive or Mandatory.

1. Whether a statute is permissive or mandatory depends upon the intent of the legislature.

Statutes Permissive in Form May Be Mandatory.

2. It is a general rule of construction that statutes which confer upon public officers power to act, for the sake of justice or concerning public interests or the rights of third persons, although permissive in form, are mandatory, and impose a positive duty to act when the condition calling for the exercise of the power is present.

Criminal Law — Reception of Verdict — Duty of Court.

3. That part of section 8246, Rev. Codes 1899, which authorizes trial judges to receive verdicts in criminal cases in which the jury has fixed the punishment higher or lower than provided by law, and to pronounce judgment thereon for the highest punishment or the lowest punishment authorized by statute for the offense of which the defendant is found guilty, is mandatory. Verdicts coming within the

exception contained in this section are legal and valid verdicts, and it is the duty of trial judges to receive the same and enter judgment thereon.

Murder — Former Jeopardy — Sentence.

4. The defendant was tried and found guilty of murder in the first degree, and sentenced to imprisonment for life. At the trial he interposed the plea of former conviction under the same information, and supported his plea by offering a verdict returned by the jury at the former trial, in which they found him guilty of murder in the second degree and fixed the period of his punishment at seven years. The trial court instructed the jury to find against the defendant upon this plea. *Held,* that this was error; that, for reasons stated in the opinion, the verdict was legal and valid, and it was the duty of the trial judge to sentence defendant thereunder; and that the trial court exceeded its authority in sentencing the defendant for life. The judgment must therefore be modified to correspond with the lawful punishment which he was authorized to impose, and as of the date of the former verdict.

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

William Barry was convicted of murder, and appeals.

Judgment modified.

Tracy R. Bangs, for appellant.

A constitutional provision must be interpreted in the light of the common law, from which it is inherited, as known to the framers. Miner v. Happersett, 21 Wall. 162, 22 L. Ed. 627; Ex parte Wilson, 114 U. S. 417, 29 L. Ed. 89; Boyd v. U. S., 116 U. S. 616, 29 L. Ed. 746; Smith v. Alabama, 124 U. S. 465, 31 L. Ed. 508; 1 Kent's Com. 336; Moore v. U. S., 91 U. S. 270, 23 L. Ed. 346; The Abbotsford v. Johnson, 98 U. S. 440, 25 L. Ed. 168.

A person is in legal jeopardy when he is put upon his trial, before a court of competent jurisdiction, upon an indictment or information sufficient in form and substance to sustain a conviction, and a jury is impaneled and sworn, charged with his deliverance. Cooley on Const. Lim. (6th Ed.) 399; McDonald v. State, 79 Wis. 651, 24 Am. St. Rep. 740; Clark's Criminal Law, 374.

No man shall be twice put in jeopardy of life or limb for the same offense. People v. Goodwin, 18 Johns. 201; Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; Coleman v. Tennessee, 97 U. S. 509, 24 L. Ed. 1118.

When one has been tried before a competent tribunal having jurisdiction, he has been in jeopardy as much as if tried in one

where a jury alone is competent to convict or acquit. Kepner v. U. S. Advance Sheets, Sup. Ct. Rep. July 15, 1904, page 797; People v. Miner, 33 N. E. 40; State v. Bowen, 47 N. W. 650; State v. Layne, 36 S. W. 390.

The verdict rendered at Langdon incriminated the defendant as guilty of murder in the second degree, and acquitted him of murder in the first degree, and a second prosecution is barred thereby. Commonwealth v. Jenks, 1 Gray, 490; State v. Burke, 38 Me. 574; Commonwealth v. Cook, 9 Am. Dec. 465; State v. Roe, 12 Vt. 93; People v. Ny Sam Chung, 94 Cal. 304, 29 Pac. 642, 28 Am. St. Rep. 129; 1 Bishop's Crim. Law, section 660; People v. Goodwin, 18 Johns. 187, 9 Am. Dec. 203; McDonald v. State, 79 Wis. 651, 48 N. W. 863, 24 Am. St. Rep. 740; McClain's Crim. Law, section 390; Sylvester v. State, 72 Ala. 201; Johnson v. State, 29 Ark. 31; State v. Belden, 33 Wis. 120; State v. Helm, 61 N. W. 246.

To put the defendant twice in jeopardy, he must be a second time put upon his trial before a jury impaneled, sworn and charged with his deliverance. Com. v. Fitzpatrick, 121 Pa. St. 109, 6 Am. St. Rep. 757, 1 L. R. A. 451; Hilands v. Com., 56 Am. Rep. 235; State v. Parker, 24 N. W. 225; Ex parte Fenton, 19 Pac. 267; People v. Hinckeler, 48 Cal. 331; State v. Parish, 43 Wis. 395; Cooley on Const. Lim. 326.

Jeopardy begins as soon as the jury is sworn. Wright v. State, 5 Ind. 290, 61 Am. Dec. 95; Com. v. Cook, 6 Sargt. & R. (Pa.) 577; State v. Norvall, 2 Yerg. (Tenn.) 24; Pizano v. State, 20 Tex. App. 139; Morgan v. State, 13 Ind. 215; People v. Webb, 38 Cal. 467; Nolan v. State, 21 Am. Rep. 281.

If a jury after being sworn is discharged without a verdict, no legal ground of discharge being shown, the effect is the same as a verdict of acquittal. State v. Calendine, 8 Iowa, 288; State v. Tatman, 59 Iowa, 471, 13 N. W. 632; Josephine v. State, 39 Miss. 613; Teat v. State, 53 Miss. 439; King v. People, 5 Hun. 297; Com. v. Cook, supra; Com. v. Fitzpatrick, supra; Hilands v. Com., 1 Cent. Rep. 899, 56 Am. Rep. 235; McCorkle v. State, 14 Ind. 39; Adams v. State, 99 Ind. 244; Powell v. State, 17 Tex. App. 345; People v. Gardner, 29 N. W. 19; Com. v. Smith, 149 Mass. 9, 20 N. E. 161; Lee v. State, 26 Ark. 260; People v. Cage, 48 Cal. 323; Ex parte Sndyer, 29 Mo. App. 256; State v. McLee, 1 Bail. L. 651.

And so when case is determined on a motion for a discharge after the conclusion of the state's case. State v. Hubbell, 51 Pac. 1039;

Const. U. S. Amend., Art. 5; Cooley on Const. Lim. sections 326, 327.

An arbitrary discharge of a jury without a sufficient cause, and without the consent of the defendant, operates as an aquittal. Hilands v. Com., 6 Atl. 267, 56 Am. Rep. 235; Haskins v. Com., 1 S. W. 730; State v. Falconer, 30 N. W. 655; State v. Ward, 2 S. W. 191; State v. Walker, 26 Ind. 346; People v. Barrett & Ward, 2 Caine's Cases, 100-304; Mount v. State, 14 Ohio, 295, 45 Am. Dec. 542; O'Brien v. Com., 9 Bush. 333, 15 Am. Rep. 715; McDonald v. State, 48 N. W. 863, 24 Am. St. Rep. 740; Powell's Case, 17 Tex. Ct. App. 345.

A person is once in jeopardy whenever he has been given in charge, on a legal indictment to a regular jury, and if the jury is unnecessarily discharged, the discharge is equivalent to a verdict of acquittal. Wright v. State, 5 Ind. 290, 61 Am. Dec. 90; Weinzorplin v. State, 7 Blackf. 194; Miller v. State, 8 Ind. 325; Reese v. State, 8 Ind. 416; Morgan v. State, 13 Ind. 215; Joy v. State, 14 Ind. 139; State v. Walker, 26 Ind. 346; People v. Webb, supra.

A conviction of murder in the second degree is an acquittal of murder in the first degree. McClain's Crim. Law, section 390; Sylvester v. State, 72 Ala. 201; Johnson v. State. 29 Ark. 31; State v. Belden, 33 Wis. 120; State v. Helm, 61 N. W. 246; State v. Tweedy, 11 Iowa, 350; People v. Gilmore, 4 Cal. 376, 60 Am. Dec. 620; State v. Ross, 29 Mo. 32; Brennon v. People, 15 Ill. 511; Barnett v. People, 54 Ill, 325; State v. Dunn, 41 La. An. 610.

When the offense on trial is a necessary element in, and constitutes an essential part of, another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to a prosecution for the other. State v. Cross, 101 N. C. 770, 9 Am. St. Rep. 53 and note; People v. Pearl, 42 N. W. 1109, 15 Am. St. Rep. 304; State v. Yanta, 38 N. W. 333; Roberts v. State, 58 Am. Dec. 544 and note; State v. Cooper, 13 N. J. L. 361, 25 Am. Dec. 490; Dankey v. Com., 17 Pa. St. 126, 55 Am. Dec. 542; Bull v. State, 48 Ark. 94; Roberts v. State, 14 Ga. 8, 58 Am. Dec. 528; Fiddler v. State, 7 Humph. 508; Com. v. Curtis, Thacker Cr. Cases, 206; U. S. v. Gilbert, 2 Sumn, 42, 3 Greenleaf Ev., section 35; State v. Hornsby, 41 Am. Dec. 314; Barnett v. People, 54 Ill. 325; People v. Knapp, 26 Mich. 112; State v. Lessing, 16 Minn. 64; State v. Smith, 53 Mo. 139; Keefe v. People, 40 N. Y. 348; People v. Thompson, 41 N. Y. 1.

A conviction of murder in the second degree is an acquittal of the higher offense, and on second trial accused cannot be convicted of murder in the first degree. Lewis v. State, 51 Ala. 1; Mitchell v. State, 60 Ala. 26; Sylvester v. State, 72 Ala. 201; Johnson v. State, 29 Ark. 31, 21 Am. Rep. 154; Johnson v. State, 27 Fla. 245, 9 So. 208; Golding v. State, 31 Fla. 262, 12 So. 525; State v. Helm, 92 Iowa, 540, 61 N. W. 246; State v. Ross, 29 Mo. 32; Jones v. State, 13 Tex. 168, 62 Am. Dec. 550; Parker v. State, 22 Tex. App. 105, 3 S. W. 100; Smith v. State, 22 Tex. App. 316, 3 S. W. 684; State v. Murphy, 43 Pac. 44; People v. McDaniels, 69 Pac. 1006; People v. Defoor, 34 Pac. 642; 1 Bish. New Crim. Law, section 1057; Reg. v. Stanton, 5 Cox Cr. Cases, 324.

The plea of autrefois convict is supported by proof of a lawful trial and verdict, though no judgment be given upon it. Shepherd v. People, 25 N. Y. 406; People v. Taylor, 3 Denio. 97; Mount v. State, supra, State v. Benham, 7 Conn. 414; State v. Norvell, 24 Am. Dec. 458; Dyer v. Com. 23 Pick. 402; People v. Goodwin, 18 John. 202; Hartung v. People, 26 N. Y. 167, 28 N. Y. 412.

If through misdirection of the judge in matter of law a verdict is improperly rendered, it can never afterwards, on application of the prosecution, in any form of proceeding be set aside. People v. Terrill, 64 Pac. 894; 1 Bish. Crim. Law, section 665; People v. Webb, supra; People v. Horn, 11 Pac. 470; People v. Roberts, 45 Pac. 1016.

The utmost favor is always extended to verdicts. They are not to be construed as strictly as pleadings are. Whenever the court can collect the clear meaning of the jury from the findings, it is bound to mould it into form and make it serve. Wittick v. Traun, 27 Ala. 562, 62 Am. Dec. 778; Moody v. Keener, 7 Port. (Ala.) 218; Tippin v. Patty, 7 Port. (Ala.) 44; Picket v. Richet, 2 Bivv. (Ky.) 178; Jeansch v. Lewis, 48 N. W. 128; People v. McCarty, 48 Cal. 557; People v. Welch, 49 Cal. 174; People v. Buckley, 49 Cal. 241; People v. Perdue, 49 Cal. 425; State v. Benham, 7 Conn. 414; Prennan v. People, 15 Ill. 517; People v. Cook, 10 Mich. 164; Teat v. State, 53 Miss. 439; Hartung v. People, 26 N. Y. 167; Mount v. State, supra; Nolan v. State, 21 Am. Rep. 281; Keeley v. People, 56 Am. Rep. 184; State v. Blaisdell, 59 N. H. 328; People v. Travers, 19 Pac. 268.

A permissive word should be construed as peremptory, when used to clothe a public officer with power to do an act which ought to be done for the sake of justice, or which concerns the public in-

terests or the right of a third person. State v. Kent, 4 N. D. 577, 62 N. W. 631; Culter v. Howard, 9 Wis. 309; Sutherland on Statutory Construction, p. 597; Supervisors v. U. S., 4 Wall. 435, 18 L. Ed. 419; 20 Am. & Eng. Enc. Law, 242; Fowler v. Perkins, 77 Ill. 271; Low v. Dunham, 61 Me. 566; State ex rel. Jones v. Loughlin, 73 Mo. 443; Cutler v. Howard, 9 Wis. 309; Potters Dwarris on Statutes, 220.

The verdict at Langdon was a valid verdict. It is general on the merits and finds the defendant guilty of murder in the second degree, and should have been accepted and recorded. State v. Maloney, 7 N. D. 119, 72 N. W. 927; 1 Bish. New. Cr. Proc., section 1005; State v. Ryan, 13 Minn. 370 (Gil. 343); Hart v. Hate, 38 Tex. 383; State v. Arnold, 42 N. E. 1095.

The right of the trial court to discharge the jury before verdict exists only in cases of extreme and absolute necessity. State v. Callendine, 8 Iowa, 288; People v. Cage, 48 Cal. 323; Mount v. State, supra; 1 Bishop Crim. Law, section 1041; Mitchell v. State, 42 Ohio St. 383; O'Brien v. Com., 9 Bush. 333; U. S. v. Shoemaker, 2 McLean, 114; People v. Goodwin, 18 Johns. 187; U. S. v. Coolidge, 2 Gall. 364; People v. Arnett, 61 Pac. 930; People v. Curtis, 17 Pac. 941; Com. v. Cook, 6 Sergt. & Rawle, 577, 9 Am. Dec. 465; State v. McKee, 21 Am. Dec. 502.

An improper discharge of a jury without the defendant's consent is equivalent to his acquittal. State v. Costello, 69 Pac. 1099; 1 Bishop New Crim. Law, sections 992-1073; 1 Bishop Cr. Proc., section 821; State v. Hubbell, 51 Pac. 1039; People v. Jones, 12 N. W. 848; People v. Harding, 19 N. W. 155; State v. Richardson, 25 S. E. 220, 35 L. R. A. 238; 11 Am. & Eng. Enc. Law, 949; 1 Bish. Cr. Proc., paragraph 821; Com. v. Cook, supra; State v. McKee, supra; Mahala v. State, 31 Am. Dec. 591; Poage v. State, 3 Ohio St. 230; Grant v. People, 4 Parker Cr. R. 527; Jones v. State, 97 Ala. 77, 38 Am. St. Rep. 150; Ex parte Maxwell, 11 Nev. 428; Bell v. State, 44 Ala. 393; Atkins v. State, 16 Ark. 568; Weinzorplin v. State, 7 Blackf. 186; Wright v. State, 61 Am. Dec. 90; McCorkle v. State, 14 Ind. 39; State v. Callendine, 8 Iowa, 288.

The weight of authority is against the principle that a constitutional right may be waived. Ex parte Glenn, 111 Red. 257; Prine v. Com., 19 Pa. 103; Cancemi v. People, 18 N. Y. 128; Spurgeon v. Com., 10 S. E. 979; People v. McKay, 18 Johns. 212; Pierson v. People, 79 N. Y. 424; Allen v. State, 54 Ind. 461; State v. Carman, 63 Iowa, 130; Hill v. People, 16 Mich. 351; Hopt v. Utah,

110 U. S. 574; 28 L. Ed. 262; State v. Richardson, 25 S. E. 220, 35 L. R. A. 238; People v. McKay, 18 Johns. 212; Thompson v. Utah, 170 U. S. 343, 42 L. Ed. 1061, 18 Sup. Ct. Rep. 620.

Submission to the jury of special pleas is the better practice and is sustained by principle and the weight of authority. Lee v. State, 26 Ark. 260, 7 Am. Rep. 611; Rex v. Roche, 7 Leach, 160; Am. Cr. Law, Vol. 1, section 538; Hill v. State, 2 Yarg. 248; The State v. Copeland, 2 Swan. 662; Clem v. State, 48 Ind. 420; Thompson v. United States, 155 U. S. 271, 38 L. Ed. 146; State v. Hudkins, 13 S. E. 367; Daniels v. States, 78 Ga. 98, 6 Am. St. Rep. 238.

George M. Price, State's Attorney, for respondent.

The jury is bound to receive the law as laid down by the court. Williams v. State, 66 Am. Dec. 615; sections 81-83, Rev. Codes 1899.

The court's declaration that a verdict did not conform to law, as far as the case on trial is concerned, settled the law. It is the conclusive province of the court to determine all questions of law. Sparf. v. U. S., 156 U. S. 51, 15 Sup. Ct. Rep. 273; U. S. v. Keller, 19 Fed. 633; Withers v. State, 117 Ala. 89; Rynon v. State, 67 Am. St. Rep. 163; People v. Ivey, 49 Cal. 56; People v. Anderson, 44 Cal. 65; State v. Reilly, 73 N. W. 356; State v. DeLong, 12 Iowa, 453; State v. Moore, 81 Iowa, 578; State v. Bowen, 16 Kan. 475; People v. Neumann, 48 N. W. 290; People v. Mortimer, 48 Mich. 37; Parrish v. State, 14 Neb. 60; People v. Bennett, 49 N. Y. 137; Armstrong v. Keith, 20 Am. Dec. 133; Duffy v. People, 26 N. Y. 588; Com. v. McMannus, 143 Pa. St. 64.

The form of the verdict is a question of law, and when once decided is final. Grand v. State, 23 L. R. A. 723.

The court has power to direct a jury to amend their verdict. People v. Dick, 34 Cal. 663; People v. Jenkins, 56 Cal. 4; Mangum v. State, 13 S. E. 558; State v. Anderson, 24 S. C. 109; Robinson v. State, 4 S. W. 904; Pehlman v. State, 17 N. E. 270; State v. Bishop, 73 N. C. 44; Com. v. Nicely, 18 Atl. 737; State v. Linney, 52 Mo. 40; State v. Waterman, 1 Nev. 453.

The court has the right to discharge the jury upon a failure to agree. State v. Gamble, 45 Atl. 716; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. Rep. 617; Barrett v. State, 35 Ala. 406; Lee v. State, 7 Am. Rep. 611; People v. Cage, 48 Cal. 323; State v. Vaughn, 29 Iowa, 286; State v. Woodruff, 2 Am. Dec. 122; State v. Jorgenson, 32 Pac. 1129; State v. White, 27 Am. Rep. 137; Thompson v. Com., 25 S. W. 1059; Richard v. Page, 81 Mo. 563;

Com. v. Purchase, 13 Am. Dec. 452; People v. Schoneth, 7 N. W. 70; Helm v. State, 67 Miss. 562; People v. Whitson, 111 N. C. 695; State v. Stephenson, 54 S. C. 234; State v. Crane, 4 Wis. 400.

It was right to submit special pleas together with the merits to the same jury at the same time, charging them to first determine the special pleas and then proceed to the merits. People v. Briggs, 1 Ter. R. 293; Territory v. King, 6 Dak. 131, 50 N. W. 623; People v. Connor, 36 N. E. 807; State v. Hudkins, 13 S. E. 367.

YOUNG, J. On February 11, 1901, an information was filed in the district court of Cavalier county by the state's attorney of that county, charging the defendant with the murder of one Andrew Mellem, alleged to have been committed on the 3d day of January, 1901. The defendant was tried in the following July, and the jury returned a verdict of guilty of murder in the first degree, and fixed his punishment at life imprisonment. The judgment entered in pursuance thereof was reversed for prejudicial errors occurring at the trial, and the defendant was remanded for a new trial. State v. Barry, 11 N. D. 428, 92 N. W. 809. The second trial was commenced at Langdon, Cavalier county, on the 3d day of November, 1903, before the Honorable John F. Cowan, acting at the request of Honorable W. J. Kneeshaw, judge of said district. The jury was impaneled and sworn on the 16th day of November, 1903. Evidence was submitted, arguments made, and the jury charged with the defendant's delivery on the 28th day of November, 1903, at 9 o'clock a. m., and thereafter, at 11:30 p. m. on the same day, the jury returned into court a verdict finding the defendant guilty of murder in the second degree, and fixing his punishment therefor at a period of seven years in the penitentiary. The court refused to accept this verdict, and returned it to the jury. The jury, having failed to return any other or different verdict, was discharged by the court on the 30th day of November, 1903, and the defendant was remanded to the custody of the sheriff without bail. Thereafter the state, over defendant's objection, secured a change of the place of trial to Walsh county, and the trial commenced on May 31, 1904. At the opening of the trial the defendant interposed the pleas of former jeopardy, former acquittal, and former conviction, in addition to his previous plea of not guilty, and presented proper proof in support of such pleas. These pleas were severally overruled by the trial judge, and, under his direction, the jury found against

the defendant as to each of them. A verdict of murder in the first degree was returned, and the punishment of the defendant was fixed at imprisonment for life. The defendant has appealed from the judgment entered on this verdict.

Counsel for defendant relies entirely upon the pleas of former jeopardy, former acquittal and former conviction as grounds for reversal. The proof offered in support of these pleas shows that at the previous trial the court instructed the jury that they might, under the law and evidence, return a verdict either for murder in the first degree or murder in the second degree; that the penalty for murder in the first degree was either death or life imprisonment, and for murder in the second degree imprisonment in the penitentiary not less than ten nor more than thirty years; and that it was their duty to designate the punishment. It also shows that on November 28, 1903, the jury, after having retired and deliberated from 9 o'clock a. m. to 11:30 p. m., returned into court, when they were asked by the presiding judge if they had agreed upon a verdict, and the foreman answered that they had, and presented the following verdict: "State of North Dakota, County of Cavalier. In District Court, Seventh Judicial District. The State of North Dakota, plaintiff, vs. William Barry, defendant. Verdict: We, the jury in the above-entitled action, find the defendant, William Barry, guilty of the crime of murder in the second degree as charged in the information, and we do hereby fix and determine that he shall be imprisoned in the penitentiary for the term of seven (7) years as his punishment therefor. E. E. Sherwin, Foreman." The trial judge refused to accept this verdict, and instructed the jury as follows: "I cannot accept the verdict which you have presented to the court, as it does not conform to any one of the verdicts which you may bring in under the evidence in this case, and the law as laid down by the court to you. Carefully read the instructions which I have heretofore given to you, that you may learn the proper verdict and the several penalties laid down by the law as I have declared it to you. I return to you the proposed verdict submitted by you to this court. I also submit to you another blank verdict of the same form and substance as the one returned. When you return the verdict you may agree upon, use pen and ink in signing it." Thereafter, in answer to requests, the following instructions were given: "In answer to your written request for further instructions as to the law in the case now before you, I charge you that the date of the information in this action has noth-

ing whatever to do with the terms of the verdict to be returned by you. Your verdict will date from the time it is rendered." Again: "In response to your request for further instructions in the case of State of North Dakota v. William Barry, I charge you that this case is now in your hands for your consideration, determination and verdict, under the law as laid down by the court to you, and upon the evidence submitted to you, as though there never had been any other trial of it. You should follow the instructions of the court as to the law. Read them carefully." On Monday, November 30, 1903, at 2:30 p. m., and thirty-nine hours after they had returned the verdict hereinbefore set out, the jury again returned into court, and stated to the court that they could not agree upon a verdict, whereupon they were discharged, and defendant remanded to the custody of the sheriff without bail.

The question of the legality of the judgment under which the defendant is now confined, and from which this appeal is prosecuted, is raised by several assignments of error. It is perhaps most clearly presented by the refusal of the trial judge to give the following instructions which were requested by the defendant: "The defendant, William Barry, has been heretofore, at a regular term of the district court of the county of Cavalier, in this state, begun and held at Langdon, in the month of November, 1903, arraigned and pleaded under the information upon which he is now on trial. The court so held in Cavalier county was a competent court to try the defendant, and had full jurisdiction of the defendant, and of the offense for which he was arraigned, and to which he pleaded not guilty. The information upon which he was tried was sufficient in form and substance to support a verdict by the jury. The jury was duly impaneled and sworn, testimony both for the state and defendant was offered and heard, arguments were made by the counsel for the state and the defendant, the jury was instructed by the court, charged with the deliverance of the prisoner, and the entire matter submitted to the jury for its verdict. Such jury was duly impaneled and sworn, and the trial of the defendant commenced on the 16th day of November, 1903, and continued thereafter until the 28th day of November, 1903, when the jury so impaneled, sworn and charged, returned into court with a verdict. * * * The verdict rendered by the jury found the defendant, William Barry, guilty of murder in the second degree, and sentenced him to imprisonment in the state penitentiary for a period of seven years, and was a valid and legal verdict." It is

insisted that the refusal of the trial court to give the foregoing instructions, and to further instruct the jury to sustain the defendant's pleas of former jeopardy, former conviction and former acquittal, was error. It is contended that the verdict returned upon the former trial was a legal and valid verdict, and sufficient in form and substance not only to authorize, but also to require, the trial judge to pronounce judgment thereon. And, as against the verdict and judgment in pursuance of which the defendant is now undergoing punishment, he invokes the protection of section 13 of the state constitution, which provides that "* * * no person shall be twice put in jeopardy for the same offense, * * *" and article 5 of the amendments to the federal constitution, of like tenor and import: "* * * Nor shall any person for the same offense be twice put in jeopardy of life and limb. * * *" If counsel's position as to the legality of the former verdict and the court's duty in reference thereto is correct, it is apparent that the defendant's pleas should have been sustained. There is, then, but one question which requires consideration, and that is whether the former verdict was legal and valid, and such a verdict as under our statutes the trial judge was required to receive. If it was, the subsequent trial, in which the jury returned a verdict of guilty of murder in the first degree and fixed the punishment at imprisonment for life, was without authority of law and void. The answer to this question turns upon the construction to be given to section 8246, Rev. Codes 1899, and the proviso contained therein relating to verdicts in criminal cases in which the jury has affixed either a less or greater punishment than that prescribed by law. That section reads as follows:

"If the jury return a verdict of guilty against the accused, the court must before it is accepted ascertain whether it conforms to the law of the case. If, in the opinion of the court, the verdict does not conform to the requirements of the law of the case, the court must, with proper instructions as to the error, direct the jury to reconsider the verdict, and the verdict cannot be accepted or recorded until it is rendered in proper form. But, if the punishment imposed by the jury in the verdict, in cases where the jury are authorized by law to determine the punishment, is not in conformity to the law of the case in that regard, the court may proceed as follows:

"(1) If the punishment imposed by the jury in the verdict is under the limit prescribed by law, for the offense of which the

defendant is found guilty, the court may receive the verdict and thereupon render judgment and pronounce sentence for the lowest limit prescribed by law in such cases; or,

"(2) If the punishment imposed by the jury in the verdict is greater than the highest limit prescribed by law, for the offense of which the defendant is found guilty, the court may disregard the excess and render judgment and pronounce sentence according to the highest limit prescribed by law in the particular case."

We are of the opinion that the appellant's contention is sound and must be sustained. The proviso contained in the section just quoted, which excepts verdicts which do not conform to the law of the case in respect to the punishment imposed from the class of verdicts which may be returned to the jury, was first introduced in this jurisdiction in the revision of 1895. That part of the section which confers upon trial judges the general power to return verdicts with proper instructions when in their opinion they do not conform to the law of the case is in substance but a re-enactment of section 7431, Comp. Laws 1887, which is also perpetuated without change in section 8248, Rev. Codes 1899. The proviso, however, is new, and it is entirely clear that the purpose of the legislature in adding it was to take verdicts in which the only objectionable feature relates to the extent of the punishment affixed out of the class of verdicts which the court is authorized to return to the jury for reconsideration.

The verdict in question in this case, it will be seen, responds directly to the issue of defendant's guilt or innocence of the crime with which he was charged. It finds him "guilty of the crime of murder in the second degree," and in this respect is not subject to criticism. In fixing the period of defendant's punishment, however—and this is the only objectionable feature—it designates seven years, which is less than the minimum period for murder in the second degree. The question, then, is whether the verdict, notwithstanding this fact, is, in view of the proviso contained in section 8246, supra, a legal and valid verdict. In our opinion, this question must be answered in the affirmative. It is just such a verdict as is described in that section. It is unobjectionable, save that it fixes a shorter period of punishment than is authorized by statute for murder in the second degree. In the latter respect it did not conform to the law of the case. That fact, however, does not make it either insufficient or illegal, for the legislature, in the section just referred to, has removed verdicts like this from the

class of defective and illegal verdicts by expressly declaring that "if the punishment imposed by the jury in the verdict is under the limit prescribed by law for the offense of which the defendant is found guilty, the court may receive the verdict and thereupon render judgment and pronounce sentence for the lowest limit prescribed by law in such cases." So, too, and for the same reason, this section declares than when the punishment fixed is too great, and the verdict is otherwise sufficient, the court is authorized to pronounce judgment for the highest punishment allowed by law. In either event, and in every case to which the proviso applies, the court is given the power to pronounce judgment, and the judgment which it is authorized to pronounce is not that the defendant shall be punished for a period fixed by the court in its discretion, but for a period of time fixed by the legislature itself, i. e., the highest or the lowest period named by the statute for the crime of which the defendant is found guilty, as the verdict returned shall require.

It does not admit of doubt that had the trial judge in this case received the verdict and pronounced judgment upon it for the minimum period of punishment prescribed for murder in the second degree—that is, ten years—as the legislature has declared he may do, the judgment would have been in all respects regular and lawful. This is conceded by the counsel for the state. Their contention is, however, that it is optional with the trial judge whether he will or will not exercise the power which is given by this statute. It is said that the statute is not mandatory, but permissive, and that he may act under it or disregard it at his option. We are all agreed that this contention cannot be sustained. Section 8246, supra, clothes trial judges with power to pronounce judgment upon verdicts like the one in question. As to this there is no controversy. But does it do more than merely create the power? Does it not in fact impose the duty? We are clear that it does. True, the language in which the power is conferred is permissive in form, but that fact is not controlling. The question as to whether a statute is mandatory or directory depends upon the intent of the legislature, and not upon the language in which the intent is clothed. "The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other." Black on Interpretation of Law, section 124.

It is well settled "that permissive words are peremptory when used to clothe a public officer with power to do an act which ought to be done for the sake of justice, or which concerns the public interests or the rights of third persons." Sutherland on Statutory Construction, 597; Black on Interpretation of Law, section 125. In obedience to this general rule, this court held, in State v. Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518, that the permissive word "may," in the statute empowering district judges to call in another judge on the filing of an affidavit of prejudice in felony cases, should be construed as "must." The rule of construction in England in construing acts of parliament, and in this country in construing statutes, is that, "when the statute directs the doing of anything for the sake of justice or the public good, the word 'may' is the same as the word 'shall,' for he is compelled to do it." Rex v. Barlow, 2 Salk. 609; Supervisors v. U. S., 71 U. S. 435, 18 L. Ed. 419, and cases cited. The power in such cases is not granted for the benefit of the donee of the power, but for the benefit of the public or third persons; and it is held that the grant does not devolve a mere discretion upon the donee, but imposes a positive and absolute duty. In Endlich on Statutory Construction, sections 306 and 310, it is said: "Statutes which authorize persons to do acts for the benefit of others, or, as it is sometimes said, for the public good or the advancement of justice, have often given rise to controversy, when conferring the authority in terms simply enabling and not mandatory. In enacting that they 'may' or 'shall, if they think fit,' or 'shall have power,' or that 'it shall be lawful' for them to do such acts, a statute appears to use the language of mere permission; but it has been so often decided as to have become an axiom that, in such cases, such expressions may have, to say the least, a compulsory force, and so would seem to be modified by judicial exposition. * * * It would be difficult to believe that parliament ever intended to commit powers to public persons for public purposes for exercise or nonexercise in any such spirit. An enactment that a court or person 'may' swear witnesses, or that a justice 'may' issue a summons on complaint of an offense, or the chancellor a commission in a case of bankruptcy, is no mere permission to do such acts with a corresponding liberty to abstain from doing them. Whenever the act is to be done for the benefit of others, the word 'may,' or any of its equivalents, simply confers a power or capacity to do the act. It is facultative, not permissive; and neither by its own connotation, nor by force

of any legal principle, does it necessarily imply an option to abstain from doing the act. On the contrary, it is a legal, or rather a constitutional, principle, that powers given to public functionaries or others for public purposes or the public benefit are always to be exercised when the occasion arises. * * * The Supreme Court of the United States similarly laid it down that what public officers are empowered to do for a third person, the law requires shall be done whenever the public interest or individual rights call for the exercise of the power; since the latter is given not for their benefit, but for his, and is placed with the depositary to meet the demands of right and prevent the failure of justice. In all such cases, the court observed, the intent of the legislature, which is the test, is, not to devolve a mere discretion, but to impose a positive and absolute duty." See cases cited in 20 Am. & Eng. Enc. Law, 239. Under the foregoing rule of construction, and to give effect to the obvious intent of the legislature, it is clear that section 8246 must be held to be mandatory, and that it was the absolute duty of the trial judge in this case to receive the verdict and pass judgment thereon. The manifest purpose of the legislature in adding this proviso was to prevent a miscarriage of justice in criminal trials, where the only objectionable feature of the verdict returned relates to the measure of punishment affixed. This it did by fixing the period of punishment which should be inflicted in all such cases, and authorizing the trial judge to pronounce judgment. Such verdicts, in view of our statute, are not defective. They are just as certain as to the punishment as though the penalty designated by the legislature was written in each verdict. The verdict in question in this case is as certain as though the jury had written into it ten years instead of seven years, for that is the period of punishment which the legislature has declared shall be pronounced under the conditions presented by this verdict. The provisions contained in section 8246, which control our decision in this case, are not common. So far as we are able to ascertain, Missouri is the only state that has the same or a similar statute. The statute has been applied in that state in a series of cases, and it has been held without question to impose a duty upon trial judges to pronounce judgment upon verdicts which come within its terms. State v. McQuaig, 22 Mo. 319; State v. Sears, 86 Mo. 169; State v. Snyder, 98 Mo. 555, 12 S. W. 369; State v. Dalton, 106 Mo. 463, 17 S. W. 700; Ex parte John Snyder, 29 Mo. App. 256; State v. Tull, 119 Mo. 421, 24 S. W.

1010. The Missouri statute uses the word "shall" instead of the permissive word "may." This difference, however, as we have seen, under the rules of construction hereinbefore stated, and the obvious purpose of the statute, has no controlling significance.

It follows from what we have said, that the verdict returned by the jury upon the former trial and on November 28, 1903, was in all respects a legal and valid verdict, and that it was the duty of the trial judge to receive the same and to enter judgment upon it for the minimum period fixed by the legislature for murder in the second degree, to wit, ten years, and that the subsequent trial and verdict was without authority of law and void, and the trial court exceeded its authority in sentencing the defendant to life imprisonment. The only valid verdict was that of November 28, 1903, and the punishment designated by the legislature under that verdict was ten years. Although judgment was not entered upon that verdict, the defendant has been restrained of his liberty because of it, and the period of his lawful imprisonment must therefore be deemed to have begun when judgment should have been entered. See State v. Snyder, 98 Mo. 555, 12 S. W. 369.

Instead of directing the entry of a new judgment nunc pro tunc as of the date of the verdict, we have concluded to modify the judgment appealed from. The district court is accordingly directed to modify its judgment so that the period of defendant's imprisonment will be the same as it would have been if the ten-year sentence had been imposed upon the return of the former verdict, November 28, 1903, and, as thus modified, the judgment will be affirmed. All concur.

ENGERUD, J., having been of counsel, did not sit in the above case; HON. C. J. FISK, Judge of the First Judicial District, sitting by request.

(103 N. W. 637.)

THE HOUGHTON IMPLEMENT COMPANY, A CORPORATION, v. THOMAS DOUGHTY.

Opinion filed May 31, 1905.

Sale — Action for Price — Evidence of Value.

1. In proving the value of an engine under an answer alleging it to be worthless on account of defects within the terms of a written warranty, the evidence should be confined to the value of the engine

when delivered, and not to a time after its delivery, when it was in a different condition on account of breakages.

Same — Warranty.

2. Evidence considered, and *held* insufficient to sustain a verdict that an engine purchased under a written warranty was worthless.

Same — Extent of Warranty.

3. A written warranty of the quality of an article cannot be enlarged by proof of parol warranties of quality made before the written warranty was made.

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

Action by the Houghton Implement Company against Thomas Doughty. Judgment for defendant, and plaintiff appeals.

Reversed.

Bosard & Bosard, for appellant.

In face of a waiver of all damages for a failure to ship promptly a purchaser cannot rescind his purchase. If he had such right of rescission, he should have refused to receive the article purchased, and promptly given notice of his right to rescind. Failing this, and keeping the article two and a half months before signifying his refusal to settle and before tendering it back, bars his right of rescission. Reeves & Co. v. Corrigan, 3 N. D. 415, 57 N. W. 80; Jaggers v. Griffin, 43 Miss. 134; Simpson Brick Press Co. v. Marshall, 59 N. W. 728; Shull v. New Bridsell Co., 86 N. W. 654; Gale Sulky Harrow Mfg. Co. v. Stark, 26 Pac. 8; Alpha Check Rower Co. v. Bradley, 75 N. W. 369; Windlander et al. v. Jones, 42 N. W. 333; Hobbs v. Whip Co., 158 Mass. 194.

McCue & Leslie, for respondent.

MORGAN, C. J. Action for the recovery of $1,280 and interest, the purchase price of one twenty-five horse power Lightning balanced gasoline engine, sold by the Kansas City Hay Press & Machinery Company to the defendant on August 23, 1902. The plaintiff is now the owner of the claim for said purchase price by due assignment thereof to it. The engine was sold under a written order providing for the giving of secured notes for the purchase price. The engine was delivered to the defendant on August 23, 1902, and kept by him until the trial. Prior to November 6, 1902, plaintiff wrote him in regard to settlement for the engine, and on

that day defendant wrote plaintiff, refusing to settle for it. This suit was thereupon commenced. The defendant answered, and alleged, among other matters claimed as defenses, that the engine was purchased under a warranty of the quality and proper construction of the engine, and that it was "strictly a first-class engine in every respect," and would give perfect satisfaction; and that it did not comply with such warranty, and was wholly worthless, and of no value. A counterclaim was also pleaded for damages growing out of the breach of warranty. Damages were claimed in the sum of $1,387, the purchase price of the machine with freight added. The jury found a verdict in favor of the defendant. Plaintiff made a motion for a new trial, based upon a settled statement of the case, wherein it was assigned that the evidence was insufficient to sustain the verdict, and that errors of law in the admission of evidence at the trial were committed. The particulars in which the evidence was insufficient to sustain the verdict were specifically pointed out.

We are agreed that the evidence was not sufficient to sustain the verdict. The jury must have found either that the engine was worthless when delivered, or that the damages arising out of the alleged breach of warranty were equal to the amount claimed as due upon the purchase price of the engine. There is no evidence that the defendant suffered any substantial damages if it be conceded that there was a breach of warranty; hence that could not properly have been the basis of the verdict. The evidence that the engine was wholly worthless, and of no value, was of the most meager kind, conceding that the witnesses giving it were competent to testify as experts in regard to the value of the engine. The evidence as to the value of the engine was the following: The defendant was asked: "What is that engine worth in its present condition, or right after the breakage? Answer. I don't know whether it has any value or not." Another witness testified: "We failed to operate it. It could not be operated with safety. It broke in the first operation. It surely wasn't safe." And that, in his opinion, the engine could not be operated so as to produce any practical result. Another witness testified: "The engine could not be operated at all in its present condition. I can distinguish between an engine that has some value and one that has none. I wouldn't say that this one had any value at all for actual work. I mean that the engine itself would work, but wouldn't turn any power without any friction wheel." These

witnesses all testified to the value of the engine either at the time of the trial or after the wheel broke. No one testifies as to its value when delivered. No one testifies that the broken flywheel could not be remedied or replaced, or that the alleged defect in the cylinder could not be remedied. Whether the breaking of the wheel was due to poor workmanship or to defects in the materials, or the breaking was caused by inefficient operation, evidence of the value of the machine after it failed to work on account of breakage was not properly received. The evidence should have been directed to its value when received, or to its value after the repairs necessary to put it into the same condition as when received had been made. Section 4990, Rev. Codes 1899, prescribes the measure of damages in cases of breach of warranty of the quality of personal property to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over the actual value at that time. Proof of value must therefore refer to the time when the property was delivered under and pursuant to the warranty. Evidence of its value after trial and after breakages was inadmissible under the issues, and its receipt prejudicial error.

The evidence would not sustain the verdict had the same evidence as to the alleged worthlessness of the engine been confined to the time of its delivery, or after repairing and making it in the same condition as when received. The evidence is not based upon facts, and is of that character that a verdict is without support that is based upon it. One witness states that he does not know whether it has any value or not. Another says, "I wouldn't say that it has any value at all for actual work." Such testimony is negative, and will not support a verdict that an engine is worthless in the face of evidence that it was operated until it broke down, and in the absence of the fact that the alleged latent defects could not be remedied; and even in that case it cannot be claimed that the engine would be of no value whatever. For these reasons we are satisfied that the evidence was improperly received after objection, and that it would not, in any event, be sufficient to sustain the verdict.

It is claimed that the verdict is sustained under the evidence and pleadings that the engine was to be used as a sample to induce the sale of like machines. Without conceding such contention, it is sufficient to say that the written order for the engine states

that it was to be equipped for threshing purposes, and nothing is therein said as to its use as a sample engine.

It is further insisted that the verdict must stand for the reason that the evidence shows that the machine did not work in a manner satisfactory to the defendant. That contention cannot avail defendant if conceded to be good, as the defendant kept the engine without seasonable objection or notice. He would therefore be entitled only to damages actually sustained by him on account of the breach of warranty.

It is also urged that damages on account of the delay in delivering the engine were properly to be considered by the jury. The written order expressly provided that no damages were chargeable for delay in delivering the engine.

Appellant assigns other errors, but as they will not probably arise on another trial they need not be mentioned.

The order refusing a new trial is reversed, a new trial granted, and the cause remanded for further proceedings. All concur.

(104 N. W. 516.)

THE STATE OF NORTH DAKOTA v. ELLA FORRESTER.

Opinion filed June 5, 1905.

Trial — Impeachment of Verdict By Jurors' Affidavits.

1. Affidavits of jurors are not admissible to impeach their verdict upon the alleged ground that they misunderstood the instructions of the court, or to show their reasons for agreeing to a verdict.

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

Ella Forrester was convicted of grand larceny, and appeals.

Affirmed.

H. F. Miller, attorney for appellant.
J. W. Tilly, of counsel.

The verdict of a jury arrived at in any other way or manner than by the sound judgment, dispassionate consideration and conscientious reflection of an individual juror should be set aside.

Meserve v. Shine, 37 Iowa, 253; Goodsell v. Seeley, 46 Mich. 623; Donner v. Palmer, 23 Cal. 40; Hauk v. Allen, 11 L. R. A. 706; Randolph v. Lampkin et al., 14 S. W. 538; Ostrander v. City of Lansing, 70 N. W. 332, 160 Mich. 395; Witchell v. Ehle, 10 Wend. (N. S.) 595.

Affidavits or oral evidence will be received to show the method of the jury in arriving at a verdict. See cases cited above.

William H. Barnett, State's Attorney, and *Seth W. Richardson,* Assistant State's Attorney for Cass county, for respondent.

Affidavits of jurors are inadmissible to impeach their verdict. Bartlett v. Patton, 5 L. R. A. 523; Murphy v. Murphy, 9 L. R. A. 820; Hauk v. Allen, 11 L. R. A. 706; State v. Kiefer, 91 N. W. 1117; Gaines v. White, 47 N. W. 524.

MORGAN, C. J. The defendant was informed against jointly with her husband upon a charge of grand larceny alleged to have been committed on October 17, 1904, and, after a separate trial upon her demand, was found guilty and sentenced to four years of imprisonment in the penitentiary. She moved for a new trial upon the following grounds: First. "Because the verdict arrived at and returned by the jury * * * was not arrived at by a fair expression of opinion on the part of all the jurors who tried said case, but, on the contrary, the said verdict was arrived at under an agreement entered into between the several members of said jury, which agreement was made upon and under a misapprehension and misunderstanding of the law and the charge of the court given them." Second. Because certain additional instructions given at the request of the jury were misleading and prejudicial to the defendant, and the jury were misled by such instructions as a matter of fact. The motion was based upon the affidavits of three of the jurors who tried the case, and the additional instructions given by the court which are claimed to be erroneous. Neither the evidence nor the original instructions are brought to this court. The affidavit jointly made by the three jurors is in substance as follows, so far as material: That, after the jury had retired for deliberation upon a verdict, affiants concluded from the uncontroverted evidence that the defendant was not guilty of the crime of grand larceny as charged to have been committed on October 17th, and that they were therefore in favor of her acquittal. But the other jurors contended that the defendant might have stolen said goods prior to October 17, 1904, and that if she did steal said goods prior to said day she would be guilty, and "they insisted that they refer the difficulty to the judge of said court for further instructions on that point." After discussing the evidence, "It was finally agreed between those members of the jury who believed

that she should be found guilty that if the said court should instruct them further that they might find that she stole the goods at a date prior to said 17th day of October, 1904, that these affiants should vote with those who believed she should be found guilty, and convict said defendant; the other members of the jury believing her guilty at the same time agreeing that if the court instructed them that under the evidence they could not find her guilty of stealing the goods on any other day than said October 17th, that they would join with these affiants and those others who believed her innocent, and vote for her acquittal." Thereupon the jury was taken into court, and the foreman asked for further instructions upon this question: "Does the burden of proof rest with the state to show that the defendant took the piece of silk on the exact date as charged in the complaint?" The instruction as given by the court is here incorporated in the affidavit. The jury were told, in answer to the question, that the defendant might be found guilty if the evidence showed that she had taken the property on any date prior to October 17th within three years before the filing of the complaint. The affidavit then states that the jury returned to their room for further consideration of the case, and that the jurors who were for conviction insisted that the jurors who favored acquittal were bound to vote for conviction, and that they all thereupon voted for conviction. It is further stated: "And these affiants say that, had they fully understood the charge of said court as given to them at the time they asked for further instructions, they would not have consented or agreed to find said defendant guilty, for the reason that there was no proof on the part of the state, or otherwise submitted on the trial of said case, in any way tending to show that said defendant stole said goods at any date prior to said 17th day of October, 1904. And * * * they, in pursuance with their agreement with said other members of said jury, and for the purpose of making good their word in relation to said agreement, did then and there vote for her conviction, and consented that their verdict be returned accordingly, contrary to their conviction and best judgment; and that they would not have consented to such verdict of guilty except to carry out their said agreement above set forth." The state interposed a motion to quash the motion for a new trial, upon the grounds that the same was not made in time, and that affidavits of jurors are not admissible to impeach their verdict. The court denied the motion for a new trial upon the merits, without passing upon the questions

raised by the motion to quash. The defendant has appealed from the order denying the motion for a new trial.

If the affidavits of the jurors are not admissible, then the appeal is devoid of merits. The appellant's contentions all fail unless the affidavits are considered. Hence the admissibility of such affidavits is the sole question to be considered. The affidavit shows: (1) That the jury unanimously agreed upon a verdict, which was declared by the foreman in open court and recorded. (2) That at least three of the jurors did not believe that the defendant had been proven guilty, but agreed to find her guilty through a misunderstanding of the additional instructions given, and on account of the agreemnt between the jurymen to abide by the instructions of the court on the question as to whether the jury was limited to evidence of her having stolen the property on October 17th. The sole question presented, therefore, is whether the affidavit of jurors may be received to impeach a verdict duly rendered, recorded and acted on. We agree that such affidavits should not be considered in such a case, and that this rule is sustained by the great weight of authority and by the better reason. It would greatly tend to unsettle verdicts if a juror be permitted to say, after it is too late to be remedied, that he did not understand the charge of the court. To do so would result in continual embarrassment and interminable controversy after trials, although a verdict had been duly and solemnly announced. It would subject jurors to constant annoyance by being called upon to state the occurrences of the jury room, which ought to be kept secret as well as privileged. It would subject jurors to influences by corrupt parties in an effort to have them impair their verdict after they had ceased to act as jurors. Although injustice may at times result from thus holding verdicts solemnly rendered unassailable by affidavits of jurors as to their not understanding the charge or as to their reasons for agreements, we deem it the better rule, and subject to less liability to injustice, that a verdict actually rendered shall be conclusively deemed to be a verdict, and beyond impeachment by the declaration of a juror as to a mental condition existing when he agreed upon a verdict, or as to his reasons for so agreeing. What was said in Wright v. The Illinois & Mississippi Telegraph Co., 20 Iowa, 195, is applicable to the case under consideration: "While every verdict necessarily involves the pleadings, the evidence, the instructions, the deliberations, conversations, debates and judgments of the jurors themselves, and the effect

or influence of any of these upon the juror's mind, must rest in his own breast, and he is and ought to be concluded thereon by his own solemn assent to and rendition of the verdict (veredictum—a true declaration). To allow a juror to make affidavit against the conclusiveness of the verdict by reason of and as to the effect and influence of any of these matters upon his mind, which in their very nature are, though untrue, incapable of disproof, would be practically to open the jury room to the importunities and appliances of parties and their attorneys, and, of course, thereby to unsettle verdicts and destroy their sanctity and conclusiveness." There is no statute in this state permitting the use of the affidavits of jurors in criminal cases in any case. The following cases and many others hold that affidavits of jurors are not admissible to impeach a verdict on the ground that the charge was misunderstood, or to show their reasons for agreement: Saunders v. Fuller, 4 Humph. (Tenn.) 516; Schultz v. Catlin, 78 Wis. 611, 47 N. W. 946; People v. Wyman, 15 Cal. 70; Sheldon v. Perkins, 37 Vt. 550; People v. Soap, 127 Cal. 408, 59 Pac. 771; Territory v. Bannigan, 1 Dak. 451, 46 N. W. 597. See, also, cases cited Am. & Eng. Enc. Law, vol. 29, p. 1008, and volume 15, Cent. Dig. c. 210, section 2392. We therefore conclude, upon consideration of public policy, that jurors' affidavits impeaching their verdicts in such cases should not be received.

What has been said disposes of the further contention of the defendant that the affidavits show that the verdict was agreed upon "by any other means than a fair expression of opinion on the part of all the jurors," and therefore a ground for a new trial under subdivision 4 of section 8271 of the Revised Codes of 1899, providing that a new trial may be granted in such cases. The contention is that the agreement between the jurors brings the case within the terms of that section. The agreement was nothing more nor less than an agreement to call for further instructions upon a disputed question of law, and to be bound by such instructions. These instructions, it is claimed, were misunderstood, and the verdict rendered by these jurors under such misunderstanding. Under the cases cited, the affidavits were not admissible to prove either the agreement or the misunderstanding.

The order appealed from is affirmed. All concur.

(103 N. W. 625.)

S. F. KNIGHT v. THE BOARD OF COUNTY COMMISSIONERS OF CASS COUNTY, NORTH DAKOTA, ARTHUR G. LEWIS, AS COUNTY AUDITOR OF CASS COUNTY, AND M. S. MAYO, AS TREASURER OF CASS COUNTY, C. P. WALKER, F. P. WALKER AND J. F. WALKER, AND J. P. HARDY, COPARTNERS, AS WALKER BROS. & HARDY.

Opinion filed June 5, 1905.

Counties — Purchase of Supplies.

1. The purchasing of blank books, blanks and stationery for the use of county officers is to be made by a committee consisting of the county treasurer, county auditor and chairman of the board of county commissioners, pursuant to section 1906, Rev. Codes 1895, as amended by chapter 59, p. 69, Laws 1899.

Competitive Bids.

2. The purchase of blank books, blanks and stationery for the use of county officers need not be made under competitive bids under section 1925, Rev. Codes 1895, as amended by chapter 59, p. 69, Laws 1899.

Injunction.

3. The allegations of the complaint considered, and *held* not to state a cause of action for an injunction against the board of county commissioners to prohibit it from carrying out the terms of a contract for the furnishing of blank books, blanks and stationery to the county officers, although the power to enter into such contract is not vested in such board.

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

Action by S. F. Knight against the board of county commissioners of Cass county, and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Morrill & Fowler, for appellant.
Seth W. Richardson and *W. H. Barnett*, for respondents.

MORGAN, C. J. This action involves the power of the county commissioners to enter into contracts for furnishing blank books, blanks and stationery to the various county officers. The board of commissioners of Cass county advertised for bids to furnish such supplies, and in such advertisement it was stated that "schedules and other necessary information may be had on application to the county auditor after March 23, 1904." The Knight Printing Company and the firm of Walker Bros. & Hardy filed bids for fur-

nishing such supplies, and after consideration of both bids the board accepted the bid of Walker Bros. & Hardy, as the lowest bid. The board thereafter entered into a contract with said Walker Bros. & Hardy for the furnishing of such supplies. The plaintiff, as a taxpayer of Cass county, brought this action to enjoin the board and the county auditor and county treasurer from carrying out the provisions of said contract. The complaint alleges that the board of commissioners had no power to enter into such contract, for the reason that the proposal for bids did not contain sufficient facts and specifications as to the amount of books, blanks and stationery that would be required by the county, and that no competitive bids could be lawfully made, and no contract lawfully entered into, when based on bids in pursuance of such proposals, and that their action was for that reason ultra vires. The defendants demurred to the complaint on the ground that the facts stated therein do not constitute a cause of action. The demurrer was sustained by the court, and plaintiff appeals from the order sustaining the same.

The plaintiff's contention is that, the proposal for bids being silent as to the amounts required of the various articles, there can be no intelligent bidding, and therefore no competitive bidding, within the meaning of section 1925, Rev. Codes 1895, as amended by chapter 59, p. 69, Laws 1899, and that the contract was therefore void, having been entered into without authority of law. The contention involves a construction of sections 1906, 1925, Rev. Codes 1895, as amended by chapter 59, p. 69, Laws 1899. Section 1906, Laws 1895, prescribes as follows: "In addition to the powers hereinbefore mentioned such board shall have power: * * * (4) To furnish the necessary blank books, blanks and stationery for the clerk of the district court, county auditor, register of deeds, county treasurer, county judge, sheriff and state's attorney of its county, to be paid out of the county treasury; also a fire proof safe, when in its judgment the same shall be advisable, in which to keep all the books, records, vouchers and papers pertaining to the business of the board." In 1899 the legislature amended said section 1906 by adding thereto the following provision: "Provided, that the county auditor, county treasurer and the chairman of the board of county commissioners together shall constitute a committee, empowered and required to purchase and provide all necessary blanks, books and other stationery for the use of all county officers in their official capacity." The plain effect of this amendment is to

take from the board of county commissioners the power of purchasing blanks, blank books and stationery, and to vest that power in a committee composed of the county auditor, county treasurer and chairman of the board. The language is explicit. It clearly places that matter in their hands. It says that they shall be a committee "empowered and required to purchase and provide all necessary blanks," etc. This amendment takes from the commissioners all power in regard to the purchasing of such supplies. The appellant's contention that this amendment confers upon the committee only the power to determine the amount of supplies to be purchased, and that it does not authorize it to make contracts for such supplies, cannot be sustained. The committee is authorized to purchase such supplies, which necessarily includes the right to make contracts for them.

Appellant contends further than the committee is not authorized to purchase such supplies by contract unless proposals for bids are first made. This depends upon the construction of section 1925, Rev. Codes 1895, as amended by chapter 59, p. 69, Laws 1899. Said section 1925 reads as follows: "The board shall cause an advertisement for bids. * * * The provisions of this section shall apply to all contracts for fuel, stationery and all other articles for the use of the county, or labor to be performed therefor, when the amount to be paid for the same during any year exceeds the sum of one hundred dollars; provided, that in all such cases advertisement for bids need not be for more than three consecutive weeks in some weekly newspaper published in such county, and provided, also, that all contracts for the furnishing of stationery, blank books and supplies generally for all county officers shall be let at the first regular meeting in April to run for the period of one year." Said section 1925 was amended in 1899 by leaving out of the section all reference to contracts for stationery, blanks and blank books. The section, as amended in this particular, now reads as follows: "The provisions of this section shall apply to all contracts for fuel and all other articles for the use of the county * * * when the amount * * * exceeds one hundred dollars." Ordinarily this language would be construed to include within its general terms stationery and books, as within "all other articles for the use of the county." But considered in connection with the terms of section 1925 before its amendment, it is clear it was the legislative intent to exclude stationery from the articles to be purchased by the board after

competitive bids. It is only such articles as are purchased by the board that contracts must be let to the lowest bidder. The section imposes no such condition upon contracts for stationery or books purchased by the committee created under section 1906. That committee is not included within the restrictions of section 1925. This may or may not be judicious legislation, but that matter rests with the legislature, and not with the courts. There is no doubt in our minds as to the construction to be placed upon the law as amended. It clearly removes the power to purchase stationery from the board, and vests such power in a committee, and purchases by such committee are not to be made upon competitive bids, and are not within section 1925.

If the power to purchase stationery had not been taken from the board of county commissioners by section 1906, the board would not be subject to be restrained from entering into the contract in question upon this ground, as contracts for stationery and supplies are now included in the articles that must be procured upon competitive bids; hence the injunction is not sustainable, upon two grounds: (1) The purchasing power rests with the committee; (2) if it rested with the board, it is not to be exercised by proposals for bids.

The complaint alleges as the cause of action that the board has exceeded its authority, by contracting for books and stationery without proposals that are legal and sufficient on which to base bids. The appellant's argument is devoted to that theory of the case only. The case has been submitted and argued on that theory, so far as the records show. We shall not, therefore, consider the question raised on the oral argument in this court in reply to respondents' argument that the injunction should be granted at all events, for the reason that the board is acting unlawfully, and performing duties devolving upon others. We think the appellant is too late to raise that question, especially when the the question comes up upon a demurrer to the complaint. Hence it has not been considered.

The order is affirmed. All concur.

MR. JUSTICE ENGERUD, having been of counsel in the court below, did not sit in the above case; HON. CHARLES J. FISK, judge of the First Judicial District, sitting in his stead by request.

(103 N. W. 940.)

PETERSBURG SCHOOL DISTRICT OF NELSON COUNTY, STATE OF NORTH DAKOTA, v. LEVI PETERSON.

Opinion filed June 9, 1905.

Eminent Domain — Defendant's Costs.

1. A landowner who resists the taking of his land for public purposes upon a failure to agree upon the value thereof, and recovers judgment therefor, is entitled to recover his taxable costs in the action.

Same.

2. Under section 14 of the constitution, prohibiting the taking or damaging of private property for public use without just compensation being first made or paid into court for the owner, it would be partially nullifying such provision if the compensation awarded him be diminished by his being compelled to pay the taxable costs.

School House Sites — Selection.

3. Under section 701, Rev. Codes 1899, providing that the board may call a meeting of the voters in a school district to select a site for a new school house, a selection of a site by such voters, describing the site, "For locating a new school house on the hill at the south end of Sixth street, in Peterson's field," is sufficiently definite on which to base a definite location of the site by the board.

Voters Select by General Designation, Not Definite Description.

4. Under said section 701, Rev. Codes 1899, the voters are required only to select by a general designation, and not by definite description.

Precise Limits and Quantity of Land Are in the Discretion of the School Board.

5. Under said section 701, Rev. Codes 1899, the board is required to locate the site upon the land selected by general designation of the voters by fixing its boundaries, and it is vested with discretion as to the precise limits of the site selected by the voters, as well as to the amount of land taken, within the statutory limit.

Condemnation Proceedings — Statute Liberally Construed.

6. In condemnation proceedings based on the right to acquire land for public purposes under the power of eminent domain, if a statute confers such power, it will be liberally and reasonably construed, so as to make its purpose effective.

Rebuttal — Discretion of Court.

7. The calling of a witness by a plaintiff in rebuttal who gives testimony that pertains to his main case is not necessarily prejudicial, but is a matter resting largely in the discretion of the trial court.

Instructions.

8. Instructions on the question of what facts may be considered by the jury in determining the value of the property involved considered, and *held* not erroneous.

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

Proceedings by the Petersburg school district of Nelson county against Levi H. Peterson to condemn land. Judgment for plaintiff, and defendant appeals.

Modified.

Guy C. H. Corliss, for appellant.

The voters never selected the site sought to be condemned. The proposition submitted was too indefinite as a designation. The boundaries were subsequently fixed by the board. The school board has no discretion in the matter, but must obey the command of the voters in selecting a site, and are without power to supplement by their own judgment and action the incomplete action of the voters. Farmers & Merchants National Bank v. School Dist., 6 Dak. 255, 42 N. W. 767; Seibert v. Botts, 57 Mo. 430; Benjamin v. Hull, 17 Wend. 437, 81 Ill. App. 560, 79 Ill. App. 359; Greenwood v. Gmelich, 51 N. E. 565; State v. City of St. Anthony, 10 Minn. 345; Township Board of Education v. Carolan, 55 N. E. 58; Lighton v. School Dist., 31 Atl. 899.

The statutes relating to eminent domain are strictly construed in favor of the land owner. Lewis on Eminent Domain, sections 253, 154; Fort Ridge Cemetery Ass'n. v. Redd, 10 S. E. 405; 10 Am. & Eng. Enc. Law, 1054.

All conditions precedent to the exercise of the right of eminent domain must be strictly pursued. In re City of Buffalo, 78 N. Y. 362; City v. Daley, 58 Fed. 751; State v. Hemsley, 35 Atl. 795; N. Y. Cable Co. v. New York, 10 N. E. 332; Harris v. Marblehead, 10 Gray 40; 3 Abb. N. C. 668.

The instruction that the jury should not consider anything that may have been done by the defendant in the way of improvement since the commencement of the action, was error. Little Rock, etc., R. Co., v. McGhee, 20 Am. & Eng. R. Cases, 82; King v. Minneapolis Union Ry. Co., 32 Minn. 224; 10 Am. & Eng. Enc. Law, 1161; Mississippi & Rum River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206.

The judgment is erroneous in that it fails to award costs to the defendant. A citizen's property can only be seized on condition of making a just compensation for it. If obliged to pay costs, where the value of the property is not great, and the litigation protracted and expensive, the land owner, instead of being compensated, will find his expense more than the compensation. Stolze v. Milw. & L. W. Ry. Co., 88 N. W. 378; Gano v. Minneapolis & St. Louis Ry. Co., 55 L. R. A. 267; 2 Lewis on Eminent Domain, section 559; St. Louis, etc., v. Southern Ry. Co., 39 S. W. 471; San Jose A. R. & Ry. Co. v. Mayne, 23 Pac. 522; San Diego Land & Town Co. v. Neale, 25 Pac. 977; Owsley v. Oregon Ry. & Nav. Co., 20 Pac. 782; In re N. Y. U. S. N. B. Ry Co., 94 N. Y. 294; N. H. & N. Co. v. Northampton, 102 Mass. 116.

Fred A. Kelly and *Scott Rex,* for respondent.

The ballots were sufficient. They identified the site although not its boundaries. The statute does not require the voter to fix the boundaries.

Parol evidence is admissible to identify the subject matter and apply that which is written to the thing itself. 21 Am. & Eng. Enc. Law, 1119, 1120.

The charge was wholly favorable to appellant and in accordance with the authorities cited by him. Joyce on Damages, sections 2184, 2185, 2190; Gulf, etc., R. Co. v. Burger, 45 S. W. 613; San Diego Land & Town Co. v. Neale, 25 Pac. 977; Chicago, N. & N. Ry. Co. v. Davidson, 31 Pac. 131; 15 Cyc. 715, 724, 726; City of Santa Ana v. Harlin, 34 Pac. 224; Curtin v. Nittany Valley R. Co., 19 Atl. 740; Michael v. Pipe Line, 28 Atl. 204; Esch v. C., M. & St. P. Ry. Co., 39 N. W. 129; Spring Valley Waterworks v. Drinkhouse, 28 Pac. 681; Alexian Bros. v. City of Oshkosh, 70 N. W. 162.

There is no error apparent in the matter of costs. The case is not governed by section 5579, Rev. Codes 1899, when costs follow as a matter of course, but by 5580, and are in the discretion of the court. The objection raised for the first time on appeal cannot be entertained by the appellate court. McKenzie v. Bismarck Water Co., 6 N. D. 361, 71 N. W. 36; Crane v. Forth, 30 Pac. 193; Chicago & N. W. Ry. Co. v. City of Chicago, 35 N. E. 881; Beynon v. Brandywine, etc., Co., 39 Ind. 129; Rabb v. Patterson, 20 S. E. 540, 46 Am. St. Rep. 743; Wisconsin Cent. Ry. Co. v. Kneale, 48 N. W. 248.

MORGAN, C. J. The defendant appeals from a judgment adjudging that certain described lands belonging to him be condemned as a schoolhouse site upon payment of damages to him assessed by the jury at the sum of $300. The school board deemed it necessary to provide proper school privileges for the district, and thereupon called a meeting of the voters of the district to vote upon the selection and purchase of a site for a schoolhouse, as provided by section 701, Rev. Codes 1899. At such meeting a majority of the votes cast was in favor of a site described as follows: "For locating a new schoolhouse on the hill at the south end of Sixth street, in Peterson's field." After the special meeting or election was held, the school board met, and adopted the following resolution: "Resolved, that the boundaries of the site for the new schoolhouse on the location adopted at special election held May 21st, 1904, be fixed as follows." The precise description of the site by metes and bounds is then given, and embraces a tract comprising two acres—included in it, the hill in Peterson's field, at the south end of Sixth street. After definitely locating the site the board interviewed defendant as to the purchase of that site, but there was a failure to agree upon the price. The board thereupon ordered that condemnation proceedings be instituted for the purpose of acquiring that site under the power of eminent domain. This action was thereupon regularly instituted for that purpose, and, in answer to a complaint setting forth a cause of action against him, the defendant answered, setting forth facts that pertained only to the value of the land to be condemned. A jury was impaneled, but no question was submitted to it, except the one as to the value of the two acres sought to be condemned as a site for a schoolhouse. The jury found the value of the land to be $300. The defendant appeals from the judgment adjudging that this land be condemned as prayed for upon payment of that sum to the defendant.

There are thirteen assignments of error in the record, but all of them are abandoned in the argument, except four, which we will consider in the order that they are presented in the brief filed:

The appellant contends that the voters of the school district did not select a site for the schoolhouse as required by section 701, Rev. Codes 1899. The contention is that the voters did not particularly specify or describe the site desired—in other words, that the designation, "For locating a new school house on the hill at the south end of Sixth street, in Peterson's field," is too indefinite,

and therefore insufficient on which to base condemnation proceedings. Section 701, Rev. Codes 1899, provides that "whenever in the judgment of the board it is desirable or necessary to the welfare of the schools in the district or to provide for the children therein proper school facilities, * * * the board shall call a meeting of the voters in the district * * * to vote upon the question of the selection, purchase, exchange or sale of a school house site. * * * Said election shall be conducted and votes canvassed in the same manner as at the annual election of school officers. * * * If a majority of the voters present at such meeting shall by vote select a schoolhouse site * * * the board shall locate, purchase, exchange or sell such site * * * in accordance with such vote." Section 702 provides, among other things, that "should the owner of such real property refuse or neglect to grant and convey such site, a site for such school house may be obtained by proceedings in eminent domain as provided in the Code of Civil Procedure." Section 703 provides that if upon the organization of a school district in cases therein particularly described, "and if no suitable room for such school can be leased or rented the board shall call a meeting of the voters of the district for the selection and purchase of a school house site therefor, and the purchase or erection of a school house as provided by section 701. If at such meeting no such site is selected, * * * the board shall select and purchase a school house site, and erect, purchase or move thereon a school house," etc. Under these provisions it seems clear to us that the voters are not required to select a site except by general designation. Under section 701 it is evident that the site to be selected by the voters and the site to be thereafter located by the board are not necessarily to be described by the same language. To select is to pick out or choose. It signifies a choice of one out of more than one. To locate is to select by fixed boundaries. The word "site" does not of itself necessarily mean a place or tract of land fixed by definite boundaries. All that section 701 contemplates is that the voters shall select the site in a way that the board can determine what place has been chosen. That having been done, its definite location is to be made by the board. It is significant that the word "locate" is not used in the section in reference to the act of voting for a site by the voters, but is used in reference to the action of the board thereafter in carrying out the wishes of the voters. The statute should receive a reasonable construction. To construe it that the voter must precisely describe the tract would

render its provisions difficult to be carried out. It would require each voter to provide himself with a technical description, which could not be done, in many cases, without the services of a surveyor. Such a construction of the law would make it impracticable. The language used excludes such a construction when all its provisions are considered together. Appellant contends that the section must be strictly construed, as it pertains to the power of eminent domain. We cannot concede the contention to be true in all respects. When the question to be determined is whether a statute confers the power to exercise the right of eminent domain, then the statute must be strictly construed. But strict construction cannot be involved in the matter of carrying out the provisions of a statute that plainly confers the power of eminent domain. The rule is well stated in section 255, Lewis on Eminent Domain (2d Ed.), as follows: "In determining whether statutes confer the right to exercise the power of eminent domain, the rules of strict construction are to be applied. But when the power has undoubtedly been conferred, then, in so far as it attempts to define the location or route, it is to receive a reasonable rather than a strict construction. It is against common right that a person or corporation should have the power, but having the power, it is for the general good that they should not be hampered or embarrassed by a narrow and technical interpretation of it." See, also, Chesapeake & O. Canal Co. v. Key, 3 Cranch, C. C. 599, 5 Fed. Cas. 563. The designation by the voters was sufficiently specific, and warranted the board in definitely locating a site comprising two acres at the end of Sixth street, on the hill in Peterson's field. The hill, the end of Sixth street and Peterson's field are fixed points. How large the site shall be, within the statutory limit, and its definite location, are matters to be determined by the board after the voters have pointed out by general description the place desired. The following authorities have a close bearing on the question: Shires v. Irwin, 87 Ill. App. 111; Newell v. Hancock, 67 N. H. 244, 35 Atl. 253; Wilbur v. Woolley, 44 Neb. 739, 62 N. W. 1095; Moore v. State, 9 Kan. App. 489, 58 Pac. 1004; Wiggin v. Exeter, 13 N. H. 304; Packard v. County Commissioners, 80 Me. 43, 12 Atl. 788; State v. Northrop, 18 N. J. Law, 271.

The court gave the following instruction to the jury: "You should fix the value of these two acres as of the date of this trial, but should not take into consideration anything that may have been done by defendant in the way of improvement in the property

since the date of the commencement of the proceeding; that is, since the 9th day of June, 1904." Defendant excepted to this instruction, and claims that the jury may have been misled by the giving of it. The evidence showed that the defendant had platted that portion of his land as an addition to the village of Petersburg after the proceedings were begun, and such addition included the two acres in question. The instruction is in strict accordance with the statute which provides that "no improvements put upon the property subsequent to the date of the service shall be included in the assessment of compensation or damages." Hence, if platting of property for residence or business purposes be considered as improvement of the property, that fact could not be considered by the jury, if done after the action was commenced. The objection of the defendant to this instruction is that by it the jury was told that they could not consider the value of the property for any other purpose than farming, and that it excluded from the jury any consideration of its value as residence property. The instruction itself cannot be construed as so directing the jury. If the jury might have taken the instruction as so saying, if standing alone, the other portions of the charge were so explicit on this question that they could not have misunderstood the rule to be followed in fixing the value of the tract. The jury was told that they should take into consideration "its value either for farming purposes, or for platting into lots and blocks, or for any other purpose which the evidence in the case may show it to be suitable and valuable for." The following instructions were also given: "If the land possesses a value for residence purposes when platted into building lots, in view of its situation with reference to the town of Petersburg, the defendant is entitled to the fair value of the land for such purpose, although at the time of the commencement of these proceedings the land had not been platted for such purpose." In view of these subsequent instructions, the jury could not have mistaken the meaning of what was said on the question of not considering improvements on the land after the proceedings were commenced.

The contention is advanced that the evidence does not sustain the finding of the jury that the market value of the land at the time of the trial was only $300. There was a wide discrepancy in the evidence on the question of value as given by the witnesses. There is competent evidence in the record that the value of the land was much less than that fixed by the jury, and evidence

that its value was more than was awarded. In view of this conflict, the verdict must stand. It was peculiarly a question for determination by the jury, and there is evidence amply sustaining the verdict.

Two witnesses were recalled, and gave their estimate of the value of the land, concerning which they were not examined when first called. This is claimed to be a prejudicial error. Conceding that it was irregular, and that the matter of the value of the property was a matter to be proved by plaintiff as a part of its main case, we cannot sustain the contention that it was a prejudicial error. Such matters rest largely in the discretion of the trial court. Its action in this instance was not an abuse of discretion.

The judgment did not award taxable costs to the defendant or to the plaintiff. The defendant claims that he is entitled to such costs. He did not make any motion to that effect, nor in any way bring the matter to the attention of the trial court, so far as the record shows. The statute which provides for taking and condemning property for public purposes under the power of eminent domain does not expressly provide for costs in favor of either party. Section 5972, Rev. Codes 1899, being a part of the eminent domain act, provides that "except as otherwise provided in this chapter the provisions of this Code relative to civil actions are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter." It is contended that this section makes the general statute relative to costs applicable to condemnation proceedings. We think that such would be a strained construction of the section. However, in our view of the law applicable to the case, the construction to be placed upon that section becomes unimportant, as the result will be the same. The conclusion that we have reached is that the defendant was entitled to his taxable costs, although no statute authorizes such allowance. This is based upon section 14 of the constitution, which reads as follows: "Private property shall not be taken or damaged for public use without just compensation having first been made to or paid into court for the owner," etc. Section 5955, Rev. Codes 1899, is to the same effect. To hold that the owner must pay his own costs in resisting attempts to take his land against his consent, without first paying adequate and just compensation therefor, would nullify to a certain extent this constitutional guaranty, and result in giving him less than just compensation for his property. The constitutional provision means that he shall receive

just compensation for his property, and not that the just compensation assessed by a jury shall be diminished to the extent of his costs. The provision was designed for the benefit of the landowner, and should be construed so as to give him its benefit to the full extent. Many authorities so hold. In Dolores No. 2 Land & Canal Co. v. Hartman, 17 Col. 138, 29 Pa. 378: "The undeniable intent of this provision is to secure the landowner whose property is taken against his will a fair compensation therefor. It cannot have been the purpose of the constitutional convention to require payment by the owner of costs reasonably incurred in the proceedings whereby his premises are taken. In some instances such costs will amount to nearly or quite as much as the compensation awarded. But if the owner must disburse for costs the money received for his land, the compensation cannot be regarded as 'just,' within the meaning of the constitutional provision." In Stolze v. Milwaukee & L. W. Ry. Co., 113 Wis. 44, 88 N. W. 919, 90 Am. St. Rep. 833, it was said: "It cannot have been the purpose of the framers of the Constitution that a person compelled to surrender his property for public uses shall have any less as compensation therefor than a full equivalent, measured by all reasonable rules. That must include all necessary expenses incurred by him in the enforcement of his rights which are taxable according to law. He must have in the end a full, just compensation for his property. It must not be diminished by any costs reasonably incurred in condemnation proceedings or in collecting the award which are ordinarily taxable, by the rules of law, in favor of the prevailing party in an action or proceeding to make his judicial remedy effective. That is the true constitutional measure of his rights." In Epling v. Dickson, 170 Ill. 329, 48 N. E. 1061, speaking of the same question, it was said: "Where private property is taken or damaged for public use, just compensation cannot be made to the property owner if he is compelled to proceed in the courts for his just rights at his own costs. The costs in the present case following the several judgments. They were a part and parcel of the several judgments, and we see no reason why appellants were not entitled to a decree for the costs, as well as the rest of their judgments." See, also, Lewis on Eminent Domain (2d Ed.) section 555, and cases cited; San Francisco v. Collins, 98 Cal. 259, 33 Pac. 56.

The respondent contends that, this question not having been raised in the district court, it is now too late to raise it. The

point pertains to the judgment which should have provided for appellant's costs on the trial. Hence it is properly the subject of an appeal, and was not waived in any way at the trial. If the matter had been called to the attention of the learned trial court by a motion to allow taxable costs, we have no doubt that the motion would have been granted. The judgment will therefore be modified, without costs to either party on the appeal.

The district court is directed to modify the judgment by the allowance of statutory costs after they have been taxed by the clerk in the usual manner in civil actions.

Modified and affirmed. All concur.

(103 N. W. 756.)

H. P. LOUGH v. A. A. WHITE.

Opinion filed June 9, 1905.

Justices of the Peace — Undertaking — Service.

1. Under our statute regulating appeals from justice courts, the service and filing of the notice of appeal, and the filing of the undertaking with the clerk of the district court are not alone sufficient to transfer jurisdiction. The undertaking must be served and the service must be made within thirty days after the judgment is rendered. Richardson v. Campbell, 81 N. W. 31, 9 N. D. 100, followed.

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

Action by H. P. Lough against A. A. White. Judgment for plaintiff, and defendant appeals.

Affirmed.

John E. Greene, for appellant.

Barnett & Reese, and *Benton & Lovell*, for respondents.

YOUNG, J. The defendant appeals from a judgment of the district court of Cass county dismissing his appeal from a justice court judgment. The appeal was dismissed because of defendant's failure to serve an undertaking within thirty days after the judgment was rendered, that being the period fixed by the statute for taking appeals. Section 6771, Rev. Codes 1899. The record shows that the justice court judgment was rendered July 31, 1903. The defendant served his notice of appeal on August 22, 1903, and on August 28, 1903, he filed the notice of appeal with the clerk of the district court, and also an undertaking in due form, and

duly approved by the clerk. On September 2, 1903, which was more than thirty days after the judgment was rendered, the plaintiff served a notice to dismiss the appeal upon jurisdictional grounds, to wit, the defendant's failure to serve the undertaking. Immediately after the notice to dismiss was served, the defendant served an undertaking. It will be noted that the notice of appeal was served and filed and the undertaking was filed within thirty days after the judgment was rendered, but the undertaking was not served until after that period had expired. The sole question is whether the failure to serve the undertaking within thirty days was fatal to the appeal. The trial court held it was, and dismissed the appeal. This action was strictly in accord with the rule laid down by this court in Richardson v. Campbell, 9 N. D. 100, 81 N. W. 31. In that case we held that under our present appeal law, which was adopted in the Revised Codes of 1895, the service of the undertaking within the thirty-day period is a jurisdictional prerequisite to an appeal, and is one of the essential steps to transfer jurisdiction. Prior to the changes effected by the 1895 law, our statute, like the statutes of California and South Dakota, did not require the service of the undertaking. It was merely filed with the justice, and the time for excepting to the sufficiency of the sureties commenced to run from the date of filing. The 1895 Code introduced an entirely new method of taking appeals. The notice of appeal and undertaking, instead of being filed with the justice, are required to be filed with the clerk of the district court, and a provision was added that "the undertaking must be served." Section 6776, Rev. Codes 1895. Under the former statute money might be deposited with the justice as the equivalent of an undertaking, and no notice of the deposit was required. The new statute requires the deposit to be made with the clerk, and requires that the appellant, "in lieu of the service of an undertaking serve a notice of the making of such deposit. Such deposit and notice shall have the same effect as the service of the required undertaking." Section 6775, Rev. Codes 1895. The time for excepting to the sufficiency of the sureties, instead of running from the date of filing of the undertaking, commences to run from its service. The changes are radical. Instead of merely requiring that the undertaking be filed it also requires that it shall be served. Each state has its own method for taking appeals. The legislature of this state has required the service of the undertaking. In states where it is merely required to be filed it is held that the filing

is a jurisdictional step, and the filing must be within the time fixed by the statute for taking the appeal. Rudolph v. Herman, 2 S. D. 399, 50 N. W. 833; Smith v. Coffin, 9 S. D. 502, 70 N. W. 636; Brown v. Ry. Co., 10 S. D. 633, 75 N. W. 198, 66 Am. St. Rep. 730; Coker v. Superior Court, 58 Cal. 177; 2 Spelling on New Trial & Appeal, section 745, and cases cited. The legislature having required the undertaking to be served, it must be held for the same reason that service is jurisdictional, and must be made within the time fixed for taking the appeal.

Counsel for appellant contend that Richardson v. Campbell, supra, was not correctly decided, and the provisions of our present statute requiring the service of the undertaking and service of notice of deposit when money is deposited in lieu of an undertaking has nothing to do with the question of jurisdiction. The basis of this contention is found in the language of a number of provisions of the old statute, which are preserved in the present statute without change. If the language relied upon stood alone, counsel's position would undoubtedly be correct. These provisions must, however, be read and construed with the added provisions requiring service. The majority of the court as now constituted did not participate in the decision of Richardson v. Campbell. We are all agreed, however, that no adequate reason has been advanced for departing from the construction announced in that case.

Judgment affirmed. All concur.

(104 N. W. 518.)

WILLIAM O'KEEFE v. WILLIAM C. LEISTIKOW.

Opinion filed June 12, 1905.

Sale — Passing of Title.

1. On a sale of seventy bushels of flax mixed with flax of like quality and grade, the mere fact that there has been no separation of the part sold from the mass will not prevent the title from passing if the parties intend that title shall pass and the property sold has been identified.

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

Action by William O'Keefe against William C. Leistikow. Judgment for plaintiff, and defendant appeals.

Affirmed.

Gray & Casey, for appellant.

When the agreement of sale is for a part of a specified stock or mass, a separation and appropriation of the part are necessary, and until they are made the contract is executory and the property in the thing does not pass. 2 Shouler's Personal Property, 256, 257; Meser v. Woodman, 53 Am. Dec. 274; 24 Am. & Eng. Enc. Law (2d Ed.) 1055, 2 Kent, 496; Cleveland v. Williams, 94 Am. Dec. 274; Woods v. McGee, 30 Am. Dec. 202; Warten v. Strane, 8 So. 23; Ganson v. Madigen, 82 Am. Dec. 659; Caruthers v. McGarvey, 41 Cal. 15; McLaughlin v. Piatti, 27 Cal. 452; Foot v. Marsh et al., 51 N. Y. 288; Coplay Iron Co. v. Pope et al., 15 N. E. 335; Pacific Coast Elevator Co. v. Bravinder et al., 44 Pac. 544; Anderson v. Read, 13 N. E. 292.

Three classes of cases occur.

1st. Action will not lie for purchase price until title passes. McCormick Harvesting Machine Co. v. Balfany, 81 N. W. 10; McCormick Harvesting Machine Co. v. Cusack, 74 N. W. 1005; Meser v. Woodman, 53 Am. Dec. 251; Ganson v. Madigan, 82 Am. Dec. 659; New England Dressed Meat & Wool Co. v. Standard Worsted Co., 43 N. E. 112; Backhaus v. Buells et al., 73 Pac. 342.

2d. In conversion or replevin buyer must show that title has vested in him. Cleveland v. Williams, 94 Am. Dec. 274; Galloway v. Week et al., 12 N. W. 10; Woods v. McGee, 30 Am. Dec. 202.

3d. In action between purchaser and one claiming under execution or attachment. Callender v. McLeod, 16 Pac. 194; Harwick v. Weddington, 34 N. W. 868; Anderson et al., v. Crisp, 31 Pac. 638; Caruthers v. McGarvey, 41 Cal. 15; McLaughlin v. Piatti et al., 27 Cal. 452.

Where title has not passed and contract is still executory, action for damages is exclusive, and action for price cannot be maintained. 24 Am. & Eng. Enc. Law, 1118; 19 Pl. & Pr. 4; McCormick Harvesting Machine Co. v. Belfany, 81 N. W. 10; McCormick Harvesting Machine Co. v. Cusack, 74 N. W. 1005; Meser v. Woodman, 53 Am. Dec. 241; Restad v. Engemoen, 67 N. W. 1146; John Deere Plow Co. v. Gorman, 59 Pac. 177.

DePuy & DePuy, for respondents.

Where no question under the statute of frauds arises, nor the rights of third parties intervene, whether a sale is completed or

executory depends upon the intent of the parties to be ascertained from the contract and circumstances surrounding the sale. Benj. on Sales (3d Am. Ed.) 268; 21 Am. & Eng. Enc. Law (1st Ed.) 484; Rodee v. Wade, 47 Barb. 53; Gibbons v. Robinson, 29 N. W. 533; Clark v. Shannon, 91 N. W. 923; Byles v. Colier, 19 N. W. 565.

A sale of a certain quantity of flax, which constitutes a portion of a designated uniform mass, will pass title as between the parties without segregation, if the acts and declarations of the parties fairly evince an intention to make it an immediate transfer. Nash v. Brewster, 41 N. W. 105; Mackellar v. Pillsbury et al., 51 N. W. 222; Winslow v. Leonard, 24 Pa. St. 14; Kimberly v. Parchin, 19 N. Y. 330; Russell et al. v. Carrington et al., 42 N. Y. 118; Lobdell v. Stowell, 51 N. Y. 70; Vagar v. Detroit L. & N. R. Co., 44 N. W. 1113; Rail v. Little Falls L. Co., 50 N. W. 471; Muskegon B. Co. v. Underhill, 5 N. W. 1073; Warren v. Milliken, 57 Me. 97; Hill v. Boston R. R. Co., 14 Allen, 439; Bacon et al. v. Gilman, 57 N. Y. 656; Horr et al. v. Barker et al., 8 Cal. 603; Kindman v. Holmquist, 14 Pac. 168; Carpenter v. Graham, 42 Mich. 191, 3 N. W. 974; Young v. Miles, 20 Wis. 646; Clark v. Griffith et al., 24 N. Y. 595; Groat et al. v. Gile, 51 N. Y. 431.

The delivery of an order upon the custodian, the presentation and acceptance by him were tantamount to an acceptance of the goods. Carpenter v. Graham, 3 N. W. 974; Merrick v. Bradley, 19 Md. 50; Scudder v. Bradbiry, 106 Mass. 422; Sigerson v. Parker, 15 Mo. 101; Stanton v. Small, 5 N. Y. Sup. Ct. (3 Sandf.) 230; McCormich v. Madden, 37 Ill. 370; Smith v. Friend, 15 Cal. 124; Magee v. Billingsley, 3 Ala. 679; Whitehouse v. Frost, supra.

Separation by the custodian for a removal by the purchaser is a delivery of both the title and the thing being sold. Wagar v. Detroit, L. & N. R. Co., 44 N. W. 1113; Weld v. Cutler, 2 Gray, 195; Lumprey v. Sargent, 58 N. H. 241; Page v. Carpenter, 10 N. H. 77; Iron Cliff Co. v. Buhl, 42 Mich. 86; Crofoot v. Bennett, 2 N. Y. 258; Brewer v. Salisbury, 9 Barb. (N. Y.) 511; DeGraff et al. v. Byles, 29 N. W. 487.

Upon failure of the purchaser to perform the contract of sale, the seller has three remedies: 1. To hold the property for the purchaser and recover the entire purchase price. 2. To sell as agent of that purchaser, and, after notice to him, recover the difference between the contract price and that realized on the sale. 3. To retain it as his own, and recover the difference between the con-

tract price and the market price at the time and place of delivery Merriam v. Kellogg, 58 Barb. 445; Dustan v. McAndrew et al., 44 N. Y. 72; Hayden v. Demets et al., 53 N. Y. 426; Mason v. Decker, 72 N. Y. 595; Donnell v. Heam, 12 Daly, 230; Siever v. Connolly, 12 N. Y. St. Rep. 616; Bagley v. Findlay ,82 Ill. 524; Wood v. Michaud, 65 N. W. 963.

MORGAN, C. J. Action for the purchase price of seventy bushels of flax. The question involved is whether the transaction involved constituted a sale or a contract for sale, and whether the title to the flax passed to the defendant or not. The facts are as follows: Defendant wrote plaintiff, asking him whether he had some flax for sale. Plaintiff answered by letter, saying that he had seventy bushels of flax for sale. Defendant immediately answered plaintiff's letter, and asked him whether the flax was clean, and how much he wanted for it. This letter was answered, and in the answer plaintiff stated that the flax was clean, and that his price for it was $2 per bushel. Defendant then wrote plaintiff as follows: "I will take the seventy bushels of flax you have on your Ops farm at $2 per bushel for seed. Kindly keep it for me and oblige. Yours very truly, W. C. Leistikow, by J. Dunn." Plaintiff, upon receipt of the above letter, sent the defendant a written order upon his son, with whom the flax was stored, to let the defendant have seventy bushels of flax, and in two or three days thereafter sent the defendant a bill for the price of the flax, $140. After the receipt of this bill, and on May 26, 1902, the defendant wrote the plaintiff another letter, in which he acknowledged the receipt of the bill, and stated that he had sold the farm upon which he intended to use the flax for seed, and for that reason had no use for the flax, but stated that he would "take the flax if you [plaintiff] insist on it." He further stated that, if plaintiff could place it with others, it would be an accommodation to him, and asked plaintiff to notify him if he could not place the flax with others, and he would send a team for it. The letter further stated that one Copps, the bearer of the letter, would like some of the flax, and plaintiff was told in the letter: "And you can give him whatever he may want out of this lot." Upon receipt of this letter the plaintiff drew upon Leistikow through the bank for $140, and did not in any other way answer the letter. The draft was returned unpaid. About May 6th the defendant, through his authorized agent, wrote his name on the back of the order which the plaintiff had

given the defendant upon his son, and turned it over to one Miller, who was working for Leistikow, with instructions to go and get the flax; and Miller presented the order to the plaintiff's son between May 15th and 20th, and signed his name on the back of it, and turned it over to O'Keefe, in whose possession the flax was. Upon indorsing and delivering the order to O'Keefe he stated, as testified by Miller, that "I could go and get the flax whenever I liked," that "the flax was mine, and that no one else could get it only me." There was also conversation between them that O'Keefe would measure the flax for Miller when he came for it. After this order was presented by Miller and accepted, Copps presented the letter from Leistikow for the purpose of taking some of the flax, but his request was refused, and the reason given for such refusal was that Miller's order had been accepted previously. After this no further steps were taken by Leistikow, or any one on his behalf, to take the flax, and it still remains in the granary. This action was then begun. The trial court directed a verdict for the plaintiff for $140, and judgment was entered on the verdict, and defendant has appealed from the order denying a motion for a new trial.

The errors assigned pertain solely to the direction of a verdict and the refusal to grant a new trial. The only question to be decided is whether the title to the flax passed to Leistikow under the facts narrated. If the title did not pass to him, an action for the purchase price will not lie. The defendant's contention is that title did not pass, for the reason that the seventy bushels of flax were not separated from the mass with which they were mingled. It is conceded that there were about eighty-five and a half bushels of flax by measure, and about seventy-four bushels by weight, in the pile. It is undisputed that the flax was all of one quality and grade, and fit for seeding purposes. Was a separation from the mass, or the measuring of the seventy bushels, a condition precedent to the passing of the title to the defendant? We agree that it was not. There was a sale of the flax. It was not an executory contract for the sale thereof. The price was not paid, but that is not necessarily a condition precedent to the passing of title. The payment of it may be waived or it may be insisted on. The flax was in bulk, but its separation is not necessarily a condition precedent to the passing of title. Whether the title passes or not under such circumstances depends upon the intention of the parties, to be gathered from the terms and conditions of the contract and

the circumstances surrounding and attending the sale. There is no rule that can be stated to govern all cases. Each must be controlled by its own facts. There is a diversity of conclusions reached by courts and text-writers as to the rules that should govern in cases where the property sold is mixed in an unseparated mass with other like or similar property. It seems to be generally held that, if the property sold is mixed with other properly not like in quality or size and a certain grade or quality only is sold, then a separation and selection is presumptively a condition precedent to the passing of title. It is also held in many cases that, if there must be measuring or selecting of certain kinds of property from a mass before the price can be ascertained, then no title presumptively passes. These rules are always subject to the intention of the parties. In this case the property was identified and ascertained. The subject-matter of the contract was specified as seventy bushels of flax on the Ops farm. The price was fixed. Delivery was not dependent on the payment of the price, but prepayment waived. Nothing was undetermined, or dependent upon measuring or weighing of the flax. The mere fact that the seventy bushels were mingled with other flax is not of controlling importance unless something was to depend upon the measuring. The evidence shows an intent to pass the title at once. There is nothing in the record to negative an intention on the part of the seller to part with the property, nor on the part of the buyer to accept it at once. The buyer and seller became tenants in common of the flax, each having the right to take his share therefrom. The following cases are in point on this question: Mecham on Sales, section 516; Hurff v. Hires, 40 N. J. Law, 581, 29 Am. Rep. 282; Mackellar v. Pillsbury, 48 Minn. 396, 51 N. W. 222; Nash v. Brewster, 39 Minn. 530, 41 N. W. 2 L. R. A. 409; Kimberly v. Patchin, 19 N. Y. 330, 75 Am. Dec. 334; Chapman v. Shepard, 39 Conn. 413; Hoffman v. King, 58 Wis. 314, 17 N. W. 136; Young v. Miles, 20 Wis. 615; Newhall v. Langdon, 39 Ohio St. 87, 48 Am. Rep. 426; Howell v. Pugh, 27 Kan. 702; Riddle v. Varnum, 20 Pick. 280; Straus v. Minzesheimer, 78 Ill. 492; Crofoot v. Bennett, 2 N. Y. 258; Welch v. Spies, 103 Iowa, 389, 72 N. W. 548; Waldron v. Chase, 37 Me. 414, 59 Am. Dec. 56. Section 3552, Rev. Codes 1899, declares the same principle as follows: "The title to personal property sold or exchanged passes to the buyer whenever the parties agree upon a present transfer and the thing itself is identified, whether it is separated from other

things or not." This section makes the change of title a matter of intention or contract, and makes the matter of separation immaterial if the property is identified. Appellant claims that a like section in the California code has been construed by the supreme court of that state, and there held in Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199, that separation is necessary before title passes. In that case the facts were not similar to the facts of this one, but even in that case separation is stated to be unnecessary where the goods are identified.

The order is affirmed. All concur.

(104 N. W. 515.)

LUTHER A. COUCH v. STATE OF NORTH DAKOTA, M. M. WEEKS, INTERVENER, AND ROBERT COTTON, INTERVENER.

Opinion filed June 13, 1905.

Actions Triable by a Jury Are No Longer Reviewable Under Section 5630, Rev. Codes 1899.

1. Since the amendment of section 5630, Rev. Codes 1899, by chapter 201, p. 277, Laws 1903, actions which are properly triable by a jury are no longer triable in the district court or reviewable upon appeal under that section.

An Action to Recover a Reward Is an Action at Law — Intervention Does Not Convert It Into an Equitable Action.

2. An action to recover a reward is an action at law, triable to a jury. Such an action is not changed to one of equitable cognizance by the fact that other claimants have been permitted to intervene under section 5239, Rev. Codes 1899, and assert their claims to the same reward. The rule is otherwise when a defendant against whom there are other claimants for the same debt interpleads such claimants, and secures his own discharge, and pays the money into court, pursuant to section 5240, Rev. Codes 1899.

Recovery of Reward.

3. To entitle one to recover a reward, he must show a rendition of the services required in the offer after knowledge of, and with a view of obtaining, the reward.

Same — Findings.

4. The state offered a reward of $300 "for the arrest or information leading to arrest" of one James Smith, who escaped from jail where he was held upon a charge of murder. There were three claimants for the reward. The trial judge rendered judgment in favor of

each for $100. Each claimant alleged in his complaint that he relied upon the offer of reward, which allegation was denied by the state's answer. The findings are silent upon the issue. *Held*, that the findings do not support the judgment.

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

Action by Luther A. Couch against the state of North Dakota. M. M. Weeks and Robert Cotton intervened. From the judgment Couch appeals.

Reversed.

Newton & Dullam, for appellant.

If one makes an offer to another or to all persons in general, and another goes forward and does the thing, the latter accepts the offer and the person who made it must pay or do what he proposed. Bishop on Contracts, section 330; Reif v. Paige, 55 Wis. 496, 42 Am. Rep. 731; Springer v. Cooper, 11 Bald. 267.

A common case is that of reward for an arrest. Bishop on Contracts, 331; Hugill v. Kinney, 9 Ore. 250; Janvrin v. Exter, 48 N. H. 83; Davis v. Munson, 43 Vt. 676; Thatcher v. England, 3 C. B. 254; Loring v. Boston, 7 Met. 409; Tarner v. Walker, Law Rep. 2 Q. B. 3; England v. Davidson, 11 A. & E. 856; Shuey v. United States, 92 U. S. 73, 23 L. Ed. 697.

An advertisement is a proposal which is accepted by performance of the conditions. Spencer v. Harding, L. R. 5 C. P. 563, 3 Am. & Eng. Enc. Law (1st Ed.) 843.

The act must be done not only with knowledge of, but with intent to accept, the offer. Hewitt v. Anderson, 56 Cal. 476, 38 Am. Rep. 65.

One cannot assent without knowledge of the offer. Howland v. Lounds, 51 N. Y. 604, 10 Am. Rep. 654; Fitch v. Snedaker, 38 N. Y. 248, 97 Am. Dec. 791; Stamper v. Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296; Lee v. Flemingsburg, 7 Dana (Ky.) 28.

It does not appear that Weeks, intervener, knew of the offer or made the arrest with the intention of accepting it. Warner v. Grace, 14 Minn. 364; Williams v. West Chicago St. Ry. Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278; Van Vlissingon v. Manning, 105 Ill. App. 255; Howland v. Lounds, 51 N. Y. 604, 10 Am. Rep. 654.

The court may not divide reward. Williams v. West Chicago St. Ry. Co., 191 Ill, 610, 61 N. E. 456, 85 Am. St. Rep. 278; Swanton v. Ost, 74 Ill. App. 281.

The officer whose duty it is to make an arrest cannot claim a reward. Lees v. Colgan, 40 L. R. A. 355; People v. Boston, 5 Cush. 219; Warner v. Grace, 14 Minn. 387; Day v. Putnam Ins. Co., 16 Minn. 408; Gilman v. Lewis, 15 Ohio, 281; Hayden v. Langre, 56 Ind. 42, 26 Am. Rep. 1.

This is a code proceeding upon a bill of interpleader and is reviewable under section 5630, Rev. Codes 1899. Clark v. Mosier, 107 N. Y. 118, 14 N. E. 96, 1 Am St. Rep. 798; Pres., etc., City Bank v. Bangs et al., 2 Paige Ch. 570, L. Ed. B., 2 P. 1033, and note; 11 Am. & Eng. Enc. Law, 494; 11 Enc. Pl. & Pr. 444; Kohn v. McNulta, 147 U. S. 288, 13 Sup. Ct. Rep. 298.

F. H. Register, for respondent Cotton.

No specifications being embodied in the statement of the case and the action being properly triable to a jury, neither errors of law occurring at the trial nor the sufficiency of the evidence to sustain the findings should be considered by this court. Barnum v. Gorham Land Co., 13 N. D. 359, 100 N. W. 1079.

All who participate in the compliance with the offer of reward are entitled to a share. Kinn v. First National Bank, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012.

YOUNG, J. The plaintiff brought this action to recover from the state the sum of $300, the amount of a reward offered by the governor of the state "for the arrest or information leading to the arrest" of one James Smith, also known as Jacob Bassanella, who escaped from the county jail of McLean county, where he was held for the murder of Anton Helinger. Smith was recaptured, tried, convicted and executed. There are three claimants for the reward. The plaintiff, Couch, attached a copy of the governor's proclamation to his complaint, and alleged that, relying upon the promise contained therein, he furnished the information which led to Smith's arrest and his return to the sheriff of McLean county. The state filed an answer which admits all of the allegations of the plaintiff's complaint essential to his recovery, except the allegation above stated, which allegation was denied. The answer alleged that one Robert Cotton, a deputy sheriff of McLean county, and one Lieut. Weeks, of the United States army, have

made application to the state for the same reward, and have each filed a complaint in intervention in this action, setting forth their respective claims for such reward. The record shows that Cotton and Weeks obtained leave to intervene under section 5239, Rev. Codes 1899, upon the ground that each had an interest in the matter in litigation adverse to the plaintiff and the state and to each other. The complaint of intervener Cotton alleges that, relying upon the proclamation, he furnished the information which led to Smith's arrest. The complaint of Weeks alleges that, relying upon the proclamation, he arrested Smith and delivered him into the custody of a deputy sheriff of McLean county. Each of the claimants prays judgment for $300, the full amount of the reward. The record contains no separate answers by the state to the complainants in intervention. Its answer to the plaintiff's complaint was apparently treated as an answer to all three complaints, and such answer, as already seen, denied the rendition of the service authorizing a recovery. The trial was to the court without a jury. In addition to the facts as to which there is no dispute, the trial court found "that the plaintiff, Luther A. Couch, and the intervener Robert Cotton each furnished information which led up to the arrest of the said James Smith * * * at Ft. Yates, North Dakota; that the intervener M. M. Weeks arrested said James Smith * * * at Ft. Yates by means of information furnished to and derived by him from plaintiff, Luther A. Couch, and the intervener Robert Cotton; that after making said arrest he delivered the said James Smith to a deputy sheriff of McLean county." As conclusions of law, the court found "that the plaintiff and each of the interveners are each entitled to one-third of the reward, to wit, one hundred dollars each." The plaintiff has appealed from the judgment rendered in pursuance of such findings, and demands a review of the entire case in this court, under section 5630, Rev. Codes, and for that purpose has caused a statement of case to be settled, which contains all of the evidence offered and proceedings had at the trial, including a demand for retrial.

Counsel for appellant, Couch, contends that a review of the evidence will show that intervener Cotton did not furnish the information or any information which caused Smith's arrest, but that same was furnished exclusively by the plaintiff to the state's attorney of McLean county, and in reliance upon the reward; that intervener Weeks, in making the arrest, acted at the request of the state's attorney, and without knowledge of or reliance upon

the offer of reward—and, upon this state of facts, contend that the plaintiff is entitled to the entire reward.

We are met at the outset by an objection on the part of the respondents that the case cannot be tried de novo in this court, for the reason that the action is at law to recover money only, and, as such, is properly triable to a jury, and is therefore not governed by section 5630, as amended in 1903. The objection is sound, and precludes a review of the evidence. Since the amendment of section 5630 by chapter 201, p. 277, Laws 1903, such actions, even when a jury is waived, are not triable in the district court, or reviewable upon appeal in this court, under the provisions of that section. See Barnum v. Gorham Land Co. (N. D.) 100 N. W. 1079. Counsel for appellant concede that the action was not originally triable under section 5630, but contend that the character of the action was changed to one of equity cognizance before the trial. It is said that the state admitted its liability, and merely asked the court to determine which of the claimants it should pay, and that the case stood in the same position as though the claimants had been brought into court under what was formerly known as a "bill of interpleader." The record does not sustain the statement as to the state's attitude or the procedure adopted. The remedy formerly obtained through a bill of interpleader is now obtained through the simpler method provided in section 5240, Rev. Codes 1899, which reads as follows: "A defendant against whom an action is pending upon a contract, or for specific, real or personal property, may, at any time before answer upon affidavit that a person not a party to the action and without collusion with him makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place and discharge him from liability to either party on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct, and the court may in its discretion make the order." Under this section a defendant against whom demands are made for the same debt as that sued upon may cause the substitution of the claimants and his own discharge upon complying with its provisions, which include the deposit of the amount of the debt in court. When this is done, the only issue remaining is between the several claimants as to the right to the money or property so deposited. It is held that "an action at law becomes one in equity by interpleading proceedings, and neither

party is entitled to a jury as a matter of right." It is so held under the New York statute, from which section 5240, supra, seems to have been taken. Bank v. Bangs, 2 Paige, 570; Dinley v. McCullagh (Sup.) 36 N. Y. Supp. 1007; Windecker v. Mutual Ins. Co. (Sup.) 43 N. Y. Supp. 358; Clark v. Mosher, 107 N. Y. 118, 14 N. E. 96, 1 Am. St. Rep. 798. The record shows no attempt whatever on the part of the state to bring itself under this section. This appears from the statement previously made. Instead of paying the amount of the reward into court, and applying for and securing its discharge from the action, and the substitution of the other claimants in its place, before answer, it answered and denied the right of claimants to recover, and the case went to trial with the state as the sole litigating defendant. Upon this state of the record, it cannot be said that the character of the action was changed to one of equity cognizance. The case cannot, therefore, be retried under section 5630, and stands for review in this court only upon the judgment roll proper.

The only question for consideration, then, is whether the findings of fact sustain the conclusions of law and judgment. The answer to the question presents one of the principal grounds of error argued by counsel for appellant. It is urged that it does not appear that Weeks had knowledge of the offer of reward, and relied upon such offer when he made the arrest. If this fact is vital to his right of recovery—and we are agreed that it is—the judgment in his favor must be reversed. There is no finding upon this issue, and the same fatal defect exists as to the other claimants, including the plaintiff. Each claimant, in his complaint, alleged that he relied upon the offer of reward in rendering the service which he claims entitles him to recover it. The findings are entirely silent upon this issue. The trial court merely found that the plaintiff and intervener Cotton gave the information which led to the arrest, and that intervener Weeks, acting upon this information, made the arrest. These facts do not establish a right of recovery in any of the claimants. To entitle one to a reward, he must show a rendition of the services required in the offer after knowledge of, and with a view of obtaining, such reward. The rule relating to contracts applies to such a case. An offer cannot become a contract unless acted upon or assented to. Howland v. Lounds, 51 N. Y. 604, 10 Am. Rep. 654; Bank v. Bangs, 2 Paige, 570; Fitch v. Snedaker, 38 N. Y. 248, 97 Am. Dec. 791; Mayor v. Bailey, 36 N. J. Law, 490; Hewitt v. Anderson, 56 Cal.

476, 38 Am. Rep. 65; Stamper v. Temple, 6 Humph, 113, 44 Am. Dec. 296; C. & A. Ry. v. Sebring, 16 Ill. App. 181; Burke v. Wells, Fargo & Co., 50 Cal. 218; Van Vlissingen v. Manning, 105 Ill. App. 255; Williams v. West Chicago St. Ry. Co. (Ill.) 61 N. E. 456, 85 Am. St. Rep. 278. In 1 Wharton on Contracts, section 24, it is said that "until the performance of its condition the offer is a mere proposal, but when the condition is performed by an ascertained person the contract is complete. There can, however, be no recovery except by the party who had notice of the proposal when he rendered the service. If there could, we would have a contract without two contracting parties. The proposer must make the proposal known before the acceptor undertakes to perform the condition, and the acceptor must have the reward in view at the time he renders the service on which he claims." Some courts have held that knowledge of and reliance upon the offer are not necessary. See Russell v. Stewart, 44 Vt. 170; Auditor v. Ballard, 9 Bush. 572, 15 Am. Rep. 728; Eagle v. Smith, 4 Houst. 293; Everman v. Hyman, 26 Ind. App. 165, 28 N. E. 1022, 84 Am. St. Rep. 284. The weight of authority and reason, however, is as above stated. It is clear, from an application of the rule just stated, that if the plaintiff, and not Cotton, furnished the state's attorney of McLean county the information which led to Smith's arrest, and this was done in reliance upon the offer of reward, and the arrest of Weeks was made under the direction of the state's attorney, and without knowledge of or reliance upon the offer of reward, as the plaintiff contends, the latter is entitled to the full amount of the reward, for in that event he alone has performed the condition which completed the contract with the state. These facts, however, do not appear in the findings, and, for reasons already stated, we cannot review the evidence. The findings do not show a right of recovery in any of these claimants.

The judgment must therefore be reversed, and a new trial ordered. All concur.

(103 N. W. 942.)

THE STATE OF NORTH DAKOTA EX REL. C. N. FRICH, ATTORNEY GENERAL, v. STARK COUNTY, NORTH DAKOTA, W. H. WALTON, GEORGE W. LEE AND F. KOESEL, AS AND CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS OF SAID STARK COUNTY, AND J. S. WHITE, AS COUNTY AUDITOR OF SAID COUNTY.

Constitutional Law.

1. Section 168 of the constitution applies to organized counties only.

Counties — Alteration in Boundaries.

2. Chapter 69, p. 78, Laws 1903, is in conflict with section 168 of the constitution, because it authorized the extension of the boundaries of the organized county of Stark so as to include in the latter two unorganized counties and certain unorganized territory, without the consent of a majority of the voters of Stark county.

Constitutional Law — Proceedings Under Void Law.

3. The fact that a majority of the voters in Stark county voted for the extension of boundaries under the law did not avoid the constitutional objection, because, the law being void, all proceedings under it were also void.

Constitutionality of a Law Tested by What Might Be, Not What Is, Done Under It.

4. Where the constitutionality of a statute depends upon the power of the legislature to enact it, its validity must be tested by what might be done under color of the law, and not by what has been done.

Special Legislation.

5. Chapter 69, p. 78, Laws 1903, is a special law for the alteration of county boundaries, and is therefore in conflict with section 167 of the organic law.

Application by the State, on the relation of C. N. Frich, Attorney General, for writ of mandamus to Stark county and others.

Writ issued.

C. N. Frich, Attorney General, *Newton & Dullam, R. N. Stevens* and *Voss & Hanley,* for plaintiff.

The act is void under section 167 of the constitution. An act relating to persons or things as a class is general; one relating to persons or things of a class is special. Sutherland on Stat. Const. 149; Wheeler v. Philadelphia, 77 Pa. 338; Ex parte Lichenstein.

67 Cal. 359, 7 Pac. 728, 56 Am. Rep. 713; McEldowney v. Wyatt, 45 L. R. A. 609, 44 W. Va. 711.

The act violates section 168 of the constitution. It requires only a majority of the aggregate votes cast to effect the change; the constitution requires a majority in each county. Cons., section 168. It is not the form but effect of the statute that determines its special character. Edmonds v. Herbrandson, 2 N. D. 270, 50 N. W. 970, 14 L. R. A. 725; State v. Nelson, 26 L. R. A. 317; Angell v. Cass County, 11 N. D. 265, 91 N. W. 72.

The constitution requires a majority of all the legal votes in each county. The aggregate vote may favor a change, and one county —Stark for instance—oppose it, yet the act declares the change effected, while the constitution declares otherwise. The constitutional validtiy of the law is to be tested, not by what has been done under it, but what may, by its authority, be done. City of Beatrice v. Wright, 101 N. W. 1039; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Thomas v. Gain, 35 Mich. 155, 24 Am. Rep. 535; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616; San Mateo County v. Southern Pac. R. R. Co., 13 Fed. 722; Brown v. City of Denver, 3 Pac. 455.

M. L. McBride, State's Attorney, *Guy C. H. Corliss* and *L. A. Simpson,* for defendants.

Statutes will be liberally construed with a view of sustaining their constitutionality. Western Ranches v. Custer County, 28 Mont. 278, 72 Pac. 659; Northwestern Mutual Life Ins. Co. v. Lewis and Clark Co., 28 Mont. 484, 72 Pac. 982, 98 Am. St. Rep. 572; University of California v. Bernard, 57 Cal. 612; Cooley on Const. Lim. 173; Sears v. Cottrell, 5 Mich. 259; Fletcher v. Peck, 6 Cranch, 87, 3 L. Ed. 162.

Section 167 of the constitution as to organizing new counties and changing county lines is a mere direction to the legislature and not a restriction upon its power. Section 168 of the constitution, requiring changes in boundaries of counties to be made after a vote by the people, relates to the electors of organized counties, because there are no electors in unorganized counties. Stuart et al v. Kirley (S. D.) 81 N. W. 147; Harris v. Schyrock, 82 Ill. 119; Town v. People, 102 Ill. 648; State v. McFadden, 23 Minn. 40.

Unorganized counties may be dealt with by the legislature without submitting the matter to the people. State v. McFadden, supra; State v. Parker, 25 Minn. 215; State v. Honerud, 66 Minn. 32.

ENGERUD, J. This is an original proceeding in this court, commenced in the name of the state, on the relation of the attorney general, against the county of Stark and the commissioners and auditor of that county, to obtain from this court an injunction perpetually restraining the defendant officers of Stark county from assuming or exercising jurisdiction, as officers of that county, in or over certain territory which the defendants assert has been added to Stark county by proceedings had pursuant to chapter 69, p. 78, Laws 1903. The law was passed by the eighth legislative assembly, and is entitled "An act changing and defining the boundaries of Stark county." It provided for the submission to the voters of Stark county, and to those residing in the unorganized territory affected by the act, the question of changing the boundaries of Stark county so as to include in that county all the territory lying within the unorganized counties of Hettinger and Dunn, and twelve congressional townships which have never heretofore been within the limits of any county. If a majority of the aggregate votes cast at such election favored the change, then the above-mentioned unorganized territory should become part of Stark county. The governor was authorized to designate polling places and election officers for the unorganized territory. The question was duly voted upon in accordance with the provisions of the act. In Dunn county there was a majority of one against the change, but there was a majority of sixty-five in Hettinger county, and 520 in Stark county, in favor of the change. It is conceded that the proceedings were regular in all respects, and the only ground upon which the state denies that the additional territory has become part of Stark county, and seeks to enjoin the officers of the latter county from extending their jurisdiction over it, is that the said legislative act authorizing the extension of the boundaries of Stark county is utterly void and of no effect, because it is in conflict with several provisions of the constitution of this state. The constitution contains the following provisions, among others, with reference to counties:

"Sec. 166. The several counties in the territory of Dakota lying north of the seventh standard parallel, as they now exist, are hereby declared to be counties of the state of North Dakota.

"Sec. 167. The legislative assembly shall provide by general law for organizing new counties, locating the county seats thereof temporarily, and changing county lines; but no new county shall be organized, nor shall any organized county be so reduced as to include an area of less than twenty-four congressional townships,

and containing a population of less than one thousand bona fide inhabitants. * * *

"Sec. 168. All changes in the boundaries of organized counties before taking effect shall be submitted to the electors of the county or counties to be affected thereby at a general election and be adopted by a majority of all the legal votes cast in each county at such election; and in case any portion of an organized county is stricken off and added to another, the county to which such portion is added shall assume and be holden for an equitable proportion of the indebtedness of the county so reduced."

At the time of the passage of the act in question, Stark county was one of the organized counties of this state, having been organized while this state was part of Dakota territory. Hettinger and Dunn counties have never had any county organization, but each of them was created and their boundaries established by the legislature of Dakota territory. The present boundaries of Hettinger county were established by chapter 39, p. 58, Laws 1883, and those of Dunn county by chapter 3, p. 226, Laws 1885.

The relator contends that the act in question conflicts with section 168 of the constitution, in that it permits the enlargement of the boundaries of the organized county of Stark, and the obliteration of Hettinger and Dunn, without the consent of a majority of the voters in each of the three counties. The argument is that, under section 168, the lines of an organized county cannot be changed so as to diminish or increase the area of an adjacent unorganized county, unless the proposed change is consented to by a majority vote of the electors in the unorganized county affected, as well as by a majority of those in the organized county. We do not think section 168 bears that construction. In our opinion, that section relates only to organized counties, and prohibits any change in the boundaries of an organized county without the consent of a majority of the voters therein; and, if two or more organized counties are affected, then the change must be consented to by a majority of the voters in each of such organized counties. The act would not have violated this section of the constitution, had it made no provision for submitting the proposed change of boundaries to the residents of the unorganized counties. To that extent we disagree with plaintiff's argument. But the act is still vulnerable to the objection that it provides for a change of the boundaries of Stark county without the consent of a majority of the voters in that county. The act provides that the change of bounda-

ries shall take place if a majority of the aggregate votes cast throughout all the territory affected shall be in favor of the change. Under the provisions of this act there might have been a majority of sixty-three votes in Stark county against the proposed extension of boundaries, yet the change would take place, because the majority of sixty-five in Hettinger county for the change would have overcome the combined majority against the change in the other two counties. It is no answer to the objection to urge that the result of the election showed that a majority of the voters of the only organized county affected consented to the change, and hence the constitutional rights of the inhabitants of Stark county, who alone were in a position to claim the protection of section 168, have not been infringed by the actual operation of the act. This section of the organic law in effect prohibits any legislation which will permit the alteration of the boundaries of an organized county without the consent of a majority of the voters thereof. A statute which makes that result possible is void, because it ignores the constitutional limitation in that respect upon the powers of the legislature. It is a question not entirely as to whether the constitutional rights of one or more individuals have been infringed in a particular case by proceedings under color of law, but it is a question of power in the legislature to enact the law under which the proceedings have been had. It is true that section 168 merely provides that the proposed change of county boundaries pursuant to law shall not take effect until the proposed change has been agreed to by a majority vote. If the constitution had provided how and when that vote should be taken, so as to be self-executing, then it might perhaps have been well argued that such constitutional provision as to the conditions precedent to the taking effect of the proposed change should be read into and become part of any statute which provided for an alteration of the boundaries of organized counties, and that, if any provisions of the statute were in conflict with this organic law, such statutory provisions should be disregarded, without nullifying the entire law. Such are not, however, the conditions here. The constitution makes no provision as to how and when the vote shall be taken, but leaves that to the discretion of the legislature. It is clear, therefore, that it is a necessary condition to the validity of every statute which authorizes a change in the boundaries of organized counties that an election be provided for, either by the act itself or elsewhere, and that the consent of a majority of the voters be made a condition precedent

to the taking effect of the change authorized by the law. The act in question provides for an election, but does not comply with the other condition—that the consent of the majority of the voters of Stark county shall be necessary to effect the change.

It was urged in argument that we should assume that the legislature had the provisions of section 168 of the constitution in mind when the law was passed, and intended to comply with its mandates, and therefore that the language of the act declaring that the proposed change of boundaries should take effect if a majority of the aggregate votes cast should favor the change should be construed to mean merely that, in addition to the consent of a majority of the voters in Stark county, the additional condition was imposed that there should also be required a majority of the aggregate votes cast throughout all the territory affected. The language of the act does not warrant such a construction. The act provides (section 1) that "the question of changing and defining the boundaries of Stark county as hereinafter provided in this act, shall be submitted to the voters of said county, and of the unorganized counties and parts of unorganized territory affected hereby, and if a majority of the aggregate vote cast at said election shall be in favor of changing and defining the boundary lines of Stark county, then the boundaries of said Stark county shall be as in this act hereinafter provided, and shall include all the territory hereinafter stated." The language is plain, unambiguous and specific, and incapable of any other construction than that the majority of the entire votes cast throughout the whole territory affected should be sufficient to effect the proposed change, even though a majority in Stark county were adverse thereto. The validity of a law, where its validity depends upon the power of the legislature to enact it, must be tested not by what has been done under it, but by the things which it authorizes to be done. City v. Wright (Neb.) 101 N. W. 1039. It is obvious that, if the legislature had no power to authorize a change of the boundaries of Stark county in the manner or on the conditions provided in this statute, then the act was a nullity from the beginning, and all proceedings under it were likewise nullities. The constitution, in effect, forbids the enactment of such a law, and the prohibition is no less effective because the evil which the constitutional limitation was designed to prevent did not happen in this instance to result from the prohibited legislation. The statute involved in Stuart v. Kirley, 12 S. D. 245, 81 N. W. 147, differed from the statute before us, in this: That

it did not give the electors in the unorganized counties affected any vote on the proposed change of the boundaries of the organized county, and hence was not vulnerable to the objection that it permitted a change of boundaries without the consent of a majority of the voters in the organized county.

The foregoing is sufficient to dispose of the case, but, inasmuch as the point was fully argued by counsel, and as we are agreed that the act in question is also void because it is special legislation prohibited by section 167 of the constitution, we will give our reasons for that conclusion. Bare inspection shows that it is a special law authorizing a change of the boundaries of the organized county of Stark. Can that result be accomplished by special legislation? Counsel for the state contend—and we think the contention is sound—that section 167, hereinbefore quoted, prohibits special legislation on that subject. Section 167 is not only a mandate requiring the legislature to make provision by general law for the organization of new counties, location of county seats, and changing county lines, but it is also a prohibition against special legislation on those subjects. It is true that the language of the section is not restrictive or prohibitive in express terms; but section 21 of the constitution declares that "the provisions of this constitution are mandatory and prohibitive unless by express words, they are declared to be otherwise." This section recognizes and establishes a sound rule to be observed in the interpretation of the organic law. It is a rule applicable alike to statutory and constitutional law that when the law directs something to be done in a given manner, or at a particular time or place, then there is an implied prohibition against any other mode or time or place for doing the act. The rule applies with peculiar force to the interpretation of constitutional law. Denney v. State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726; People v. Hutchinson, 172 Ill. 486, 50 N. E. 599, 40 L. R. A. 770; People v. Spruance, 8 Col. 307, 6 Pac. 831; Collins v. Henderson, 11 Bush, 74; Opinions of the Justices, 18 Me. 459, 464; Page v. Allen, 58 Pa. 338, 98 Am. Dec. 272; Varney v. Justice (Ky.) 6 S. W. 457; Cooley's Constitutional Limitations (7th Ed.) p. 109 et seq. Courts have often departed from the rule, and, even when dealing with constitutional provisions, have assumed to declare such provisions either mandatory or directory or nonrestrictive, according as one view or the other seemed to agree with the court's ideas of what the law ought to be. As said by Justice Cooley: "The courts tread upon dangerous ground when they venture to ap-

ply the rules which distinguish directory and mandatory statutes to the provisions of a constitution." Cooley's Constitutional Limitations (7th Ed.) p. 114. It was doubtless for the purpose of insuring in this state an unvarying observance of the rule mentioned that the rule was embodied in the constitution itself.

Our attention has been called to the case of Stuart v. Kirley, 13 S. D. 245, 81 N. W. 147, which involved the construction of section 1, art. 9, of the constitution of South Dakota, which is similar in terms to our sections 167 and 168. The constitution of that state contains no provision corresponding to the rule set forth in section 21 of the constitution. This difference between the constitutions of the two states renders the decision of less weight with us than it otherwise would have.

As to whether or not unorganized counties are included in the prohibition against special legislation, we express no opinion.

A writ will be issued as prayed for by the relator. All concur.

(103 N. W. 913.)

G. J. SCHWOEBEL v. GEORGE E. FUGINA.

Opinion filed June 19, 1905.

Landlord and Tenant — Denial of Title — Termination of Tenancy.

1. If the tenant denies his landlord's title, the latter may at his election treat it as a disseisin, and the tenancy is thereby terminated without notice to quit.

Use and Occupation — Liability of Former Tenant.

2. When the former tenant retains possession of the premises after the termination of the relation of landlord and tenant, he is liable for the value of the use and occupation of the premises.

Witness — Cross-Examination.

3. The latitude to be allowed in cross-examination is largely discretionary with the trial court, and its rulings in that respect will not be disturbed, except in cases of abuse.

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

Action by G. J. Schwoebel against George E. Fugina. Judgment for plaintiff, and defendant appeals.

Affirmed.

S. E. Ellsworth, for appellant.

Neither failure to pay rent, nor owner's demand of possession, terminated his tenancy in the absence of agreement to that effect, or notice to quit the premises. Section 3346-3350, Rev. Codes 1899; Stoppelkamp v. Mangeot et al., 42 Cal. 316.

A tenancy from year to year is certain for the year pending, with a springing right for succeeding years, on failure of parties to terminate by the required notice. 18 Am. & Eng. Enc. Law (2d Ed.) 210; section 4085, Rev. Codes 1899.

Such tenancy is not terminated by death of the landlord nor a conveyance by him. 18 Am. & Eng. Enc. Law (2d Ed.) 202; MacDonough v. Starbird et al., 38 Pac. 510.

F. Baldwin, for respondents.

Defendant was not the renter of plaintiff's grantors, and further shows that he never made any other claim than that of being the owner of the land, and upon this he was beaten in the former action. He ought not to complain of the judgment for use and occupation of plaintiff's land.

ENGERUD, J. This is an appeal by defendant from a judgment for plaintiff, entered pursuant to the verdict, in an action to recover for the use and occupation of about 120 acres of farming land in Eddy county during the farming seasons of 1901 and 1902.

The substance of the allegations of the complaint were as follows: First. That the land in question was owned by Joseph Fugina and Marcus Fugina from the 1st day of January, 1886, until the 1st day of April, 1901. Second. That some time between the years 1886 and 1895 the defendant and his father were permitted to enter into the possession of said premises and use the same under an agreement whereby they were to have the use of said land upon the condition that they pay the taxes thereon; that the defendant and his father took possession of the premises under said agreement, and occupied the same thereunder until on or about the 1st day of February, 1901, when the father of this defendant died. Third. That about that time the owners of the land discovered that the defendant and his father had failed to fulfill the agreement under which they occupied the premises by failing to pay the taxes as agreed, and that this defendant was attempting to secure a tax title to the land; that the owners thereupon paid the taxes and demanded possession of the premises from the defendant; that the defendant thereupon claimed to be the owner of

the land and refused to surrender possession thereof, and subsequently, on or about the 14th day of September, 1901, commenced an action in the district court against the said Joseph Fugina and Marcus Fugina, the then apparent owners, to establish title in himself to said land; that said action resulted in a judgment in favor of Joseph Fugina and Marcus Fugina and against said George B Fugina, whereby it was adjudged and decreed that George B. Fugina had no title or interest in said land. Fourth. That on or about the 1st day of April, 1901, the plaintiff purchased from Joseph Fugina and Marcus Fugina the premises in question, and all their right, title and interest in and to the same, and the rents thereof accruing after that date, and that plaintiff now is, and at all times since the 1st day of April, 1901, has been, the owner of and entitled to the possession of said lands and the rents thereof. Fifth. That the defendant wrongfully and unlawfully withheld the possession of said lands from the plaintiff under said pretended claim of title, and occupied and cropped the same during the farming seasons of 1901 and 1902. Sixth. That the rent and use of said premises during each of said seasons was reasonably worth the sum of $250, or $500 for both seasons. Seventh. Alleges a demand for and refusal to pay the said sum of $500. Judgment is demanded for $500 and interest.

To such complaint the defendant made answer, the material parts of which are as follows: Admits the ownership of the land by Joseph and Marcus Fugina, as alleged in the complaint, prior to April 1, 1901, and a purchase thereof by plaintiff at the time mentioned in the complaint, but alleges that whatever interest plaintiff acquired under said purchase he acquired with full notice and subject to the agreement existing between the defendant and Joseph and Marcus Fugina, which entitled the defendant to the use and possession of the land during the years 1901 and 1902. Defendant admits that he occupied and cropped the lands during the years 1901 and 1902, but denies that such possession was wrongful, and denies that the rent and use for said years is worth the sum of $250 a year. He admits "that between the years 1886 and 1895 the said Joseph Fugina and Marcus Fugina entered into an agreement with this defendant and his father, which agreement in substance and effect provided that defendant and his father were to have the use of said land, but denies that in consideration of said use defendant or his father were to pay the taxes on said land. He admits that he and his father entered into possession of said

land immediately after said agreement and have had the possession and use of the same at all times since the making of said agreement until this time. He admits that during all of said time this defendant resided with his father and worked said land in pursuance of their said agreement with said Joseph Fugina and Marcus Fugina as aforesaid." The answer denies that at the time mentioned in paragraph 3 of plaintiff's complaint the defendant or his father had failed to perform the agreement under which they occupied and were entitled to the use of said land; denies that he, at the time mentioned in said paragraph 3 of the complaint, or at any time, claimed to be the owner of said land; and denies that the possession of the same was at any time demanded of him by said Joseph Fugina and Marcus Fugina. The answer admits that at about the time mentioned in said paragraph 3 of the complaint this defendant commenced an action against said Joseph Fugina and Marcus Fugina, and that said action was tried in the said district court; but denies that the decree entered in said action in any manner determined the right to the use and rental of said land during the years 1901 and 1902.

The appellant contends, and most of the assignments of error are based on that contention, that the complaint shows that the defendant was in possession as a tenant holding over from year to year under the original lease, and was accordingly liable only for the agreed annual rental, to wit, the amount of the annual taxes, and no more. We do not so construe the complaint. We think it states, though with unnecessary prolixity, a good cause of action for the recovery of the value of the use and occupation of the premises, grounded on defendant's wrongful occupation during the farming seasons of 1901 and 1902. The complaint shows that the relation of landlord and tenant existed between the former owners of the land and this defendant and his father until the father's death. It was then discovered that this defendant was in possession, claiming title in himself, and denying his landlord's title. The defendant's denial of his lardlord's title was in law a repudiation and termination of the tenancy, dispensing with notice to quit, and the landlord might treat it as a disseisin, as has been done by commencing this suit to recover, not the agreed rent, but the value of the use and occupation. Wood on Landlord and Tenant, p. 498, and following cases cited in note on page 492 of same work: Hall v. Dewey, 10 Vt. 593; Currier v. Earl, 13 Me. 216; Tillotson v. Doe,

5 Ala. 407, 39 Am. Dec. 330; Stearns v. Godfrey, 16 Me. 158; Fusselman v. Worthington, 14 Ill. 135.

The complaint would have been in better form, had it simply alleged the ultimate facts giving the right to recover, instead of narrating the circumstances which establish those facts. The evidence established, without material dispute, that the facts were substantially as narrated in the complaint, except in one particular. The evidence showed the former owners of the land leased it, as stated in the complaint, not to defendant and his father, but to the father alone, although the father and son apparently jointly farmed it. The variance, however, was not material. It was not a departure from the issues in any substantial particular, and defendant was in no way prejudiced thereby. An amendment was therefore unnecessary. Halloran v. Holmes (N. D.) 101 N. W. 310.

Before resting his case the plaintiff had offered no proof to show that the defendant had asserted title in himself, as alleged in the complaint. This fact, however, was proved by the testimony of the defendant himself upon cross-examination, after being called as a witness in his own behalf. The cross examination by which this testimony was elicited had no relation to the matters concerning which the defendant had testified on his direct examination, and was permitted over the objection of defendant's counsel that it was irrelevant and immaterial and improper cross-examination. It was clearly relevant and material, because it tended to prove that the defendant had, by denying his landlord's title, terminated by his own act any tenancy which he might otherwise be in a position to claim. The objection that it was improper cross-examination was one addressed to the discretion of the trial court, and the ruling of that court will not be disturbed except in case of abuse. State v. Bunker, 7 S. D. 639, 65 N. W. 33; Rea v. Missouri, 17 Wall. 532, 21 L. Ed. 707. There was no abuse of discretion. The witness being cross-examined was the defendant himself. This fact distinguishes this case from that of Kaeppler v. Bank, 8 N. D. 406, 79 N. W. 869. The chief reason for the rule that the cross-examination should be confined to the matters referred to in the direct examination is that the party who calls a witness is to a certain extent deemed a sponsor for the truthfulness of his testimony. To permit such a witness to be cross-examined to prove facts foreign to the matters to which his direct examination extended would therefore be a manifest injustice to the party calling him. This reason for the rule has no application where the interested party is

himself on the witness stand; and hence the rule is not so strictly enforced in the cross-examination of the adverse party as in the case of other witnesses. Rea v. Missouri, supra. Any fact in issue within the knowledge of the adverse party may be proved by cross-examination of him before or at the trial after issue joined; and he may be so examined, whether he offers himself as a witness or not. Chapter 98, Laws 1903. It was clearly within the discretionary power of the court to permit proof of the omitted fact to be made at any time before the evidence closed.

None of the errors alleged by defendant were prejudicial, because, as we view the pleadings and proof, the undisputed evidence established plaintiff's right to recover the fair value of the use and occupation of the premises during the time in question; and the only question for the jury to decide was what that value was. The trial court was right in so holding. The sufficiency and competency of the evidence to support the jury's finding as to value are not questioned.

The judgment is affirmed. All concur.

(104 N. W. 848.)

P. P. SPOONHEIM AND ANNA SPOONHEIM v. HALVOR P. SPOONHEIM.

Opinion filed June 21, 1905.

Deed — Validity — Intoxication of Grantor.

1. A deed is voidable if the grantor at the time of executing it was so intoxicated as to be incapable of understanding the nature and effect of the transaction.

Cancellation of Instruments — Ratification.

2. The grantor in such cases must move promptly and within a reasonable time after the intoxication ceases and knowledge of the transaction has come to him, or he has notice of facts sufficient to put him upon inquiry, or he will be deemed to have ratified the deed.

Same — Unreasonable Delay.

3. An unexplained delay of nearly seven years before commencing an action to set aside the deed is unreasonable, especially in view of the fact that the land has materially increased in value.

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

Action by P. P. Spoonheim and Anna Spoonheim against Halvor P. Spoonheim. Judgment for plaintiffs, and defendant appeals.

Reversed.

J. A. Sorley, for the appellant.

Intoxication so deep and excessive as to deprive one of his understanding is a good defense to an alleged contract made while the defendant is in that condition. 14 Cyc. 1103; 17 Am. & Eng. Enc. Law, 401; Story Eq. Jur., section 231; Wilcox v. Jackson, 1 N. W. 513; Caulkins v. Fry, 35 Conn. 170; Wright v. Fisher, 32 N. W. 605; Van Wyck v. Brashear, 81 N. Y. 260; Peck v. Cary, 27 N. Y. 9; 28 Am. & Eng. Enc. Law (2d Ed.) 85, and note and cases cited; Young v. Lamont, 57 N. W. 478; Burnham v. Burnham et al., 97 N. W. 176; Schuur v. Rodenback, 65 Pac. 298; Warvelle on Vendors (2d Ed.), section 75; Bush v. Breing, 6 Atl. 86; In re Schusler v. Estate, 47 Atl. 966; Foot v. Tewksburg, 2 Vt. 97; Bates v. Ball, 76 Ill. 108; Schackelton v. Sebree, 86 Ill. 616; O'Connor v. Rempt, 29 N. J. Eq. 156; Dixon v. Dixon, 22 N. J. Eq. 91; Lofthus v. Maloney, 16 S. E. 749; Taylor v. Purcell, 31 S. W. 567; Gardner v. Gardner,, 34 Am. Dec. 345; Coombe's Exr. v. Carthew, 43 Atl. 1057; Wright v. Walker, 54 L. R. A. 440.

Deed made in a sober interval by an habitual drunkard is good. Ritter's Appeal, 59 Pa. St. 9; Ralston v. Turpin, 25 Fed. 7.

Neither fraud or undue influence is presumed. They must be shown by satisfactory evidence. Heyrock v. Surerus, 9 N. D. 28, 81 N. W. 36; Burnham v. Burnham et al., 97 N. W. 176; Bumpus v. Bumpus, 26 N. W. 410; Wilcox v. Jackson, 1 N. W. 513; Franks v. Jones, 17 Pac. 663; Crane v. Conklin, 1 N. J. Eq. 346.

Where intoxication is induced by the other party. Brummond v. Krause et al., 80 N. W. 686; Peckham v. Van Bergen, 8 N. D. 595, 84 N. W. 566; Story Eq. Jur., section 231; Trimbo v. Trimbo, 47 Minn. 389; Pom. Eq. Jur., section 946.

Assuming plaintiff's intoxication as alleged, the transaction was voidable only. Johnson v. Harmon, 94 U. S. 371; 24 L. Ed. 271; Carpenter v. Rogers, 28 N. W. 156.

Accepting the benefits of a transaction is equivalent to a consent to all the obligations arising from it, so far as are known, or ought to be known to the person accepting. 9 Am. & Eng. Enc. Law, 124; 18 Am. & Eng. Enc. Law, 102; Warvelle on Vendors (2d Ed.) 101; Joest v. Williams, 42 Ind. 565; Pom. Eq. Jur., sections 820, 897; Wright v. Fisher, 32 N. W. 605; Youn v. Lamont, 57 N. W. 478; O'Connor v. Rempt, 29 N. J. Eq. 156; Whitcom et al. v.

Hardy, 76 N. W. 29; Bumpus v. Bumpus, 26 N. W. 410; Pom. Eq. Jur. 965.

Guy C. H. Corliss, for respondents.

Where the relation of mortgagor and mortgagee exists and the latter receives title to the mortgaged property by a subsequent conveyance, the mortgagee has the burden of showing the transaction is in all respects fair. Linnellinnel v. Lyford, 72 Me. 283; Ritchie v. McMulten, 79 Fed. 522; Peugh v. Davis, 96 U. S. 332, 24 L. Ed. 775; Moeller v. Moore, 50 N. W. 396; Baugher v. Merryman, 32 Md. 192; Odell v. Mantrose, 68 N. Y. 499; Niggeler v. Maurin, 24 N. W. 369; Marshall v. Thompson, 39 N. W. 309; DeLancy v. Finnegan, 90 N. W. 387; Russell v. Southard, 12 How. 139, 13 L. Ed. 927; Hyndman v. Hyndman, 19 Vt. 10; Hall v. Hall, 44 Am. St. Rep. 696; Bradbury v. Davenport, 46 Pac. 1062; Jones v. Foster, 51 N. E. 862; Seymour v. Mackay, 18 N. E. 552; Scanlan et al. v. Scanlan, 25 N. E. 652; Cassem v. Heustis, 94 Am. St. Rep. 164; Alexander v. Rodriquez, 12 Wall 323, 20 L. Ed. 407; Cassem v. Heustis, 94 Am. St. Rep. 160; Dougherty v. McColgan, 6 Gill & J. 275.

The deed should be set aside on the ground of surprise. 1 Story Eq. Jur., sections 118, 120, 251; 2 Pom. Eq. Jur., section 847; Coffman v. Lookout Bank, 40 Am. Rep. 21; Graffam v. Berhess, 117 U. S. 180, 29 L. Ed. 938.

While a deed is only voidable where the grantor has some intelligence left, yet, if intellectual powers are gone, whether through insanity, idiocy, disease or cripplings of old age, or temporarily through the use of intoxicants and drugs, the deed is void because there is no intelligent personality left to make a deed. German S. & L. Soc. v. LeLashmutt, 67 Fed. 399; Delafield et al. v. Parish, 25 N. Y. 9; Van Deusen v. Sweet, 51 N. Y. 378; Aldrich v. Bailey, 132 N. Y. 85, 30 N. E. 264;; Castro v. Geil, 52 Am. St. Rep. 84; Rogers v. Blackwell, 49 Mich. 192; Estate of Desilver, 28 Am. Dec. 645; Rogers v. Walker, 47 Am. Dec. 470; Griswold v. Butler, 3 Conn. 227; Elder v. Schumacher, 33 Pac. 175, 13 Cyc. 573.

MORGAN, C. J. Plaintiff brought this action to set aside a deed of real property executed and delivered by him to the defendant, his brother, on December 26, 1889. The complaint alleges that the plaintiff was at said time in such mental and physical condition through the excessive drinking of intoxicating liquors that he was

in danger of sudden death, and that it was agreed between him and the defendant, at defendant's solicitation, that plaintiff should convey the land to the defendant, and that the defendant agreed to convey the same to plaintiff's wife; that plaintiff thereupon conveyed the land to the defendant, but defendant has since refused to convey the land to the plaintiff's wife; that defendant has been in possession of said lands since and including a part of the year 1895, and has appropriated all the crops raised thereon; and that the value of the rents and profits of said land is the sum of $1,000 per annum. The answer denies these allegations, except as to possession, and alleges that said deed was given to him as security for money then owing to defendant from plaintiff, and for security for liability incurred by defendant in becoming plaintiff's security on notes given by him to others, and as security for future advances. The defendant also sets forth in the answer a counterclaim in substance as follows: That on September 17, 1894, plaintiff was indebted to the defendant in the sum of about $2,284.75 for money loaned, and that these parties had a settlement on that day which resulted in a conveyance of said land by plaintiff to defendant by warranty deed, in consideration of the satisfaction and discharge of all of plaintiff's indebtedness and liability to defendant; that such settlement was fully consummated on that day; and that defendant went into possession of said land and cultivated the same, and has ever since been in possession thereof. The plaintiff interposed a general denial to all the allegations of the reply. The trial court found that the deed of December 26, 1889, was a mortgage, and further found that the deed of September 17, 1894, was given when the plaintiff was entirely incapacitated from knowing what he was then doing by reason of his intoxication, and ordered said deed set aside upon payment by plaintiff to defendant of the amount adjudged to be due and owing to him by plaintiff, after allowing as credit thereon $250 per annum, the annual rental value while defendant was in possession. Defendant has appealed from said judgment, and demands a review of the entire case under section 5630, Rev. Codes 1899.

It will be noticed that the trial court found against the plaintiff so far as the allegations of the complaint are concerned. This finding is not expressly challenged by the plaintiff on the appeal, although its correctness is not conceded. It therefore follows that there is no issue to be determined on this appeal as to the relation between the parties arising out of the deed of Decem-

ber 26, 1889. This deed was a mortgage in equity, although an absolute warranty deed in terms. The important issue that remains to be decided is as to the circumstances under which the deed of September 17, 1894, was given, and the legal effect under the evidence of the giving of that deed. There is a direct conflict in the evidence as to the circumstances under which the deed was given. Plaintiff contends that he has no memory of the giving thereof, and that, if he signed it, he was so drunk at the time that the deed was void. He further contends that the defendant induced him to begin drinking in August, 1894, and encouraged him in continuing on a long drinking spree, which ended in his becoming incompetent to do any business, that he might procure a deed of this land from him. The evidence shows that plaintiff had been using intoxicating liquors for over three weeks before September 17th. He was intoxicated during a part of every day of that time. He drank large quantities of liquor, and at times was unable to walk at all during that time. He was often drunk, and was not entirely free from the influence of liquor during most of the time. During these days he generally staggered while walking and was boisterous and abusive in his talk. He constantly showed, by his conversation, appearance and actions, that he was on a debauch. He also used morphine occasionally during this time. He neglected his farming affairs and spent money freely. He lived two and a half miles from Hatton and spent much of his time there, but generally went home nights, and often took his liquor home with him and drank during the night. A few days after September 17th he was taken before the insanity board of Grand Forks county on the application of his wife and lodged in jail. He was not committed to the asylum, but was allowed to go home on parole as he states. He was taken before the board, not with a view to having him sent to the asylum, but, as is to be fairly inferred from the evidence, to induce him to stop drinking. The fact of his having been intoxicated during this time is proven by the testimony of his neighbors and the business men of Hatton. Over a dozen witnesses testify to that fact, and from their having seen him during this time and from his actions and appearance they further testify that they did not think him capable or competent to intelligently transact any important business while in the condition in which they saw him. Four of these witnesses saw him on September 17th, but two of these did not see him until late in the day, several hours after the deed was de-

livered, and they testify that he was intoxicated when they saw him. The plaintiff's signature was duly witnessed, and defendant acknowledged the deed before a notary public at Hatton. The notary public was not a witness at the trial. The attesting witnesses were sworn, and one of them, defendant's attorney of record in the case, testifies that he was not intoxicated, and the other witness did not particularly observe him, but saw nothing in his actions indicating his present intoxication. Plaintiff's wife testified that he drank during the night of September 16th, and says that he was not as drunk as usual on September 17th. Plaintiff transacted other business with parties on the morning of the 17th, and their testimony tends to show that they did not consider him capable of intelligently transacting business at that time. The defendant testifies that plaintiff was sober during the 17th of September, and plaintiff testifies that he has no recollection whatever of the transactions of that day. Plaintiff drank nothing during that day until the settlement was completed, although he had all the appearance of having been on a protracted debauch. He is a man of good business ability, has a fair education, and was prosperous as a farmer. He had drank liquors to some extent since 1883, and during and since 1889 has been accustomed to continue drinking and become intoxicated at irregular periods. The witnesses Gowran and Adams, who transacted business with plaintiff on the morning of September 17th, before the deed was signed, testify that they had considerable trouble in getting him to settle up their matters, but that he finally gave them orders for certain grain in the elevators to satisfy their liens. They both say that he was unfitted for business. Mr. Gowran states his opinion to be that "a man addicted to drink, or that has been under the influence of it sufficient to have the face that he had, wouldn't have sufficient judgment for any business." He further says that he exercised judgment and that he understood the business that he transacted with him, although not so fully as a person would who had never drank.

The settlement was agreed to between Mr. Sorley and plaintiff near plaintiff's residence. Mr. Sorley was there at defendant's request. He went there to procure a settlement of all matters unsettled between the brothers. After all items of account between them had been considered and adjusted, plaintiff said that he was unable to pay, and Sorley suggested that he sell the land to defendant. After some talk the price was agreed upon at $2,300

after Sorley had submitted the matter to defendant. They went to defendant's home to draw up the deed, and went there at plaintiff's request. At defendant's house, one-half mile distant from plaintiff's home, the deed was drawn up, signed and witnessed. They went to Hatton, where the deed was acknowledged, and three notes, marked "Paid" by Sorley, were turned over to plaintiff. Plaintiff signed a contract to sell certain mortgaged wheat at private sale, and that the proceeds be applied on defendant's indebtedness, not included in the $2,284.75. Defendant did not record this deed on advice of his counsel that it was unnecessary if he took possession. Defendant had knowledge that the plaintiff had been drinking to excess between August and September 17th.

It remains to determine what conclusions are deducible from the evidence upon the following questions: (1) Was the deed void? (2) If not void, was it voidable at the election of the plaintiff? (3) Was the settlement fairly and honestly made, in view of the fact that the relation of mortgagor and mortgagee had hitherto existed between the parties? (4) If not so made, and the giving of the deed was voidable at the time, has plaintiff ratified the giving of the deed by not attacking its validity promptly?

Upon the first question we find that the evidence will not sustain a conclusion that the deed was given when there was an entire want of understanding on the part of the plaintiff as to what he was doing. Whether the contract or deed of an intoxicated person is ever entirely void on the ground, alone, that it was given while intoxication continued and rendered the person entirely without understanding or judgment, we need not determine as a question of law. The authorities are in conflict on this question. Conceding, for the purposes of this case, that the deed of an intoxicated person who is entirely without understanding is void, and that section 2706, Rev. Codes 1899, providing that "a person entirely without understanding has no power to make a contract of any kind," applies to contracts made while a person is temporarily intoxicated, we would nevertheless be forced to find that the plaintiff was not in that condition when he made the settlement and gave the deed. But there is hardly any conflict in the authorities upon the question as to whether a deed given while a person is in an intoxicated condition is voidable at his election. It is generally held that he may avoid his deed under such circumstances. The general rule is stated in 17 Am. & Eng. Enc. Law, p. 401, as follows: "Where a person seeks to avoid responsibiltiy for a con-

tract on the ground of intoxication alone, it must appear that the drunkenness was so excessive that he was utterly deprived of the use of his reason and understanding and was altogether incapable of knowing the effect of what he was doing. Any degree of intoxication which falls short of this will furnish no ground for release, in the absence of fraud on the part of the other contracting party." Tested by this rule, we are strongly inclined to the view that the facts do not bring the plaintiff within its application. Considering everything that was done and said by him on September 17th, and his condition prior thereto, we should hesitate long before deciding that he was in such condition that he did not understand the effect of his settlement and deed of that day. Plaintiff drank nothing during that day until after the transactions were all closed. Nothing is shown in his conduct or by his words indicating that degree of incapacity that will avoid the deed. During the whole day he did not show in any way that he was not in his normal mental condition. He probably drank during the night previous, and the effects of such drinking had not entirely passed; but that fact is far from being a good ground for finding him wholly incapacitated from understandingly transacting business. But we are agreed that plaintiff's conduct and inaction, after he had become entirely sober and entirely free from the effects of excessive drinking, are sufficient grounds for denying him relief. Hence the question of fact as to whether the deed was voidable on account of his condition will not be further considered. Plaintiff did not act promptly in asking to have the deed set aside, and he has by such inaction ratified this deed, conceding that he could have avoided the deed, had he acted.

The following facts convince us that he is entitled to no relief: This conclusion is reached from the evidence of facts that transpired on September 17th, and from what the evidence shows his condition to have been on that day. Whether he was capable of understandingly making a settlement and signing the deed depends upon his condition on that day. His condition days or weeks before that day, or on days following, has alone but a very remote bearing on the question as to his condition on September 17th. It is undisputed that the plaintiff has not drank intoxicating liquors, except occasionally and to a very limited extent, since about October 19, 1894. Since that time he has been sober, and at all times conceded to have possession of his full mental powers. After receiving the deed, defendant went into possession of this land and plowed

it in the fall of 1894. In 1895 he put the same into crop and harvested it, and appropriated the crops to his own use. This has been done by him every year since, and up to the present time. The plaintiff had been in possession of and cultivated the land up to and including the 17th day of September, 1894. The plaintiff acknowledged that he knew that the defendant was in possession thereof since the year 1894, or early in 1895. When the settlement of all their mutual accounts was made and the deed delivered on September 17th, three notes, aggregating in amounts about $1,600, were marked "Paid" and turned over to the plaintiff by defendant. These notes were kept by the plaintiff and introduced in evidence at the trial. At the conclusion of the settlement, when the deed was delivered, plaintiff was paid a small sum of money, being about $16—the difference between the aggregate indebtedness and the price agreed upon for the land, $2,300. The plaintiff admits in his evidence, in answer to questions by his counsel, that defendant informed him early in 1895 that he was the owner of the land in question. In the same year the following conversation was had between plaintiff and defendant: "Q. What did you say to him, and he to you? Ans. Well, we did not have a long conversation, and I asked him how things were, and he says they are all fixed up. I says, 'How is that?' He says, 'I have had an attorney over there to straighten things out with you, and I am through with it' Yes; he said he had to leave it to an attorney to get it fixed up legally." This conversation and the other facts stated conclusively show that the plaintiff learned early in 1895 that the defendant claimed the land as his own, and plaintiff did nothing towards moving to set aside or disaffirm the settlement until the year 1900, and did not begin this suit until nearly seven years after the deed was given. It is true plaintiff claims that he said to the defendant, when they met on the highway, that defendant would have to settle, or words to that effect. Plaintiff testifies that in 1898 defendant informed him that he had a deed to this land, and plaintiff said we will test that. These matters of casual conversation do not excuse nor justify the long delay. Defendant has at all times since September 7th claimed the land as his own.

From these facts we have no hesitation in holding that the plaintiff ratified the sale, and cannot now invoke the aid of a court of equity to relieve him from his contract. He should have disaffirmed his contract promptly upon learning of it, or of facts suf-

ficient to put him upon inquiry. No adequate excuse is offered for the long delay in asserting his rights. Defendant informed him in 1895 that he was through with the matter and that everything was settled. The relationship between the parties, and the fact, as testified to by the plaintiff, that he hoped that defendant would act as a brother should, and that he thought that he would finally settle with him, are not sufficient reasons to excuse his failure to move promptly in the legal assertion of his rights as he now claims them. A person will not be allowed to wait, and determine after unreasonable lapse of time, whether a contract be disadvantageous to him or not, before rescinding it. He must determine promptly upon recovering his judgment whether he will abide by his contract or repudiate the same. No definite time can be fixed for his so doing, but each case will be disposed of upon its own circumstances. Drake v. Wild, 65 Vt. 611, 27 Atl. 427; Hammond v. Wallace, 85 Cal. 522, 24 Pac. 837. 20 Am. St. Rep. 239; Rowe v. Horton, 65 Tex. 89; Amey v. Cockey, 73 Md. 297, 20 Atl. 1071; Hatch v. Kelly, 63 N. H. 29; Jones v. Cullen, 142 Ind. 335, 40 N. E. 124; Fuller v. Montague (C. C.) 53 Fed. 204. In this case the evidence shows that the value of the land has materially increased during the seven years that followed the giving of the deed. In 1894 the sum of $2,300 was not far from its actual cash value. The court found it worth $2,500. There is competent evidence in the case that it was worth much less. It is now worth $6,000. We are satisfied that it is the increased value of the land that is the incentive to the bringing of this suit. Mahon v. Leech, 1 N. D. 181, 90 N. W. 807; Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856. It would be inequitable to permit the plaintiff to get his land back at its increased value, with the rental value during all these years, and to allow the defendant legal interest only. The plaintiff should have avoided such a condition promptly by attacking the conveyance, or show some valid reason for not doing so.

The plaintiff claims that, coupled with his alleged intoxication, the facts should be considered that the defendant employed an attorney to procure the settlement, and that plaintiff was thereby surprised and made the settlement under coercion, and that the settlement was unfair and should be set aside on that ground, as the relation of mortgagor and mortgagee existed between the parties, which fact causes courts of equity to scrutinize all transactions of the sale of the equity of redemption. These matters are

disposed of on the grounds stated in relation to the question of the alleged intoxication of the plaintiff. The plaintiff has ratified the deed by not moving to set aside the deed promptly, or at least within a reasonable time after he became free from his alleged incapacity.

The judgment is reversed, and the district court is directed to order judgment for the defendant. All concur.

(104 N. W. 845.)

MARY WEISBECKER v. JOHN CAHN.

Opinion filed June 22, 1905.

Execution — Time of Issuance.

1. Under section 5500, Rev. Codes 1899, providing that a judgment may be enforced by execution at any time within ten years after its entry, a judgment cannot be properly enforced by execution issued after said time, although the judgment debtor has been continually absent from the state during said time, and the judgment remains in force for that reason.

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

Action by Mary Weisbecker against John Cahn. Judgment for plaintiff, and defendant appeals.

Affirmed.

Barnett & Richardson, for appellant.

That judgment debtors have property within the state subject to levy does not operate to continue the running of the statute of limitations during his absence from the state. 55 Ky. 554; 66 Cal. 202; Richards v. Continental Ins. Co., 47 N. W. 350; 36 N. Y. App. Div. 473; 37 Iowa, 570; 51 Kan. 341; 43 Miss. 212; 78 Tex. 278; Robertson v. Stuhlmiller et al., 61 N. W. 986; 49 Iowa, 282; 28 So. 751, 34 S. W. 606, pp. 234-235.

Statute of limitations does not run against a judgment while judgment debtor is absent from the state. Osborne v. Lindstrom, 9 N. D. 5, 46 L. R. A. 715, 81 N. W. 72.

Time of a judgment debtor's absence from the state must be deducted in determining how long a statute has run against a judgment. Sheldon v. Barlow et al., 66 N. W. 338; Hathaway v. Meads et al., 4 Pac. 519; Weiser v. McDowell, 61 N. W. 1094;

Casady v. Grimmelman et al., 77 N. W. 1067; Ross et al. v. Duval et al., 13 Peters (U. S.) 45, 10 L. Ed. 50, 63 Mass. 527.

While time to sue on judgment may not be barred, by absence of debtor, time to issue execution may. Buttam v. Link Jord, 61 S. W. 1000.

Spalding & Stambaugh, for respondents.

Section 5210, Rev. Codes 1899, applies to actions only, and in no way applies to the ten-year period in which an execution may issue. Merchants National Bank of Bismarck v. Braithewaite, 7 N. D. 358, 75 N. W. 244.

The right to issue an execution is in no way dependent upon or affected by the statute of limitations. Ruth v. Wells et al., 83 N. W. 568.

MORGAN, C. J. This appeal is from an order denying an application to set aside a default judgment and for leave to interpose an answer. The application may be deemed regular in every respect for the purposes of this appeal. The trial court denied the application solely upon the ground that the proposed answer does not set forth facts sufficient to constitute a defense to the cause of action pleaded in the complaint. The complaint states a cause of action for determining adverse claims to certain real estate and its allegations conform strictly to those required in such actions by chapter 5 of the Laws of 1901. The defendant's proposed answer sets forth the following facts: That the state of North Dakota recovered a judgment against one William Wilkens on the 3d day of March, A. D. 1892, and that the same was regularly filed, entered and docketed on that day; that said Wilkens removed from the state on or about said 3d day of March, 1892, and has continuously remained absent from this state ever since, and is now a resident of the state of Wisconsin, and has never paid said judgment; that on the 28th day of October, 1903, the state of North Dakota, by its proper officers, caused an execution to be issued on said judgment, and that pursuant to such execution the sheriff of Cass county levied upon the real estate involved in this action, and regularly sold the same to the defendant, and issued to him a certificate of the sale thereof to him on the 19th day of March, 1904; that said sale was confirmed by the district court, and was regularly made in all respects; that on the 17th day of June, 1904, the plaintiff caused to be filed and recorded in

the office of the register of deeds of Cass county a deed of said land from said Wilkens to her, and now claims to be the owner of the same by virtue of said deed.

The question which will determine the merits of this appeal is whether a sale of real property is valid when made under an execution issued after ten years from the entry of judgment. Actions based on judgments are barred at the expiration of ten years after a cause of action has accrued thereon. Section 5200, Rev. Codes 1899. The absence of the judgment debtor from the state is conceded by the respondent to stop the running of the statute of limitations upon the judgment, and that section 5210, Rev. Codes 1899, providing that the time during which a person is absent from the state after a cause of action shall have accrued against him, the time of his absence, if for one year or more, shall not be deemed or taken as any part of the time limited for the commencement of an action on such cause of action, is applicable to causes of action arising on judgments. This being the fact, it follows that when the execution in this case was issued and the sale made thereunder the judgment was in full force and effect as a cause of action. What was the effect of issuing an execution on said judgment ten years after its rendition? Section 5500, Rev. Codes 1899, provides as follows: "The party in whose favor judgment has been given, and in case of his death his personal representatives duly appointed, may at any time within ten years after the entry of judgment proceed to enforce the same by execution as provided in this chapter." Appellants contend that, the judgment having been kept alive by virtue of the debtor's absence from the state, the right to enforce the same by execution was extended notwithstanding section 5500, supra. We cannot agree to this contention. There is no connection between section 5210 and section 5500. They apply to different matters, and neither one controls or affects the other. The issuing of an execution is, like the continuing of the lien of a judgment, controlled by the statute. There is nothing relating to an execution or the issuing of the same that is controled by section 5210. That section pertains only to actions or causes of action. An execution is not a cause of action. It pertains to the enforcement of the lien of a judgment. The terms of section 5500 are explicit. Its construction, as contended for by appellant, would make it necessary to read into it certain exceptions or provisos. This is not permissible. We have nothing to do with the policy of this section. Its language is plain

and unambiguous. It limits the time during which an execution may issue on a judgment to ten years after its entry. Its language will not uphold the construction that the right to enforce the judgment by execution continues after ten years if the debtor has become a nonresident or been absent from the state during more than one year during the ten years. The right to an execution under that section does not continue while the judgment remains in force as a cause of action. Under the facts of this case that right terminated in ten years from the entry of the judgment. The absence of the defendant did not prevent the judgment creditor from issuing an execution before the ten years expired. Under the common law an execution must issue within a year and a day of the entry of the judgment. The creditor was strictly held to that limitation, and, if he failed to issue execution during that time, he lost his right to an execution, and must resort to an action on the judgment, except in certain cases not material on this appeal. Freeman on Executions (3d Ed.) section 27. The case of Merchants' National Bank v. Braithwaite, 7 N. D. 358, 75 N. W. 244, 66 Am. St. Rep. 653, in effect is decisive of this case.

Appellant strongly relies on Brittain v. Lankford (Ky.) 61 S. W. 1000. The case is not in point as it is based on a different statute. The statutes of Kentucky do not fix a definite limit to the time during which an execution may issue on a judgment. That right exists while the judgment remains in force as a cause of action. The question decided in that case is that the judgment was in force as a cause of action, and that the execution was therefore properly issued. There are no other cases cited on this point.

The order is affirmed. All concur.

(104 N. W. 513.)

JACOB FRIEDLANDER v. JOHN B. TAINTOR.

Opinion filed June 23, 1905.

Mechanic's Lien — Rights of Architect.

1. A supervising architect, who furnishes plans and specifications and supervises the construction of a building pursuant to a contract with the owner for such services, is entitled to a lien therefor under section 4788, Rev. Codes 1899, which gives a lien to "any person who shall perform any labor upon * * * any building."

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

Action by Jacob Friedlander against John B. Taintor. Judgment for plaintiff, and defendant appeals.

Affirmed.

E. Smith-Peterson, for appellant.

The services of an architect in drawing plans and specifications for the construction of a house, directing the builder in charge of the work, cannot be called "work or labor upon a building." Raeder v. Bensberg, 6 Mo. App. 445; Murphy v. Murphy, 22 Mo. App. 18; Bank of Pennsylvania v. Gries, 35 Pa. St. 423.

Simply providing plans and specifications does not entitle one to a mechanic's lien. Price v. Kirk, 90 Pa. St. 47; Rush v. Able, 90 Pa. St. 153; Foushee v. Grigsby, 12 Bush. 76 (Ky.); Ames v. Dyer, 41 Me. 397.

Under statutes similar to ours the weight of judicial opinion is against the claim of an architect to the protection of the statute for furnishing plans and specifications. Mitchell v. Packard, 47 N. E. 113; Crowell v. Cape Cod Ship Canal Co., 46 N. E. 424; Railroad Co. v. Leuffer, 84 Pa. St. 168, 24 Am. Rep. 189; Ericsson v. Brown, 38 Barb. 390; Thompson v. Baxter, 92 Tenn. 305; Mining Co. v. Cullins, 104 U. S. 176, 26 L. Ed. 704; Little v. Hobbs, 53 N. C. 179.

Conceding that plaintiff is entitled to a mechanic's lien for supervision, he is entitled to none for plans and specifications. Having united his two claims, lienable and nonlienable, in one gross charge without apportioning, no lien can be enforced. 20 Am. & Eng. Enc. Law (2d Ed.) 359; Mitchell v. Packard, 47 N. E. 113; Adler v. World's Pastime Exp. Co., 18 N. E. 809; Morrison v. Minot, 5 Allen, 403; Allen v. Elwert, 44 Pac. 823; Gerry v. Ames, 48 Pac. 355; 2 Jones on Liens, section 1523.

In an action to enforce a mechanic's lien, if plaintiff fails to establish such lien, he can have no personal judgment for the amount of his claim. Bray v. Booker, 8 N. D. 526, 72 N. W. 933; Dudley v. Congregation of Third Order of St. Frances, 34 N. E. 281; Beck v. Allison, 56 N. Y. 366; Boroughs v. Tostevan, 75 N. Y. 567.

Guy C. H. Corliss, for respondent.

An architect, who is creator of the building in the form it takes, and gives his time seeing that it is built in compliance with his

plans and specifications, has performed the most vital labor in the erection of the building and is entitled to a lien for his labor. Phillips, Mech. Liens, section 158; Boisot, Mech. Liens, section 16; Kneel, Mech. Liens, section 13a; Stryker v. Cassidy, 76 N. Y. 50; Insurance Co. v. Rowland, 26 N. J. Eq. 389; Bank v. Gries, 35 Pa. St. 423; Knight v. Norris, 13 Minn. 473 (Gil. 438); Hughes v. Torgerson, 16 L. R. A. 600; Taylor v. Gilsdorf, 74 Ill. 354; Phoenix Furniture Co. v. Put-in-Bay Hotel Co., 66 Fed. 683; Gardner v. Leck, 54 N. W. 746; Parsons v. Brown, 66 N. W. 880; Rinn v. Power Co., 38 N. Y. Supp. 345; Rara Avis Gold & Silver Mining Co. v. Bouscher, 12 Pac. 433; Mulligan v. Mulligan, 18 La. Ann. 20; Arnoldi v. Gouin, 22 Grant Ch. 314; Johnson v. McClure, 62 Pac. 983; Field v. Consolidated Co., 55 Atl. 757; Van Dorn v. Mengedoht, 59 N. W. 800.

A few cases hold that supervision comes within the statute but plans and specifications do not. Mitchell v. Packard, 47 N. E. 113; Raeder v. Bensberg, 6 Mo. App. 445; Foushee v. Grigsby, 12 Bush. 76; Price v. Kirk, 90 Pa. 47; Rush v. Abel, 90 Pa. 153.

Nebraska affords a lien for plans alone. Henry & Coatsworth Co. v. Halter, 79 N. W. 616.

Some cases destroy the lien when plans and specifications are furnished. Our statute says any person may have a lien.

YOUNG, J. The plaintiff brought this action to foreclose a mechanic's lien upon a certain two-story store and office building situated in the city of Park River. The findings and judgment of the trial court were in plaintiff's favor. The defendant has appealed from the judgment, and assigns error upon the judgment roll proper.

The trial court found, among other things, that the plaintiff furnished plans and specifications for, and superintended the construction of said building, pursuant to a contract with the defendant, under the terms of which the plaintiff was to be paid for his services 3 per cent of the cost of the building. The appeal presents but a single question. The plaintiff is an architect, and the lien involved in this case is for his services in drawing plans and specifications and supervising the construction of the building upon which the lien is claimed. The defendant contends that such service will not support a lien under our statute. This contention cannot be sustained. Section 4788, Rev. Codes 1899, declares that "any person who shall perform any labor upon * * * any

building or other structure upon land * * * under a contract with the owner of such land * * * shall * * * have for his labor done * * * a lien upon such building." The statute does not designate the persons who are entitled to liens under it by name or occupation. Its language is general. "Any person" who otherwise comes within its provisions is entitled to a lien. It includes all persons who perform "any labor upon any * * * building." It is urged that the services of an architect in drawing plans and specifications and supervising the construction cannot be said to be labor upon the building. This question is not a new one to the courts, and it has been held with great unanimity that where the architect not only draws the plans, but superintends the construction, he is entitled to a lien; and this under statutes which merely give a lien in general terms for work and labor furnished in the erection of a building. Boisot on Mechanic's Liens, section 116; Phillips on Mechanic's Liens, section 158. Also Stryker v. Cassidy, 76 N. Y. 50, 32 Am. Rep. 262, overruling Stryker v. Cassidy, 10 Hun, 81. See, also, Rinn v. Electric Power Co. (Sup.) 38 N. Y. Supp. 345; Knight v. Norris, 13 Minn. 473 (Gil. 438); Gardner v. Leck, 52 Minn. 522, 54 N. W. 746; Mutual Benefit Life Ins. Co. v. Rowland, 26 N. J. Eq. 389; Bank v. Gries, 35 Pa. 423; Hughes v. Torgerson (Ala.) 11 South. 209, 16 L. R. A. 600, 38 Am. St. Rep. 105; Taylor v. Gilsdorff, 74 Ill. 354; Von Dorn v. Mengedoht (Neb.) 59 N. W. 800; Field & Slocomb v. Consolidated M. W. Co. (R. I.) 55 Atl. 757; Johnson v. McClure (N. M.) 62 Pac. 983; Parsons v. Brown (Iowa) 66 N. W. 880; Phoenix Furniture Co. v. Put-in-Bay Hotel Co. (C. C.) 66 Fed. 683; Arnoldi v. Gouin, 22 Grant, Ch. 314; Mulligan v. Mulligan, 18 La. Ann. 20. Our statute gives a lien for labor "upon" the building, but we do not regard this language as peculiar, or requiring a difference in construction. The Alabama statute uses the same language, and the court, in Hughes v. Torgerson, supra, sustained the lien of a supervising architect. "Are such services by an architect 'work or labor upon * * * a building or improvement on land,' within the meaning of the statute? Code, section 3018. It is plain that a contractor for the construction of the building is within the protection of the statute. If he was also intrusted with the planning of the building, and with the sole supervision of its erection, we think it equally plain that his services in these particulars could be regarded as properly a part of his work 'upon the building,' and that compensation therefor might be included in the

amount for the security of which he could acquire a lien under the statute. Under a New York statute a lien was authorized in favor of 'any person who shall perform any labor or furnish any materials in building, altering or repairing any house,' etc., 'by virtue of any contract with the owner,' etc. 'This language,' it was said in Stryker v. Cassidy, 76 N. Y. 50, 32 Am. Rep. 262, 'is general and comprehensive, and its natural and plain import includes all persons who perform labor in the construction or reparation of a building, irrespective of the grade of their employment or the particular kind of service. The architect who superintends the construction of a building performs labor as truly as the carpenter who frames it, or the mason who lays the walls; and labor of a most important character. * * * The language quoted makes no distinction between skilled and unskilled labor, or between mere manual labor and the labor of one who supervises, directs and applies the labor of others. The general principle upon which the lien laws proceed is that any person who has contributed by his labor or by furnishing materials to a structure erected by an owner upon his premises shall have a claim upon the property for his compensation.' The claim of an architect was allowed in that case. What was there said seems eminently sound, and is equally applicable to the Alabama statute. An architect who prepares the drawings, plans and specifications for a building, and superintends the erection thereof, may as truly be said to perform labor thereon as any one who takes part in the work of construction. That he is within the protection of the statute is a proposition well supported by adjudications upon other similar statutes." Some courts have held that an architect is not entitled to a lien even when his services cover both furnishing of plans and the supervision of construction. See Raeder v. Bensberg, 6 Mo. App. 445; Foushee v. Grigsby, (Ky.) 12 Bush, 76. The weight of authority and reason, as already stated, is against this view. There is a sharp conflict in judicial opinion as to whether an architect who merely furnishes plans and specifications is entitled to a lien. Upon this we express no opinion. The plaintiff's contract in this case included the supervision of the construction, and under the rule of construction adopted by the great majority of the courts under the same or similar statutes to which we give our adherence he was entitled to the lien.

Judgment affirmed. All concur.

(104 N. W. 527.)

RENA STEVENS v. CHARLES A. MEYERS.

Opinion filed June 27, 1905.

Appeal — Review of Evidence — Specification in Statement.

1. The specification contained in appellant's statement of case and set out in the opinion calls for a legal conclusion, and not the determination of a question of fact, and does not, therefore, authorize a review of the evidence under section 5630, Rev. Codes 1899.

Fraudulent Conveyance — Intent.

2. Under our statute (section 5055, Rev. Codes 1899) a fraudulent intent will not necessarily be conclusively presumed as a matter of law from the fact that a conveyance was made without a valuable consideration, and by one who was at the time insolvent. Under the above section the intent is a question of fact and not of law.

Same — Absence of Consideration — Findings.

3. The absence of a valuable consideration and the insolvency of the grantor are evidentiary, and not ultimate, facts, and will not, when embodied in additional findings, control an express finding that a transfer was made without fraudulent intent.

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

Action by Rena Stevens against Charles A. Meyers. Judgment for plaintiff, and defendant appeals.

Affirmed.

W. J. Meyer, for appellant.

Voluntary conveyances by insolvents are fraudulent and void although consummated without fraudulent intent. Stickney v. Borman, 2 Pa. St. 69; Kimel v. M'Right, 2 Pa. St. 38; Thompson v. Crane, 73 Fed. 327; Wooten v. Steele, 109 Ala. 563, 55 Am. St. Rep. 947; Goodman v. Wineland, 61 Md. 449; Marks v. Bradley, 69 Miss. 1; Potter v. McDowell, 31 Mo. 62; Fellows v. Smith, 40 Mich. 689; Farmers Bank v. Price, 41 Mo. 291; 14 Am. & Eng. Enc. Law, 302.

Transfers from husband to wife are presumably fraudulent and void. French v. Holmes, 67 Me. 192; Haston v. Eastern, 31 N. J. Eq. 703; Lockhard v. Buckley, 10 W. Va. 107; Reed v. Livingston, 3 Johns Ch. 481; Hanson et al. v. Manley et al., 33 N. W. 357; Woods v. Allen et al., 80 N. W. 540.

The property retained by the insolvent must be accessible to execution. 14 Am. & Eng. Enc. Law, 308; Eddy v. Baldwin, 33

Mo. 369; Hunter v. Waite, 3 Gratt (Va.) 26; Levering v. Norwell, 9 Baxt. (Tenn.) 176; Baker v. Lyman, 53 Ga. 339; Elwell v. Walker, 3 N. W. 64; Gardener v. Emerson, 91 Me. 536; House v. Judson, 1 Fla. 133; Pomeroy v. Bailey, 43 N. H. 118; Walker v. Loring, 34 S. W. 405; Church v. Chapin, 34 Vt. 223.

The specification of fact to be reviewed was sufficient. Fraud is a question of fact. Rev. Codes 1899, sections 5055, 3848, 3850; Cole v. Tyler et al., 65 N. Y. 73.

Guy C. H. Corliss, for respondent.

Fraudulent intent is a question of fact, not of law, and transfer is not void solely on a lack of valuable consideration. Rev. Codes 1899, section 5055; Dygert v. Remerschnider, 32 N. Y. 629; Bull v. Bray, 26 Pac. 873; Emmons v. Barton, 42 Pac. 303.

A tort claim claimant is only a creditor when his unliquidated claim takes the form of a judgment; and when the judgment is recovered after an alleged fraudulent transfer, he is a subsequent creditor. Lillard v. McGee, 4 Bidd. (9 Ky.) 165; Farnsworth v. Bell, 6 Sneed. 531, 76 Hun. 557; Evans v. Lewis, 30 O. St. 11; Miller v. Dayton, 47 Iowa, 312; Langford v. Fly, 7 Hump. 585; Hill v. Bowman, 35 Mich. 191; Beach v. Boynston, 26 Vt. 725.

The burden of showing the insolvency of the alleged fraudulent grantor is upon the party attacking it. Kain v. Larkin, 131 N. Y. 300, 30 N. E. 105; Hyde v. Chatman, 33 Wis. 391; Pence v. Croan, 51 Ind. 336; Bishop v. Lord, 83 Ind. 67; Nevers v. Hack, 46 Am. St. Rep. 380; Puckett v. Richardson, etc., Co., 20 S. W. 1127; Lewis v. Boardman, 79 N. Y. Supp. 1014; Muldz v. Price, 81 N. Y. Supp. 931; Windhaus v. Bootz, 28 Pac. 557; Emmons v. Barton, 42 Pac. 305; Fleugel v. Henschel, 7 N. D. 276.

Insolvency at a later date does not show insolvency at date of transfer. Smith v. Reid, 134 N. Y. 568, 31 N. E. 1082; Kain v. Larkin, supra; Sherman v. Hugland, 54 Ind. 579; Windhaus v. Bootz, 28 Pac. 557; McCole v. Loehr, 79 Ind. 430; Whitesell v. Hiney, 62 Ind. 168.

Actual fraud, as distinguished from constructive fraud, is essential to an attachment. 3 Am. & Eng. Enc. Law (2d Ed.) 201, and cases cited, 146 Ill. 42; Murray Nelson Co. v. Leiter, 60 N. E. 851.

Conveyance had been made at the time of the attachment. Plaintiff could not move to set it aside for actual fraud, as she was not a party in the attachment case, and had no interest to warrant

her intervention therein. Davis v. Warford, 38 Ind. 53; Risher v. Gilpin, 29 Ind. 53; Gordon v. McCurdy, 26 Mo. 304; Hallam v. Jones, 21 Va. 142; City Ins. Co. v. Commercial Bank, 68 Ill. 351.

As to whose claim is the most meritorious, that of a man slandered the day before a husband deserts his wife, or that wife deserted by a husband who owes her support, and in discharge of that legal and moral duty obligation transfers property to her, is answered by the policy of our homestead and exemption laws. DeRuiter et al. v. DeRuiter, 62 N. E. 100, 91 Am. St. Rep. 107.

A tenant in common, in actual possession of land, actually used as a home, has a homestead right therein. Ward v. Mayfield, 41 Ark. 94; McGuire v. Van Pelt, 55 Ala. 344; Oswald et al. v. McCauley et al., 6 Dak. 289, 42 N. W. 769; Kaser v. Haas, 7 N. W. 824; Lindley v. Davis et al., 7 Mont. 206, 14 Pac. 717; Giles v. Miller, 54 N. W. 551; Hill v. Myers, 19 N. E. 593; McElroy v. Bixby, 36 Vt. 254, 84 Am. Dec. 684.

The question is settled in this jurisdiction by the decision in Oswald v. McCauley, supra.

YOUNG, J. The plaintiff brought this action to quiet title to an undivided one-fourth interest in 480 acres of land situated in Grand Forks county, which was conveyed to her by her husband, Richard Stevens, on January 30, 1902. The adverse interest of the defendant arose through the levy of a warrant of attachment upon the land on April 13, 1903, in an action against plaintiff's husband to recover damages for a slander alleged to have been published by him concerning the defendant on January 26,1902. The defendant alleges that the conveyance to the plaintiff, which was made after the utterance of the alleged slander, "was made fraudulently, and with intent to cheat and defraud his creditors, and particularly this defendant, and to prevent and hinder him in collecting his just claim for damages." Judgment was entered declaring the attachment proceedings null and void and quieting title in the plaintiff. Defendant has appealed from the judgment.

The statement of case, which was settled pursuant to section 5630, Rev. Codes 1899, under which the case was tried, specifies the following question for review: "Was the transfer of the land here in controversy, made by Richard Stevens to his wife, Rena Stevens, the plaintiff in this action, fraudulent as to this defendant, Charles A. Myers?" Counsel for plaintiff contends that the foregoing specification is sufficient to authorize a review of the

evidence. The contention must be sustained. Section 5630, which is our only authority to review evidence in cases tried under that section, requires the appellant to specify in his statement of the case "the questions of fact that he desires the Supreme Court to review," unless he desires a review of the entire case, in which event he shall so specify. The appellant has not demanded a review of the entire case.. He specifies but a single question for review, and that, in our opinion, is not a question of fact within the meaning of the above section, but a question of law. A similar specification was held insufficient in Salemonson v. Thompson, 101 N. W. 320, 13 N. D. 182. In that case the question specified was whether a certain person was a creditor. We said: "The vice in this question is that it does not present for examination and determination on the evidence any particular fact, but, on the contrary, calls for the deduction of a legal conclusion from indefinite and unknown facts. * * * The statute above quoted contemplates that the specification of questions of fact for review in this court shall be sufficiently specific to enable the respondent to determine, for the purpose of amendment, what evidence should be included in the statement upon the controverted question of fact. One could only conjecture as to what evidence or facts the appellant would rely upon to sustain her contention that she was a creditor." We think the specification in this case is insufficient for the reasons stated in the case just cited. It calls for a legal conclusion. A more liberal rule should not be applied in determining the sufficiency of a specification of facts for retrial under this statute than prevails in testing the sufficiency of pleadings. Fraud "is never sufficiently pleaded except by the statement of the facts upon which the charge is based." See Bliss on Code Pleading, sections 211, 339, and note, and cases cited; Maxwell on Code Pleading, 193; Bump on Fraudulent Conveyances, section 28; 9 Enc. Pl. & Pr. 686, 687 and 688, and cases cited. Also Bump on Fraud, 114. The appellant having failed to demand a review of the entire case, or to specify any particular fact for review, we are without authority to examine the evidence, and all questions of fact must be deemed to have been properly decided.

The only question of fact before us, then, is this: Do the findings of fact sustain the conclusions of law and judgment? This question, in our opinion, must receive an affirmative answer. The trial court found, among other things, "that the said conveyance was made by the said Richard Stevens in good faith, and without any

intent on his part to defraud the defendant or any other person, but for the sole purpose of providing the plaintiff with a means of support, the said conveyance being so made by him to plaintiff on the eve, and in anticipation, of the abandonment of plaintiff by her said husband, Richard Stevens, without any just cause or excuse; and that said conveyance was accepted by this plaintiff in good faith, and without any intent on her part to defraud the defendant or any other person, and without any participation by plaintiff in such intent, and without knowledge of any such intent on the part of said Richard Stevens; and that at the time of accepting said conveyance this plaintiff knew nothing of the defendant or his alleged claim for slander against the said Richard Stevens." It will be conceded that the above finding, standing alone and unimpeached, would establish conclusively the validity of the conveyance. Defendant seeks to avoid its effect by referring to certain additional findings which were made at his request, in which the court found, in substance, that at the time of the execution of the deed in question Richard Stevens was indebted to one Thomas Stevens in a sum exceeding $1,400; that the land conveyed to the plaintiff was all the property he then owned in the state, which was the place of residence of himself and wife on that date; and that because of such transfer the defendant has been unable to collect his claim. It is said that these additional findings present a case of voluntary conveyance by an insolvent, and that the question of actual intent with which the conveyance was made is not material. In other words, that the law conclusively presumes an intent to defraud when a voluntary conveyance is made by an insolvent. Many courts have so held. A discussion of the principles which lie at the foundation of these cases can serve no useful purpose. Our statute in plain language has laid down a different rule, and, whether wise or unwise, it is our duty to apply it. Sections 5052 and 5055, so far as material, read as follows: Section 5052: "Every transfer of property * * * with intent to delay or defraud any creditor or other person of his demands, is void as against all creditors of the debtor." Section 5055: "In all cases arising under * * * the provisions of this chapter, the question of fraudulent intent is one of fact and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration." It will be noted that section 5052 makes the fraudulent intent the vital fact which renders the conveyance void, and section 5055 declares that "the

question of fraudulent intent is one of fact, and not of law," and the latter section goes further, and provides that no transfer shall be adjudged fraudulent solely upon the ground that it was not made for a valuable consideration. This statute will not permit us to hold that a fraudulent intent will be conclusively presumed as a matter of law from the fact that a conveyance was made without consideration, and by one who was at the time insolvent; for such a holding assumes that under such circumstances the question of intent is one of law, and not of fact, and is directly in the teeth of the statute. The question of intent is always one of fact. It must be alleged, proved and found in order to avoid the transfer. The fact of insolvency of the grantor and the inadequacy or total want of consideration are evidence of the grantor's intent to defraud, but are not conclusive evidence. The fraudulent intent is the ultimate fact in issue. Insolvency and want of consideration are evidentiary facts, from which the fraudulent intent may be inferred. In this case the trial judge found that the conveyance was without fraudulent intent, and that is the ultimate fact in issue, and the finding is conclusive. This finding is in no way affected by the presence of the additional findings as to the grantor's insolvency and the absence of consideration, for the latter, as already stated, are merely evidentiary. The trial judge might have inferred a fraudulent intent from those facts, but he did not do so, but found there was no fraudulent intent. That an ultimate fact in the findings cannot be overthrown by the presence of additional findings of evidentiary facts from which a different conclusion might have been drawn is well settled. The ultimate, and not the evidentiary, facts govern. If it were not for our statute, declaring that "the question of fraudulent intent is one of fact, and not of law," it might be contended with good reason that a voluntary conveyance by an insolvent should be conclusively presumed as a matter of law to have been given with intent to defraud. Our statute forbids that view.

The California statute, sections 3439 and 3442, prior to the amendment of 1901, was identical with our sections 5052 and 5055, supra. The Supreme Court of that state has held in a series of cases that under the coercion of these provisions the question of intent is always a question of fact, and never a question of law, even in case of a voluntary conveyance by insolvents. Bull v. Bray, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576; Daugherty v. Daugherty, 104 Cal. 221, 37 Pac. 889; Knox v. Moses, 104 Cal. 502, 38

Pac. 318; Emmons v. Barton, 109 Cal. 662, 42 Pac. 303, and cases cited. In our view, no other conclusion is permissible. For other cases holding that such evidence is presumptive, but not conclusive, see Hyde v. Chapman, 33 Wis. 399; Barkow v. Sanger, 47 Wis. 500, 3 N. W. 16; Hooser v. Hunt, 65 Wis. 74, 26 N. W. 442; Jackson v. Peek, 4 Wend. (N. Y.) 302; Seward v. Jackson, 8 Cow. (N. Y.) 423.

Judgment affirmed. All concur.

(104 N. W. 529.)

NOTE.—On appeal in an action tried under section 5630, Rev. Codes 1899, where findings are waived and never filed, the Supreme Court will not retry issues of facts. Nichols & Shepard Co. v. Stangler, 7 N. D. 102, 72 N. W. 1087. Objection to evidence, preserved in statement of the case, will be reviewed only in retrial of the issues of fact by Supreme Court, and will not be reviewed as errors as in jury cases. Id. Under Section 5630, the Supreme Court will not try anew a case in which no statement of the case is settled, and the bill of exceptions contained none of the specifications requisite to a trial de novo. Ricks v. Bergsvendsen, 8 N. D. 578, 80 N. W. 768; Nat. Cash Register Co. vs. Wilson, 9 N. D. 112, 81 N. W. 285; Erickson et al. v. Cit. Nat. Bank, 9 N. D. 81, 81 N. W. 87. Unless the statement of the case contains specifications of facts to be tried, or a request to try the case anew, the Supreme Court is without authority to try either specific facts or the entire case; such request in the notice of appeal is insufficient. Hayes v. Taylor, 9 N. D. 91, 81 N. W. 49; Mooney v. Donovan, 9 N. D. 93, 81 N. W. 50; Douglas v. Glazier, 9 N D. 615, 84 N. W. 552. Where a retrial of any fact in issue is not demanded in a settled statement of the case, as required by section 5630, Rev. Codes 1899, the Supreme Court is precluded from a retrial of any fact, or considering the evidence for any purpose. Security Improvement Co. et al. vs. Cass Co., 9 N. D. 553, 84 N. W. 477; State v. McGruer, 9 N. D. 566, 84 N. W. 363. Unless it otherwise appears in the record, a certificate of the judge to a statement of the case, that "it contains all the evidence introduced" is sufficient to permit a review of the entire case. Erickson v. Kelly, 9 N. D. 12, 81 N. W. 77; Littel v. Phinney et al., 10 N. D. 351, 87 N. W. 593. Specification of particulars wherein evidence is insufficient to support findings is superfluous under section 5630, Rev. Codes 1899. Erickson v. Cit. Nat. Bank, 9 N. D. 81, 81 N. W. 46. Unless the statement of the case embodies all the evidence, the Supreme Court is without authority to try the case anew, under section 5630, Rev. Codes 1899. Littel v. Phinney, 10 N. D. 351, 87 N. W. 593; Geils et al. v. Fluege, 10 N. D. 211, 86 N. W. 712; Eakin v. Campbell, 10 N. D. 416, 87 N. W. 991; Teinen et al. v. Lally et al., 10 N. D. 153, 86 N. W. 356. In an action tried before a jury, where evidence was excluded upon objection, but at the conclusion of the trial the jury were discharged by consent of counsel, and the case submitted upon the evidence adduced, on appeal a retrial could not be had under section 5630, Rev. Codes 1899, because all the evidence offered did not, and could not,

appear in a stated case. Hagen v. Gilbertson et al., 10 N. D. 546, 88 N. W. 455. In such a case the Supreme Court will not review errors in rulings made in the trial court. Id. Objection that a statement of the case is defective is not a proper ground for a dismissal of the appeal. N. P. Ry. Co. v. Lake, 10 N. D. 541, 88 N. W. 461. Under section 5630, Rev. Codes 1899, where part of the issues only were tried in the court below, the Supreme Court cannot retry the action. Mapes v. Metcalf, 10 N. D. 601, 88 N. W. 461. Refusal of the court to find upon all issues is not ground for granting or refusing a new trial. The remedy is an appeal from the judgment and a trial de novo in the Supreme Court. Chaffee-Miller Land Co. v. Barber et al., 12 N. D. 478, 97 N. W. 850. Motion for new trial grounded on errors of law is not provided for under section 5630, Rev. Codes 1899. Park River v. Norton, 12 N. D. 497, 97 N. W. 860. Errors of law are reviewed only in connection with a review of the facts upon the merits under that section. Id. On appeal under section 5630, Rev. Codes 1899, the case will be heard upon the same theory upon which it was tried in the court below. Fifer v. Fifer, 13 N. D. 20, 99 N. W. 763. Section 5630, Rev Codes 1899, gives the appellant the right to specify questions of fact for review upon appeal, but not the respondent. Salemonson v. Thompson, 13 N. D. 182, 101 N. W. 320. Specifications of fact must be sufficiently definite to enable respondent to determine for purposes of amendment, what evidence should be embodied in a statement of the case. Id. In cases not triable de novo on appeal, neither errors of law accruing at the trial, nor insufficiency of the evidence to sustain the findings, can be considered by the Supreme Court, without specifications of errors embodied in a statement of the case. Barnum v. Gorham Land Co., 13 N. D. 359, 100 N. W. 1079. Since the enactment of chapter 201, page 277, Laws of 1903, an action at law, where jury is waived, is not triable under section 5630, Rev. Codes 1899. Id.

HARRY A. THOMPSON v. THE FARGO HEATING & PLUMBING COMPANY.

Opinion filed June 28, 1905.

Appeal from Justice Court — Approval of Undertaking.

1. The fact that the undertaking on appeal from justice court was presented to the clerk of the district court, and his approval indorsed thereon before the notice of appeal and undertaking were served, was not an irregularity which invalidated the appeal.

Appeal from District Court, Burleigh county; *Burke*, S. J.

Action by Harry A. Thompson against the Fargo Plumbing & Heating Company. Judgment for plaintiff, and defendant appeals.

Reversed.

Newton & Dullam, for appellant.

F. H. Register, for respondent.

ENGERUD, J. Appeal from a judgment of the district court dismissing an appeal from justice court for irregularity. The appellant, before serving the notice of appeal and undertaking on the adverse party, presented the undertaking to the clerk of the district court, and the latter indorsed thereon a formal approval thereof. The notice and undertaking were served two days later, and were subsequently filed in the clerk's office, with proof of service. All these acts were done within the time allowed for appeal. The only irregularity alleged as ground for dismissal was the fact that the formal approval was indorsed on the undertaking before service and filing. This was no ground for dismissal. It is not material in what chronological order the acts necessary to perfect an appeal are done, provided they are all done within the time prescribed by law. Respondent relies upon the case of Eldridge v. Knight, 11 N. D. 552, 93 N. W. 860, wherein Judge Cochrane, speaking for the court, said: "The statute makes the service, approval and filing of the undertaking, prerequisite to the transfer of jurisdiction from one court to the other. * * * The order of performance of the separate steps necessary to be taken in accomplishing the transfer is the order in which they are named. The first step is the service of the notice of appeal and undertaking upon the adverse party or his attorney, and the last one necessary to the transfer of jurisdiction is the filing of the notice of appeal and undertaking in the clerk's office." In that case the district court had dismissed an appeal because the undertaking had not been filed and approved before service. This court reversed that ruling of the lower court, and held that it was proper practice to serve the notice and undertaking, and have it approved and filed afterwards. It was not intended by the language used in that case to convey the idea that the successive steps requisite to an appeal must necessarily be taken in the order therein mentioned, and not otherwise.

The judgment is reversed. All concur.

(104 N. W. 525.)

THE SCOTT & BARRETT MERCANTILE COMPANY, A CORPORATION, v. NELSON COUNTY, NORTH DAKOTA, AND HENRY TELANDER, AS COUNTY AUDITOR OF SAID NELSON COUNTY, NORTH DAKOTA.

Opinion filed June 28, 1905.

Taxation — Illegal Sale — Demurrer.

1. A statement in the complaint that "said real property was not described in the assessment thereof purported to have been made in said year," is, as against a demurrer, insufficient to show that the property had not been assessed.

Delinquent Taxes — Sale.

2. The county auditor was authorized to include in the delinquent tax sale of 1897 the unpaid taxes of 1895, if for any reason the land charged with the latter taxes had not been sold therefor in 1896.

Same — Right to Relief — Objections Before Sale.

3. The complaint in an action to annul a tax sale alleged numerous defects in the tax proceedings prior to sale. *Held*, that the defects alleged were all either cured or relief therefrom barred by section 1263, Rev. Codes 1899.

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

Action by the Scott & Barrett Mercantile Company against Nelson county and Henry Telander, auditor. Judgment for plaintiff, and defendant appeals.

Reversed.

George D. Kelly, for appellants.

A state levy in percentage and not in specified amounts does not invalidate the tax. Fisher v. Betts et al., 12 N. D. 197, 96 N. W. 132.

County levy not based on an itemized statement of expenditure for the ensuing year is not a void levy and does not invalidate the tax. Sykes v. Beck, 12 N. D. 242, 96 N. W. 844.

That taxes were excessive is not ground for canceling a certificate or enjoining its enforcement, unless the maximum amount that might have been imposed upon plaintiff's property is either paid or tendered before action. Wells Fargo Express Co. v. Crawford County et al., 37 L. R. A. 371; Wilson et al. v. Longendyke et al., 4 Pac. 361; Douglas v. City of Fargo et al., 13 N. D. 467, 101 N. W. 919; Farrington v. The N. E. Investment Co. et al., 1 N. D. 103, 45 N. W. 191.

Whether a description of land in an assessment list is sufficient or not for the purpose of identification is a question of law, and a pleading should show the exact facts touching the assessment. Absence of assessor's oath from the assessment list does not vitiate either the tax or certificate. Douglas v. City of Fargo, supra; Farrington v. The N. E. Investment Co. et al., supra.

The postponement of the sale was to plaintiff's advantage, and no prejudice could arise to impair the validity of the certificate. Paden v. Akin, 7 Watts & S. 456; Little v. Gibbs et al., 30 Pac. 986; Colman v. Shattuck, 62 N. Y. 348.

Villages, townships and school districts are essential parties to an action to annul tax proceedings. Adams v. Auditor General, 5 N. W. 457; Railway Co. v. Robinson, 42 N. W. 83; Hope v. Gainesville, 72 Ga. 246; Hill v. Hayes, 17 Id. 360; Gilmore v. Fox, 10 Id. 509; Voss v. Union School District, 18 Id. 467; 10 Enc. Pl. & Pr. 911.

Fred A. Kelly and *Scott Rex,* for respondents.

The tax in question was not equalized. This is fatal. Powers v. Larabee, 2 N. D. 141, 49 N. W. 724.

The village taxes are in excess of the taxes that the village had power to levy. This is expressly excepted from the curative feature of chapter 158, Laws 1903. Where the complaint negatives the existence of a tax, plaintiff is not required to pay or tender what does not exist. Cooley on Taxation, 1427; Jaggard on Taxation, 758; Bode v. New England Investment Co., 1 N. D. 121, 42 N. W. 658; Gage v. Kaufman, 133 U. S. 408, 10 Sup. Ct. Rep. 406; Greenley v. Hovey, 73 N. W. 808.

The part of the demurrer that charges a defect of parties is not well taken. Demurrer itself is defective in that it fails to point out the proper parties. Jaeger v. Sunde et al., 73 N. W. 171; Kreling v. Kreling, 50 Pac. 546; Leedy v. Nash, 67 Ind. 311; Gunderson v. Thomas, 58 N. W. 750; Schwartz v. Wechler, 20 N. Y. S. 861.

ENGERUD, J. This is an appeal from an order overruling a demurrer to the complaint. The county of Nelson and auditor of that county are the only parties defendant. The complaint alleges plaintiff's ownership of a town lot in the village of Lakota, and continues as follows:

"(4) That taxes were attempted to be levied, assessed and charged against said real estate for the year 1895 by the state of North Dakota, Nelson county, and the village of Lakota. That

the taxes attempted to be levied in said year by the state of North Dakota were levied upon a percentage basis, and not in a specific amount. The tax attempted to be levied by Nelson county was not based upon an itemized statement of the county expenses for the ensuing year. The tax attempted to be levied by the village of Lakota in said year was greatly in excess of the amount which the corporate authorities of such village had power to levy. That the tax attempted to be charged against said real property in said year is composed of said illegal state, county and village taxes aforesaid. Said real property was not described in the assessment thereof purported to have been made in said year, nor was such assessment authenticated by the oath of the assessor. The county board of equalization did not equalize said taxes. Said real property was not offered for sale and was not sold for the payment of the delinquent taxes of the year 1895 at the time required by law, but was offered for sale and was in form struck off and sold on December 7, 1897, to defendant Nelson county, and tax sale certificate No. 340 was issued therefor, dated on said day. That all said proceedings are a cloud on plaintiff's title to the said real property.

"(5) That more than six years have elapsed since the sale of said land for said taxes and since the date of said certificate of sale. That possession of said real property has never been taken by defendant Nelson county, nor have proceedings to obtain possession thereof ever been instituted, nor has any deed therefor been executed or delivered to it. That defendant Nelson county is now about to take out a tax deed based on the aforesaid illegal taxes and the proceedings had to enforce the collection of the same, and to that end a notice of expiration of the period of redemption has been issued under the hand and seal of the defendant Telander, a copy of which is hereto attached, marked 'A,' and made a part hereof. * * *

"(6) That, unless restrained and enjoined from so doing, defendant Telander, at the instance and request of defendant Nelson county, will execute, acknowledge and deliver to said defendant a tax deed of said real property based on the aforesaid illegal taxes, and the irregular, defective and void proceedings had to enforce collection of the same, and on the said outlawed tax sale certificate, and said defendant Nelson county will receive and accept such tax deed; and that the same, if executed and delivered, will

further seriously cloud and impair plaintiff's title to said real property.

"Wherefore plaintiff prays that said pretended taxes and all proceedings had to enforce the collection thereof be adjudged and decreed to be void; that the cloud on plaintiff's title to said real property occasioned thereby be, by the judgment and decree of this court, removed; that the defendant, Henry Telander, as county auditor of said Nelson county, and his successors in office, be perpetually restrained and enjoined from executing, acknowledging and delivering any tax deed of said real property based on the taxes aforesaid; that during the pendency of this action, and until the final determination thereof, the said Telander be, by the order of this court, restrained and enjoined from executing, acknowledging and delivering a tax deed of said real property; that plaintiff have such other and further relief as the nature of its cause may require; and that it recover of defendant Nelson county its costs and disbursements herein."

We think the demurrer ought to have been sustained on the ground that the complaint does not state facts sufficient to constitute a cause of action. The levy of state taxes by percentage was valid. Fisher v. Betts, 12 N. D. 197, 96 N. W. 132. The absence of an itemized statement as a basis for the county levy was an irregularity, which the legislature could cure, and that defect was cured by the provisions of section 263, Rev. Codes 1899. Every defect complained of in paragraph 4 of the complaint, except the alleged defective assessment, is one that was either cured or barred by virtue of the provisions of section 1263, no objection having been made before sale.

The want of an assessment could not be cured or barred by the sale, but the allegations of the complaint are insufficient as against a demurrer to show that there was no assessment. It is admitted by the allegation that there was an "assessment thereof purported to have been made in said year," but it is said that the property was not described therein. One part of this allegation is contradictory of the other part. There could be no assessment of the property without a description of it. The construction which the allegation bears is that the property was insufficiently described in the assessment roll. The allegation must be construed against the pleader on demurrer. So construed, it is clear that it states a mere legal conclusion on the part of the pleader.

The fact that the land was not sold in 1896, but was sold at the annual sale in 1897, is no ground for objection. We think it is clearly the meaning and intent of the 1897 revenue law that the auditor shall include in the annual sale for delinquent taxes not only the unpaid taxes of the next preceding year, but also the taxes for any preceding year, if for any reason the lands charged therewith had not been previously sold therefor. Rev. Codes 1899, sections 1259, 1270, 1283.

Chapter 165, p. 220, Laws 1901, amending section 1269, Rev. Codes 1899, relating to the rights of purchasers at tax sales, and requiring that such purchasers shall take possession or procure deeds within six years from the date of the sale, or within one year after the act took effect, if the sale had been made more than five years before the passage of the act, has no application to sales to the state or county, where the rights of the latter had not been assigned. It cannot be pretended that the legislature had any such intention, and, although the state or county might be termed a purchaser at a tax sale, it is too clear for argument that the word "purchaser," as used in section 1269, as amended, refers only to private persons or corporations holding tax sale cretificates. The complaint, in our opinion, does not state facts sufficient to entitle the plaintiff to any relief, and the demurrer should have been sustained for that reason.

We do not wish to be understood as holding or intimating that any notice of expiration of redemption or a tax deed was necessary in order to cut off plaintiff's rights in the land and to pass the title to the county. We express no opinion on that point, because a discussion of that question is not necessary to the disposition of the case. If the redemption notice and deed were unnecessary, they work no prejudice to plaintiff.

The order appealed from is reversed, and the cause remanded for further proceedings. All concur.

(104 N. W. 528.)

STATE OF NORTH DAKOTA v. JOHN WILLIAMS.

Opinion filed June 28, 1905.

Intoxicating Liquors — Sale of Patent Medicine.

1. A sale of a patent medicine as medicine by a storekeeper in good faith is not a violation of law under section 7281, Rev. Codes 1899, although the same contains alcohol as one of its ingredients.

Same — Question for Jury.

2. Whether a sale of liquids is made as a medicine or as a beverage, under section 7598, Rev. Codes 1899, is a question of fact for the jury.

Same — Instructions.

3. Instructions considered, and *held* erroneous, as stating to the jury that the sale of patent medicines is unlawful unless made by a registered pharmacist.

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

John Williams was convicted of maintaining a liquor nuisance, and appeals.

Reversed.

Gooler & Goer, for appellant.
C. N. Frich, Attorney General, for respondent.

MORGAN, C. J. The defendant was convicted of the offense of keeping and maintaining a nuisance—that is, a place where intoxicating liquors were alleged to have been sold—in violation of section 7605, Rev. Codes 1899, and appeals from the judgment.

The insufficiency of the evidence to sustain the verdict is not challenged, and errors of law occurring at the trial are alone urged as grounds for the reversal of the judgment. Error is assigned on the giving of the following instruction: "The fourth way that it may occur under the evidence in this case is by selling intoxicating liquors as a medicine without having a permit to make such sale from the judge of the county court of the county in which the sale is made, if any sale of such drug or material was made. With reference to the last class of a nuisance, where it is claimed that the mixture or intoxicating liquor, by whatever name known, was sold as a medicine, I say to you that such a sale made of intoxicating liquor or intoxicating mixture by one who was not a druggist would, in effect, be a sale of such intoxicating liquor or mixture as a beverage. In other words, such a sale, though made as a sale of medicine, by one not qualified to make it under the law of this state, is a violation of our law. Our law upon that point is: 'It shall be unlawful for any person or persons to sell or barter for medicinal, scientific or mechanical purposes any malt, vinous, fermented or other intoxicating liquor without first having procured a druggist permit therefor from the county judge of the county wherein such druggist may be doing business at the time.'" The

evidence shows that the defendant was a storekeeper, and he claims that he sold the liquids alleged to be intoxicating liquors as patent medicines. Section 7281, Rev. Codes 1899, enacted as an amendment to section 12 of chapter 108, p. 305, Laws 1890, provides as follows: "The provisions of the last section [relating to pharmacists] shall not be construed to interfere in any manner with, * * * nor to prevent shopkeepers from dealing in or selling the commonly used medicines and poisons, if such medicines or poisons are put up by a regular pharmacist; nor from dealing in and selling patent or proprietary medicines." It is claimed that the instruction above quoted is erroneous, as not containing a qualification to the effect that, if the defendant sold the liquids in good faith as a patent medicine, the defendant could not be found guilty. We think that the instruction is prejudicially erroneous. Section 7281, supra, does not prohibit the sale of patent medicines by a shopkeeper, although they may contain alcohol as one of their ingredients. The instruction stated to the jury that the sale of intoxicating liquors or mixtures thereof as medicine would be, in effect, a sale thereof as a beverage, and a violation of law. This is not necessarily true. Shopkeepers are permitted to sell patent medicines as medicine. The jury should have been instructed to that effect. It was a question for them to determine whether the sale was made in good faith for medicine, or whether the liquids were sold as intoxicating liquors as a beverage. Said section 7281 should be construed in connection with section 7605, defining what a nuisance is under the prohibitory law. Under the instruction given, a storekeeper maintains a nuisance if he sells any compound as a medicine if it contains alcohol as an ingredient, although the same may be universally used as a medicine, and was compounded by a regular pharmacist. There are many liquids that are sold as medicines that contain alcohol, which are not deemed intoxicating liquors as defined by section 7598. The last section deals with intoxicating liquors, or mixtures that are intoxicating, that are sold as beverages. Section 7281 deals with selling or dealing in proprietary or patent medicines. The prohibition of the former section is directed against selling as a beverage, whereas the latter authorizes a sale as medicine. Whether a sale is made in violation of the former section or under the latter section, which does not prohibit such sales, is a question for the jury. In stating to the jury that a sale of medicine is, in effect, a sale as a beverage unless made by a registered pharmacist, the court erred. The de-

fendant was entitled to have the jury pass upon his testimony that he sold the liquids in question as patent medicines. If he did so in good faith as a storekeeper, no offense was committed.

The judgment is reversed, and a new trial ordered. All concur. (104 N. W. 546.)

HENNING JOHNSON v. ERICK ERICKSON, ANDREW ANDERSON AND LOUIS ANDERSON.

Opinion filed August 24, 1905.

Justice of the Peace — His Duty When Title to Land Is in Controversy.

1. Under section 6670, Rev. Codes 1899, as amended by chapter 201, p. 259, Laws 1901, a justice of the peace does not lose complete jurisdiction of a case because a question of the title to or boundary of real property arises. He is authorized, and it is his duty, to certify the case to the district court for trial.

Same — Appeal — Jurisdiction.

2. Where a justice of the peace dismisses a case, instead of certifying it, as required by the above section, and the plaintiff appeals generally from the judgment, the district court has jurisdiction to try the action.

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

Action by Henning Johnson against Erick Erickson and others. Judgment for defendants, and plaintiff appeals.

Reversed.

McCumber, Forbes & Jones, for appellant.

The justice had jurisdiction of the case. He could issue the summons, receive, file and determine the validity of the pleading, try and determine the issues, or certify the case to the district court thus having jurisdiction; he conveyed it to the district court. Having jurisdiction, the justice erred in dismissing, and the judgment of dismissal was a proper subject of appeal. Rev. Codes 1899, section 6771; Simmons v. C., B. & Q. Ry. Co., 103 N. W. 954.

Upon appeal it would appear that the justice had jurisdiction to try the case or certify it, and its dismissal was error. An appeal upon questions of law and fact would give the district court jurisdiction. City of Santa Barbara v. Eldred, 30 Pac. 562; Hart v. Carnall-Hopkins Co., 35 Pac. 633.

The case should have been certified to the district court instead of dismissed. Douglas v. Easter et al., 4 Pac. 1034; Tordsen v. Gimmer, 34 N. W. 20; Van Etten v. Van Etten, 23 N. Y. S. 711.

Purcell, Bradley & Divet, for respondents.

YOUNG, J. This action was brought in justice court to recover damages to real property. The defendants answered jointly, and alleged that the acts complained of were done in constructing and improving a public highway, and that the place where they were done was a regularly established highway. Both the complaint and answer were verified. A trial was had, and both parties introduced evidence, from which the justice found "as a matter of fact that the land in question * * * is on the section line and is a regularly laid out highway, * * *" and entered judgment dismissing the action and awarding costs to the defendants. The plaintiff perfected a general appeal from the judgment, in pursuance of which the justice certified to the district court the summons and return of service, the complaint and answer, and a copy of his docket. The clerk of the district court placed the case upon the calendar for the next regular term of court. When the case was reached for trial, counsel for defendants made and filed a written motion "to dismiss this action upon the ground that the court has no jurisdiction of the subject-matter thereof, for the reason that the justice court in which said action originated had no jurisdiction of the subject-matter thereof, because said action involves a question of the title and boundary of real property." The motion was granted, and judgment was entered dismissing "said appeal and plaintiff's action," and awarding the defendants costs and disbursements of both courts, amounting to $89.10. The plaintiff has appealed from the judgment.

The question presented is one of procedure. Counsel for appellant contend that the district court had jurisdiction, and that the dismissal was error. In our opinion, the contention is sound and must be sustained. Counsel for defendant, to support their contention that the district court was without jurisdiction, rely upon the rule that the district court, by virtue of an appeal, succeeds only to the jurisdiction of the justice court, and that, where the justice court has no jurisdiction, the appellate court acquires none. See Vidger v. Nolin, 10 N. D. 353, and cases cited on page 360, 87 N. W. 593, on page 596; also, Wagstaff v. Challiss, 31 Kan. 212, 1 Pac. 631. In cases coming within the rule no jurisdiction

is transferred by the appeal. The error, as applied to this case, lies in the assumption that under our present statute a justice of the peace has no jurisdiction whatever when a question of the title to, or boundary of, real property arises. Counsel's position would have been correct under section 6670, Rev. Codes 1899, prior to its amendment. As the statute then stood, the introduction of a question of title or boundary caused a complete loss of jurisdiction, save for the one purpose of entering a judgment of dismissal and for costs. But, as amended by chapter 201, p. 259, Laws 1901, the justice not only has authority, but it is made his duty, to transfer the case to the district court. The section as amended reads as follows: "A question of title to, or boundary of, real property cannot be determined in a justice's court, and when such question arises upon a material issue joined as prescribed in the preceding section, or when such question arises by controversy in the evidence as to a fact material to the determination of the issues in the action, the justice must discontinue the trial and forthwith certify and transmit to the district court of his county all the pleadings and papers filed with him in such action; for which transcript the jutsice shall receive one dollar to be paid by the plaintiff. Such transcript shall be filed in the district court at the cost of the plaintiff; and thereupon the district court shall have the same jurisdiction over such action as if it had been originally commenced therein. * * *"

In this case the justice not only had authority to transfer the case to the district court, but it was his express duty to do so. The distinction between this case and those where there is no jurisdiction or no authority to transmit is apparent. In such cases there is neither right nor duty to certify the case, and, of course, an appeal would not give jurisdiction. But in this case it was the duty of the justice to certify the case to the district court, and that court had authority to try it. The justice erred in dismissing the action. He should have certified it. The same result has, however, been accomplished by the appeal, and the case has been transferred to the district court for trial. The district court would have acquired jurisdiction under a regular certificate by the filing of the papers, as required by section 6670, supra. All this has been done under this appeal. The proceedings are irreguar, but were made so by the error of the justice in rendering a judgment of dismissal, instead of certifying the case, and for this error the plaintiff is in no way responsible. If it appeared that the failure

of the justice to certify was because of plaintiff's refusal to pay him the statutory fees for his services, a different question would be presented. In this case no such excuse is offered. The act of the justice in dismissing the action was not the result of any failure or refusal to pay this fee. The purpose of the amended statute was to prevent dismissals, and to furnish an easy method of transfer of jurisdiction to the district court. We are of opinion that when a justice has, by disregarding the statute, made it necessary to appeal, the district court acquires jurisdiction, and that it is error for the district court to refuse to entertain the action and to dismiss the appeal, and this view is in harmony with the opinion of other courts under similar statutes. Douglass v. Easter, 32 Kan. 496, 4 Pac. 1034; Lyman v. Stanton, 39 Kan. 443, 18 Pac. 513; Santa Barbara v. Eldred, 95 Cal. 381, 30 Pac. 562; Hart v. Carnall-Hopkins Co. (Cal.) 35 Pac. 633. The test of the jurisdiction of the appellate court to try the case pursuant to an appeal, it will be seen, is whether it was the duty of the justice to certify it to that court. On this point, in connection with the cases above cited, see Wagstaff v. Challiss (Kan. Sup.) 1 Pac. 631, and Santa Barbara v. Stearns, 51 Cal. 499.

The district court will reverse its judgment and reinstate the action. All concur.

(105 N. W. 1104.)

R. I. SIMONSON v. JENS JENSON.

Opinion filed July 3, 1905.

Sale — Breach of Warranty — Rescission.

1. A breach of a warranty of the quality of personal property upon an exchange or sale thereof does not entitle a person to rescind such sale or exchange where it has become fully executed, unless fraud be shown or the agreement authorizes a rescission.

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

Action by R. I. Simonson against Jens Jenson. Judgment for plaintiff, and defendant appeals.

Reversed.

Styles & Koffel, for appellant.

W. L. Carpenter, for respondent.

MORGAN, C. J. The complaint in this case alleges that the plaintiff "sold and delivered" to the defendant 500 pounds of twine of the value of $75; that the defendant has refused to pay for the same, although payment was duly demanded. The answer contains (1) a general denial; (2) allegations to the effect that defendant and the firm of R. I. Simonson & Co. entered into an agreement whereby defendant received from said firm certain twine in exchange for a certain horse duly delivered to said firm, and accepted by it in payment of said twine. The plaintiff interposed a reply to the answer in the form of a general denial. The trial court directed a verdict in plaintiff's favor for the full sum claimed in the complaint at the close of plaintiff's case. The appeal is from the judgment entered on the verdict.

The only specification of error is the direction of a verdict in plaintiff's favor. The evidence shows that the plaintiff and defendant entered into an agreement under which plaintiff delivered to defendant 500 pounds of twine in exchange for a horse belonging to defendant, which was delivered to plaintiff. After the delivery of the horse to plaintiff he sold it, but upon trial the horse was found to be balky, and was returned to plaintiff, and that sale rescinded by mutual consent. Plaintiff testifies in respect to the transaction in suit that the horse was sold and delivered to him under a warranty that it was free from all blemishes, sound, etc., and that the horse did not fulfill the terms of the warranty; and, upon discovering the fact that the horse did not comply with the warranty, he "sent the horse back to the defendant." The evidence does not show that the defendant and plaintiff ever had any negotiations in respect to the return of the horse, nor that the horse was accepted by defendant when sent back, or that it was received by him. The record therefore discloses that the parties exchanged 500 pounds of twine for a horse, and that there was a delivery of the property to each party pursuant to the contract. The question is therefore presented whether the plaintiff has shown himself entitled to rescind the sale that became a completed sale by the delivery of the property by both parties, and after such rescission by his own act alone sue for the value of the twine. There is no allegation of fraud, nor proof showing it, and no proof that the warranty was coupled with a condition that the horse should be returned if the warranty failed. The warranty was therefore unconditional. The right to rescind did not, therefore, exist under such circumstances. The warranty is a

collateral agreement, and not a necessary constituent element of the sale. A breach of it does not alone warrant rescission unless the breach of warranty is agreed upon as ground for rescission, or the facts show that such was the intention of the parties, or fraud is shown to exist. No right to a rescission exists under executed sales for mere breach of warranty. Section 3988, Rev. Codes 1899. Aside from the statute, that principle is sustained by the weight of authority. The cases will be found collected in Vol. 30, Am. & Eng. Enc. Law, p. 190. In such cases the person must resort to an action for damages for the breach of warranty. Lynch v. Curfman, 65 Minn. 170, 68 N. W. 5; McCormick Harvesting Machine Co. v. Fields, 90 Minn. 161, 95 N. W. 886. The rights and obligations of parties to an exchange of property are the same as they are in cases of a sale of property. Section 3998, Rev. Codes 1899. It was therefore erroneous to direct a verdict for the plaintiff.

The judgment is reversed and a new trial ordered. All concur. (104 N. W. 513.)

LOTTIE E. KEENEY v. CITY OF FARGO.

Opinion filed October 2, 1905

Setting Aside Judgment — Moving Promptly.

1. To warrant a court in setting aside a judgment upon a showing of surprise under section 5298, Rev. Codes 1899, the party must move promptly, and within one year after notice.

Same.

2. In cases of motions to set aside judgments not within the provisions of section 5298, Rev. Codes 1899, the party seeking relief must move seasonably.

Same — Discretion of Court.

3 In applications for relief under section 5298, Rev. Codes 1899, trial courts are vested with large discretion, and their action will not be disturbed unless such discretion has been abused.

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

Action by Lottie E. Keeney and Patrick Devitt against the city of Fargo. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Seth Newman, for appellant.

The action of the city attorney in disclaiming all interest in the land, the title to which it was sought to quiet, was beyond his authority. This authority is no greater than of any other attorney with reference to his client's business in a civil action. People v. Mayor, 11 Abb. Pr. 66; Bush v. O'Brien, 164 N. Y. 205, 58 N. E. 106; Stone v. Bank of Commerce, 174 U. S. 413.

His general power extends to the conduct of the case and to the remedy, not to the release, compromise or settlement thereof. Gaillard v. Smart, 6 Cowan, 385; Shaw v. Kidder, 2 How. Pr. 244; Ex parte Holbrook, 5 Cowan, 35; Holker v. Parker, 7 Cranch, 436 (3 L. Ed. 496); Nozan v. Jackson, 16 Ill. 472; House v. Murray, 11 Johnson, 464; Lewis v. Gamage, 1 Pick. 347; Barrett v. Third Ave. R. R. Co., 45 N. Y. 628.

The motion is not upon "mistake, inadvertance or inexcusable neglect," and not, therefore, within section 5298, Rev. Codes 1899. Sav. & Loan Society v. Thorne, 67 Cal. 53; Mace v. O'Rielly, 70 Cal. 231.

If the judgment was collusively obtained, or entered irregularly and without authority, it should be vacated as a matter of right. People v. Mayor, 11 Abb. Pr. 69.

F. B. Morrill and *S. G. Roberts,* for respondent.

If the motion is under section 5298, Rev. Codes, it is barred by the limitation of time therein, and should be quashed, as not made within one year after notice of the judgment. This notice need not be in writing. Minn. Mfg. Co. v. Holz et al., 10 N. D. 16, 84 N. W. 585.

Vacating a judgment by motion is of statutory origin, and a statutory ground must exist, or resort must be had to a direct action for the purpose. Kitzman v. Minn. Mfg. Co., 10 N. D. 26, 84 N. W. 581; Jacks v. Baldez, 97 Cal. 91, 31 Pac. 899; Artope v. Backes, 74 Ga. 462; Hall v. West Pub. Co., 180 Pa. St. 561; Germantown Brewing Co. v. Booth, 162 Pa. St. 100; Yates v. Gridley, 16 S. C. 500; also Gromes v. Hawley, 50 Fed. 319; in the matter of the estate of Hudson, 63 Cal. 454; Dean v. Sup. Ct., 63 Cal. 473; Freeman v. Wood, 11 N. D. 1, 88 N. W. 721.

A client is bound by the action of his attorney, even if the latter knows that his client has a good defense, and client must look to the attorney for redress. Hudson v. Allison, 54 Ind. 215; Thompson v. Pershing, 86 Ind. 303; Devenburgh v. Vifer, 29 N. E. 923; Holmes v. Rogers, 13 Cal. 191; Suydon v. Pitcher, 4 Col. 281;

Beverly v. Stephens, 17 Ala. 701; Williams v. Simmons, 7 S. E. 133; Dockman v. City, 26 La. Ann. 302; Sypert v. McClane, 22 Pa. St. 195; Foster v. Wiley, 27 Mich. 244.

A municipality is bound by the acts of its city attorney as far as procedure is concerned, the same as an individual by his lawyer. Adams School Twp. v. Irwin, 49 N. E. 806; Cicero Twp. v. Pickens, et al., 23 N. E. 763; East St. Louis v. Pickens, 102 Ill. 453; State v. Elgin, 11 Iowa, 216; Welch et al. v. Challen, 3 Pac. 314; Dick v. Williams, 58 N. W. 1029.

MORGAN, C. J. This is an appeal from an order of the district court of Cass county denying an application to set aside a judgment and refusing leave to answer in the action. The action was commenced by a personal service of a summons and complaint on September 12, 1899. An amended complaint was served and filed on January 25, 1900. The cause of action stated in the amended complaint is that the plaintiffs are the owners of the lots therein described, and that the city of Fargo claims some interest therein adversely to the plaintiffs. The relief demanded is that the defendant be adjudged to have no rights or interest in the lots, and that the title to the same be forever quieted in the plaintiffs. After the service of the amended complaint the city attorney served an answer in which the city disclaimed any interest whatever in any of the lots described in the complaint or in any portion thereof. On April 17, 1900, the action was brought on for trial, at which no one appeared for the defendant. Later the court made findings of fact and conclusions of law in the action to the effect that plaintiffs owned the lots in question, and that the city had no interest therein, and that the plaintiffs were entitled to judgment quieting the title to said lots in them. On June 12, 1900, judgment was entered pursuant to and in accordance with said findings of fact and conclusions of law. On February 8, 1904, the defendant procured an order to show cause returnable on March 1, 1904, why said judgment should not be set aside and the defendant permitted to serve an answer in the cause. The application to open up the judgment is regular in every respect, and is based on affidavits, to which are attached or added a verified answer setting forth a valid defense, and also an affidavit of merits. On March 24, 1904, the court denied the motion to set aside the judgment, and on March 25th the defendant appealed from the order denying that motion.

The defendant contends that the city attorney had no authority to serve a disclaimer, and that in so doing he sacrificed the city's

interests, and that in consequence of his unauthorized act the city is entitled to have the judgment vacated, with leave to interpose a defense as a matter of right. It is further contended that the application to vacate the judgment is not made under section 5298, Rev. Codes 1899, and that in consequence thereof the fact that the application was not made within one year is not material. Whether the city attorney could bind the city by interposing a disclaimer of any interest in the lots simply by virtue of being the attorney of the city, and without express authority from the city authorities, we shall not attempt to determine. Conceding that he had no such authority, we agree that the judgment should not be set aside as the city has not moved to set aside the same promptly after notice of its existence. It is not claimed that written notice of the entry of that judgment was ever served, but the city authorities had knowledge that such judgment had been rendered for more than two years before this application was made, and by its acts acquiesced in the judgment and instituted proceedings to condemn, for the use of the city, the lots embraced in the judgment now attempted to be set aside. As stated, the judgment involved on this appeal was rendered on June 12, 1900. In December, 1901, the city council instructed the city attorney to institute an action against the owners of these lots, the plaintiffs in this action, for the condemnation of these lots to the use of the city, and such action was commenced and proceeded to judgment. The city attorney appeared for the city in the condemnation proceedings. The judgment was thereafter set aside by the district court, and such order afterwards affirmed in this court. 11 N. D. 484, 92 N. W. 836. These condemnation proceedings are a conclusive foundation for the fact that the city had notice of the judgment sought to be set aside by this appeal. The city authorities must be presumed to have knowledge of what property the city owns and its rights thereto. By ordering condemnation proceedings, the city council must have known that, if the city ever had rights to the lots in question, such rights had been lost to the city or the condemnation proceedings could not have been deemed necessary. The city attorney, in prosecuting the condemnation proceedings, must have been aware of such judgment at that time, although he was not the city attorney that appeared for the city in the suit to quiet the title to these lots. The record further shows that these lots had never been listed for taxation before that action had been terminated, and that they were listed for taxation against

the present plaintiffs immediately after its termination by judgment. These facts alone, without reference to others having an indirect bearing on the question, are ample to show that the city had knowledge of this judgment for more than two years before any effort was made to set it aside.

There is no sufficient showing to excuse the long delay before attacking the judgment as having been rendered through the alleged unauthorized act of the city attorney in serving a disclaimer, instead of an answer setting up a defense on the part of the city. It is contended by the appellant that the provisions of section 5298, Rev. Codes 1899, have no application to this proceeding. That section provides: "That this court * * * may also in its discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, * * * taken against him through his mistake, inadvertence, surprise or excusable neglect," etc. Whether or not said section has any proper application, it is unnecessary for us to decide. In cases wherein said section does apply, the defendant must act promptly and within a year after knowledge of the entry of the judgment. Wheeler v. Castor, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746. Courts have a wide discretion relating to granting or withholding relief in such cases, which will not be disturbed, except on a showing of an abuse of discretion. Nichells v. Nichells, 5 N. D. 125, 64 N. W. 73, 33 L. R. A. 515, 57 Am. St. Rep. 540; Smith v. Wilson, 87 Wis. 14, 57 N. W. 1115. If it be conceded that section 5298 is not applicable to the facts of this case, it would not better the defendant's position. If the city was at one time entitled to relief as a matter of right, as claimed by it, the remedy has been lost by not acting seasonably after notice of the judgment. Nichells v. Nichells, supra. In no event can it be held that the defendant is entitled to the relief sought after the long delay.

The order is affirmed. All concur.

(105 N. W. 92.)

LOTTIE E. KEENEY AND PATRICK DEVITT v. CITY OF FARGO.

Opinion filed October 2, 1905.

Judgment Quieting Title Bars Easement and License Existing at the Time of Its Entry — Res Judicata.

1. In an action to quiet title to real estate, in which the complaint alleges that the plaintiff is the owner of the land in fee and that the

defendant has no right, title or interest therein, a judgment that the plaintiff does own the land and that the defendant had no right, title or interest therein conclusively adjudicates all questions affecting the title to such land, and bars a claim to an interest in the real estate in the nature of an easement in or license or consent to use the land existing when such adjudication was made, in a subsequent action by the same plaintiff for damages on account of the unlawful occupation of said real estate by the defendant.

Evidence — Expert Testimony — Opinions as to Value of Real Estate Must Rest on Knowledge Thereof, or of Other Similarly Situated.

2. A witness is not competent to testify in reference to the rental value of real estate, concerning which rental value he has no knowledge nor any knowledge of the rental value of real estate similarly located. The knowledge of the witness as to the rental value of lots used for business purposes does not render such witness competent to testify as to the rental value of real estate of different character and location, and having no rental value for business purposes.

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

Action by Lottie E. Keeney and Patrick Devitt against the city of Fargo. Judgment for plaintiffs, and defendant appeals.

Reversed.

Seth Newman, City Attorney, for appellant.

Entry upon lands by the consent or acquiescense of the land owner will operate as a waiver of the right to prepayment, and the land owner cannot obtain a judgment of ejectment until the damages have been assessed and a default made upon the judgment therefor. 6 Am. & Eng. Enc. Law (1st Ed.) 587, 594; McAuley v. Western Vt. R. Co., 33 Vt. 322.

Plaintiffs have acquiesced in all the defendant's acts in the occupancy and improvement of the property, and can only recover damages under the law of eminent domain. 6 Am. & Eng. Enc. Law (1st Ed.) 595, 597, and notes.

The measure of damages is the damage done to the property less the benefit it received from the improvement. Const. N. D., section 14; Rev. Codes 1899, subdivision 4.

F. B. Morrill and *S. G. Roberts,* for respondent.

By pointing out specific objections to the charge the defendant signified his intention to rely upon such objections alone, and has waived all rights that he might have under the alleged general

exception. State v. Campbell, 7 N. D. 58; Galloway v. McLean, 9 N. W. 98; Banbury v. Sherin, 55 N. W. 723; McCormack v. Phillips, 34 N. W. 39; Kennedy v. Falde et al., 29 N. W. 667; New Dunderberg Min. Co. v. Old, 97 Fed. 155.

Defendant admits by answer the sole exclusive use and occupation of the premises in controversy and is estopped to assert the contrary. 11 Am. & Eng. Enc. Law, 447.

The objection that the court erred in directing a verdict, "because the evidence shows conclusively that plaintiffs were not the owners of the entire premises in controversy," is untenable, because nowhere in defendant's specifications of error is the ground upon which the direction of the verdict is now attacked noticed. Wilson v. Seaman, 87 N. W. 577; Henry v. Mather, 6 N. D. 413, 71 N. W. 127; Thompson v. Cunningham, 6 N. D. 426, 71 N. W. 128; Baumer v. French, 8 N. D. 319, 79 N. W. 340; First National Bank v. Merchants National Bank, 5 N. D. 161, 64 N. W. 941; Hostetter v. Brooks Elevator Co., 4 N. D. 357, 61 N. W. 49.

The judgment in Devitt v. Fargo, entered in 1900, is res judicata as to the contention that plaintiffs acquiesced in the use of the premises as used, and conclusively precludes the defendant from raising, or the court considering, the point. Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195; Aurora v. West, 7 Wall. 82, 19 L. Ed. 42; Caperton v. Schmidt, 26 Cal. 479; Smith's Leading Cases, Vol. 3 (9th Ed. p. 2094, and cases); South Minn. Ry. Co. v. St. Paul, etc., Ry., 55 Fed. 696; David Bradley Plow Co. v. Eagle Mfg. Co., 57 Fed. 989.

The measure of damages is not the damage to the property less the benefit of the improvement thereto: (1) because defendant occupied it as a street and could not be an occupying tenant; (2) because the alleged improvement was made in connection with the use of the street, and plaintiffs were never cited in the proceedings for the laying out of the same and never consented thereto. Stark v. Star, 1 Sawyer (U. S.) 15; (3) defendant's entry was not under color of title and in good faith. 16 Am. & Eng. Enc. Law, 79; Carpenter v. Mitchell et al., 29 Cal. 330; Hunt v. Pond, 67 Ga. 528; Stamper v. Bradley, 53 S. W. 16; Ry. Co. v. Jones, 68 Ala. 48,

Defendant had notice of plaintiff's title before the improvement was made, and hence did not act in good faith and cannot recover for improvements. Campbell v. Brown, 2 Woods, 349; Gordon v. Tweedy (Ala.) 49 Am. Rep. 813; Craton v. Wright, 16 Iowa, 133; Estell v. Cole, 62 Tex. 695.

Defendant did not ask a directed verdict on the ground that the evidence showed the value of the alleged improvement, and that such improvement was a proper reduction of damages, and only the grounds specified in the motion can be considered on appeal. Minn. Thresher Mfg. Co. v. Lincoln, 4 N. D. 410, 61 N. W. 145; First National Bank v. Laughlin, 4 N. D. 481; Mattoon v. Fremont, 60 N. W. 740; Colka v. Jones, 6 N. D. 461, 71 N. W. 558.

The measure of damages is "the value of the use of the property for the time of its occupation." Section 4998, Rev. Codes 1899.

The value of the use is "the rental value, that is, the commercial value of the use of the thing ascertainable by direct proof of what it would rent for or proof of the facts from which a fair rental value may be known." Leick v. Fritz, 62 N. W. 855; Woodhull v. Rosenthal et al., 61 N. Y. 382; Cutter v. Waddingham, 33 Mo. 369.

The value of the lots was not based upon an increased value by reason of the improvement, and even if it were, the defendant, being a trespasser when placing it upon the lots cannot complain. Gilley v. Williams, 43 S. W. 1094; Carpenter v. Mitchell, 29 Cal. 330; Miller v. Ingrom, 56 Miss. 510.

That the premises were never rented, does not prove that they had no rental value. The presumption is that they did have, and the burden is upon the defendant to prove that they had none. This it wholly failed to do, and the opposite appears from the record. Curry v. Sandusky Fish Co. (Minn.) 93 N. W. 896; Bradley v. Brown (Iowa) 53 N. W. 268; Brownwell v. Chapman (Iowa) 51 N. W. 249; Syracuse Gaslight Co. v. Ry., 11 Civ. Proc. R.

MORGAN, C. J. This is an action to recover the possession of certain lots in the city of Fargo, which the city is alleged to have wrongfully taken possession of and excluded the plaintiffs therefrom, and for the recovery of damages for the value of the use of the lots. The property involved in the action is known as "Keeney & Devitt's Third Addition to the City of Fargo," and comprises fourteen lots on Seventh Avenue North. This avenue is thirty-five feet wide, according to the original plat of the city. As traveled and used at present, said avenue is seventy-five feet in width, and the additional width is made by using the lots in question. The city answered and alleged that the plaintiffs had acquiesced in the taking of the lots as a street, and that the city has the right to the possession of the same by prescription, and that the plaintiffs have no title to these lots and are estopped from

claiming any title thereto. The unlawful taking and occupation of these lots is alleged to consist of their use for street purposes and the building of sidewalks thereon, and grading the same as a street, and placing sewer pipes and culverts thereon. The court withdrew all disputed questions from the consideration of the jury, except the damages to be assessed against the city on account of its use of the street since September, 1899. The jury found the plaintiff's damages to be $714.58. Judgment was entered on the verdict, and the city appeals from the judgment.

The question of the title to this property is not open to investigation in this action. Nor is the question whether the plaintiffs consented and acquiesced in the taking of the lots for street purposes open for consideration or adjudication in this suit. These questions were adjudicated in a former suit, brought by the plaintiffs against this defendant to quiet the title of the lots in question in the plaintiffs, and to bar the defendant from claiming any right, title or interest therein. The city was served with the summons and complaint, and through the city attorney filed a disclaimer of any claim or interest to the lots in question. Judgment was thereupon entered adjudging the plaintiffs to be the owners of the lots and further adjudging that the defendant had no right, title or interest to the same. This judgment is still in force and effect, and this court recently affirmed an order of the district court refusing to set the same aside. Keeney et al. v. City of Fargo (N. D.) 105 N. W. 92. The rights of the plaintiffs to these lots were finally settled by that judgment. The issue tendered by the complaint was the ownership and title to the lots, and judgment was entered adjudging that plaintiffs were the owners and that the defendant had no right, title or interest thereto.

It is contended by the defendant that the former suit was an adjudication as to the title to said lots only, and that it is not a bar as to the question of whether the plaintiffs consented or acquiesced in the occupation of the street by the city for the construction of sewers, culverts and other improvements. If the plaintiffs in the former suit consented to the laying of the sewers and the making of other public improvements on the lots in question, then the city had an interest in the lots for that purpose. This consent or acquiescense constituted such an estate or interest in the land that, upon pleading and proving it, the right to quiet the title in the plaintiffs absolutely would have been defeated. Likewise would the right to an unconditional judgment quieting the title

in the plaintiffs have been defeated upon showing that the lots had become a street by prescription or by dedication. When that judgment was rendered, the sewers and culverts had been completed and the lots partly graded for convenience of travel. The issue was tendered by the complaint whether the city had occupied these lots for such purpose under a license from the plaintiffs, and, if the city had an easement in these lots under which it was permitted to occupy the same for purposes of constructing sewers or other public purposes, the right to establish the same was given to the city when it was made a party to that suit and the complaint served upon it. These issues were necessarily tendered by that complaint, and, when the city failed to present the facts as now claimed to exist, the judgment became a final and binding adjudication of these questions. By the judgment it was established that the city had no right, title or interest in the lots, and this was an adjudication that the city had no license or easement to use the lots for any purpose and no interest whatever therein. The judgment declared that the city had no right to these lots, and quieted the title thereto in the plaintiffs without condition or reservations. This bars the right to litigate them now, as they were necesarily an issue in that action. In Indiana, B. & W. Ry. Co. v. Allen (Ind. Sup.) 15 N. E. 446, the court said: "Our statute does not confine the question to one of ownership, but it embraces all claims affecting the owner's right to enjoy his lands; for it provides that the action may be brought against any one 'who claims title to or interest in the real property.' * * * It must result from this, as has been often held, that one who is brought into court to answer as to his interest must set forth all the interest he then claims, and, if he fails to do so, his claim, whatever its character, is barred. The complaint challenges him to present his claim, and it is his own fault if he neglects or declines to use the opportunity offered him of making good his claim. * * * We think it very clear that, where title has been quieted in the owner of the fee, a claim to an easement is conclusively adjudicated and cannot again be asserted." See, also, Smith v. Baldwin, 85 Iowa, 570, 52 N. W. 495; Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195; Van Valkenburgh v. Milwaukee, 43 Wis. 574. The former judgment was therefore a bar to the consideration of all question as to the right of the city to occupy these lots by license, acquiescence or easements and a bar to showing that the city has any interest or estate in the same, and such questions are therefore res adjudicata.

The other assignments of error raised on the appeal pertain to the admission of evidence as to the damages to be assessed against the city. It is insisted that incompetent evidence was admitted as to the value of the use of the lots. The plaintiffs showed by competent evidence the value of each of the fourteen lots involved in the action. The witnesses were then asked what the rental value or value of the use of these lots was per annum. The answers were invariably that the rental value was a certain given per cent of the value of the lots. The rental value was generally given at 6 per cent per annum of the value of the lots. On cross-examination it was shown that their answers were based on what real estate in the business portion of the city actually rented for. They also answered that they knew of no property situated like the property in question that ever rented in the city of Fargo. This property is unoccupied property, and such property was not shown to have any rental value. The only showing made was that lots in the business parts of the city have a rental value. We deem it error to allow an answer as to rental value to stand upon the record when given by a witness and based on the rental value of other property not similarly situated with the property, the value of which is under investigation. Testimony that the rental value of all unoccupied lots in a city is 6 per cent of their value because business property is actually rented for 6 per of its value is misleading and not based on proper foundation. The Stilwell & Bierce Mfg. Co. v. Phelps, 130 U. S. 520, 9 Sup. Ct. 601, 32 L. Ed. 1035. In the one case the property is shown to have a rental value. In the other case there is no such showing. Some of the witnesses testifying as to the rental value of these lots were real estate dealers and others were not such dealers, but were familiar with the value of these lots from general knowledge of the value of similar property. Whether such testimony was given by real estate dealers or not, they are not competent as witnesses to show rental value, without showing that they were qualified by experience in dealing with similar property or actual knowledge of transactions in reference to renting such property, to express an opinion as to such value. The mere fact that a witness is a real estate dealer does not alone make him qualified to express an opinion as to rental value. There must also be experience in dealing with the property in question or similar property. See Rogers on Expert Testimony, section 152, and cases cited.

Defendant made timely objections to the questions asked and motions to strike out the answers of witnesses testifying that the rental value of these lots was a certain per cent of their value as fixed by them, as not based upon proper foundation. The answers should have been stricken out. The answers were based on the rental value of other property not similarly situated with the property in question. To assume that unoccupied vacant property, not shown to have any rental value, has the same rental value proportionate to its value as other property, not of the same character or location, leads to conclusions not necessarily based on the truth. No invariable rule can be laid down for ascertaining the rental value of real estate of different classes. The rental value of each class may be different, although the value of the lots may be the same. The rental value of these lots should have been shown without relation to the prevailing rental value of other property not similarly located. The method adopted in this case of establishing the rental value on a basis of a percentage of its actual value has been generally citicized. See Woodhull v. Rosenthal, 61 N. Y. 382, and Brownwell v. Chapman (Iowa) 51 N. W. 249, 35 Am. St. Rep. 326.

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

(105 N. W. 93.)

W. J. MORGRIDGE AND F. E. MERRICK, COPARTNERS AS MORGRIDGE & MERRICK, v. JACOB STOEFFER.

Opinion filed October 2, 1905.

Justice of the Peace — Summons — Amendment.

1. A summons in justice court, which contained a partnership name without showing the Christian name of each partner, is not a nullity, but is merely irregular, and may be cured by amendment.

Dismissal — Irregularity in Practice.

2. An action should not be dismissed for a mere irregularity of practice which can be remedied by amendment without prejudice to the substantial rights of the parties.

Mistakes in Pleading or Process May Be Amended in Justice Court.

3. The provisions of section 5297, Rev. Codes 1899, relating to the correction of mistakes in pleading, process or proceeding, is applicable to justice court.

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

Action by W. J. Morgridge and F. E. Merrick against Jacob Stoeffer. Judgment for defendant, and plaintiffs appeal.

Reversed.

Gooler & Goer, for appellants.

Where a defendant fails to plead by demurrer or answer the want of legal capacity to sue, he waives it. McFall v. Buckeye Grangers' Warehouse Assn. et al., 122 Cal. 468, 55 Pac. 253, 68 Am. St. Rep. 47.

Defendant could not take advantage of the defect—suing in partnership name—by motion to dismiss upon a special appearance; it must be done by plea, and if amendment is offered it should be granted. 1 Wait's Pr. 491; Talcott v. Rosenborg, 8 Abb. Prac. 287; Bank v. Magee et al., 20 N. Y. 355; Barber v. Smith, 1 N. W. 992; Hawkeye First National Bank v. Noel, 94 Mo. App. 498; Sims v. Jacobson, 51 Ala. 186; DeLeon v. Heller, 77 Ga. 740; Bannerman v. Quackenbush, 11 Daly (N. Y.) 529; Clayburg v. Ford, 3 Ill. App. 543; Lewis v. Locke, 41 Vt. 11; Dixon v. Dixon, 19 Iowa, 512; Hoges v. Kimball, 49 Iowa, 577; Stuart v. Corning, 23 Conn. 105; Vol. 1, Enc. Pl. & Pr. p. 541, note 3; Van Brunt & Davis v. Harrigan et al., 65 N. W. 421; Karpen v. Keippen, 52 Am. St. Rep. 604; Fisher v. Northrup, 44 N. W. 610

Defect in title of case is not fatal, but may be amended. Morse v. Barrows, 33 N. W. 706; Bradley v. Sandilands, 61 Am. St. Rep. 386; Gans v. Beasley et al., 59 N. W. 714.

The provisions relating to amendment are similar in New York and in this state, both as to justice courts and courts of record. The power of amendment, both as to pleading and process, can be exercised by either of such courts. Lapham v. Rice, 55 N. Y. 472; Ackley v. Tarbox et al., 31 N. Y. 564; Lowe v. Rommell, 5 Daly (N. Y.) 17.

Burke & Middaugh, for respondent.

Justice summons must be issued with no blanks to be filled; otherwise it is void. Seurer v. Horst, 18 N. W. 283.

Judgment cannot be supported where declaration is against a partnership by its firm name. Reade v. McLeod, 20 Ala. 576.

Suit brought in firm name will be dismissed upon motion. Weiss et al. v. Davey et al., 44 N. W. 470; Hayes v. Lanier, 3 Black. 322; Hughes v. Walker, 4 Black. 51; Van Brunt & Davis v. Harrigan et al., 65 N. W. 421; Reedy v. Howard, 76 N. W. 304; Gans v. Beas-

ley et al., 4 N. D. 140, 59 N. W. 714. Section 5297, Rev. Codes 1899, is not applicable to justice courts. Section 6225 is a limit upon the applicability of the Code of Civil Procedure, particularly the power of amendment as limited by section 6666. Richmire v. Andrews & Gage El. Co., 11 N. D. 453, 92 N. W. 819.

ENGERUD, J. The plaintiffs, M. J. Morgridge and F. E. Merrick, who are partners doing business in the firm name of Morgridge and Merrick, commenced this action in justice court. The partnership name only appeared in the summons, without showing the christian names of each of the two partners. The defendant appeared specially on the return day of the summons, and moved to dismiss the action on the ground that the summons failed to set forth the names of the individuals composing the plaintiff firm. The justice denied the motion. The defendant excepted to the ruling, and, so far as the record discloses, took no further part in the proceedings. After denying defendant's motion to dismiss, the justice permitted the summons to be amended by inserting the christian names and surnames of the two partners, and a complaint in proper form was also filed. Judgment was thereupon entered for the plaintiffs. The defendant appealed to the district court on question of law only. The district court held that the justice erred in overruling defendant's motion, and directed judgment to be entered setting aside the justice's judgment and dismissing the action. The plaintiff thereupon appealed from the judgment of the district court.

Defendant's contention is that the use of the partnership's name to designate the plaintiffs in the summons was a fatal irregularity, equivalent to an entire omission of the name of any plaintiff, and hence the summons was a nullity. It is true that the use of the partnership name as the only designation of plaintiffs was irregular. The summons was not, however, a nullity for that reason. The partnership name furnished the means of identifying the plaintiffs, and it cannot therefore be said that the firm name was the same as no name. It was merely an irregularity which could be waived by the defendant, if he failed to object, and could be cured by amendment. Enc. Pl. & Pr. vol. 15, p. 841, and notes; Bank v. Magee, 20 N. Y. 355; Barber v. Smith, 41 Mich. 138, 1 N. W. 992; Johnson v. Smith, Morris (Iowa) 106.

The defendant was entitled to have the record disclose on its face the names of all the persons who composed the plaintiff firm.

He was not, however, entitled to a dismissal of the action, unless the plaintiffs failed or declined to make the necessary amendment. It is provided by the Code of Civil Procedure (Rev. Codes 1899, section 5297) that any pleading, process or proceeding may be amended "by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect." It is contrary to the policy of the Code of Civil Procedure to dismiss an action for mere irregularities of practice which can be remedied by amendment without prejudice to the substantial rights of the parties. It cannot be pretended that the amendment allowed by the justice in this case could prejudice defendant's rights in the slightest degree. The provisions of the Code of Civil Procedure govern the proceedings in justice court as far as applicable, when the mode of procedure is not prescribed by the Justice Code. Rev. Codes 1899, section 6625. There is nothing in the latter Code inconsistent with the observance by a justice of the provisions of section 5297.

We attach no importance to the fact recited in the abstract that the defendant withdrew after the denial of his motion and before the amendment. If we regard defendant's motion merely as an objection to the jurisdiction, it was properly overruled, and that was evidently defendant's contention, as he appeared specially only for the purpose of the motion, thereby denying the jurisdiction of the court. If we disregard the special appearance and treat the motion as a general appearance, the motion was likewise properly denied, because, as we have already shown, the defendant was not entitled to an unconditional dismissal. The justice properly granted permission to amend, and, although it would have been better practice to direct the amendment and withhold the denial of the motion until after the amendment was made, the course pursued, as shown by the docket, accomplished the same result. The defendant could not, by withdrawing from the case in the midst of the hearing, immediately after the adverse ruling, deprive the court of jurisdiction to proceed therewith, and by subsequent orders remove any vice in the ruling complained of.

The judgment of the district court is reversed, and that court will enter judgment for the plaintiffs, affirming the justice's judgment, and for the recovery of plaintiff's taxable costs and disbursements. All concur.

ON PETITION FOR REHEARING.

ENGERUD, J. The respondent has filed a petition for rehearing, urging that the court, in rendering the foregoing opinion, was in error when it said that there is nothing in the Justice Code inconsistent with the observance by a justice of the provisions of section 5297. It is claimed that section 6666, relating to amendments in justice court, and which provides that "either party may be allowed to amend his pleadings at any time," etc., confers all the power possessed by a justice in respect to amendments of any kind, and excludes any other power than that expressly conferred. It is urged that the section last mentioned must receive this construction, and therefore renders section 5297 inapplicable in justice court, because section 6625 declares that the provisions of the Code of Civil Procedure are applicable in justice court only "when the mode of procedure is not prescribed by this [Justice] Code, but the powers of justice's courts are only as herein prescribed." The argument is that section 6666 both confers the power of amendment and prescribes the mode of procedure, and hence for both reasons the rule with respect to amendments in district court are inapplicable in justice court.

We did not, in deciding this case, overlook any of these statutory provisions upon which counsel relies in the petition for rehearing. It seemed very clear to us that section 6666 did not bear the construction urged by counsel, and we did not deem it necessary to refer to it. We take this occasion, however, to state the reasons for our conclusion. The power to amend pleadings or process, where there is no jurisdictional defect, is inherent in the courts. It is a necessary incident of judicial power, and exists independently of statute. Volume 1, Enc. Pl. & Pr. p. 508, and cases there cited. This is as true of a justice court as of a court of general jurisdiction. It is therefore apparent that neither section 6666 nor section 5297 are statutes creating or conferring power to amend. They are merely declaratory of an existing power, and enjoin upon the courts a more liberal rule for the exercise of the power than that which generally prevailed in the absence of such statutes. Such being the nature of the statute, it is clear that it is not within the rule of construction which generally applies to statutes creating a remedy or conferring a power that the mention of one thing excludes all others not mentioned. Hence the fact that the section recognizes and to some extent regulates the right of a justice with

respect to amendments of pleadings does not require us to hold that it impliedly denies the right to amend in other respects. We cannot think that the legislature intended to deprive a justice court of its inherent power to amend irregularities of procedure—a power so peculiarly essential in that court, where the proceedings are often conducted by persons not learned in the law. New York has the same statutory provisions as those we have been discussing. See Bliss, Ann. Code N. Y. sections 2944, 723. The decisions of that state support the views herein expressed. Ackley v. Tarbox, 31 N. Y. 564; Lapham v. Rice, 55 N. Y. 472.

The ruling of this court in Richmire v. Andrews, 11 N. D. 453, 92 N. W. 819, that the provisions of the Code of Civil Procedure, requiring notices to be served upon the attorney of the adverse party, did not apply to the service of the notice of appeal from a justice's judgment, is not in conflict with the present decision. In that case the court was dealing with a statute which not only created the right of appeal, but prescribed the mode of procedure for exercising that right, and for that reason held that the provision of the Code of Civil Procedure did not apply.

(104 N. W. 1112.)

THE JOHN MILLER COMPANY v. JOHN A. KLOVSTAD.

Opinion filed October 2, 1905.

Gaming — Dealing in Options — Evidence.

1. An agent sues its principal to recover for losses sustained in transactions on the Duluth Board of Trade in the sale of grain for future delivery. *Held*, that there was no sufficient evidence requiring the trial court to submit to the jury the issues raised by defendant's answer, and hence the ruling of the court in directing a verdict for the plaintiff was proper. Sales of commodities for future delivery are presumed to be legitimate, and the burden is upon the party asserting the contrary to establish such fact.

Same — Validity of Contract.

2. A contract for the sale of a commodity for future delivery is valid if the parties intend that there shall be an actual delivery; but if the parties do not contemplate an actual delivery of the commodity sold, but agree that one party shall pay the other the difference between the contract price and the market price at the date set for the execution of the contract, it is void as a wagering or gaming contract.

Same — Delivery — Intent of Parties.

3. In an action on such a contract, it is no defense that the vendor did not intend an actual delivery of the commodity, if the other party contemplated such delivery. The test of illegality is the intention, not alone of one of the parties, but of both.

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

Action by the John Miller Company against John A. Klovstad. Judgment for plaintiff, and defendant appeals.

Affirmed.

F. B. Morrill and *A. W. Fowler,* for appellant.

A controverted fact should never be taken from a jury where there is a reasonable doubt upon the state of the evidence. Vickery v. Burton, 6 N. D. 245, 69 N. W. 193; McRea v. Bank, 6 N. D. 353, 70 N. W. 813; Cameron v. Gt. N. Ry. Co., 8 N. D. 124, 77 N. W. 1016; Warnken Co. v. Langdon Merc. Co., 8 N. D. 243, 77 N. W. 1000; Pewonka v. Stewart, 13 N. D. 117, 99 N. W. 1080; Slatterly v. Donnely, 1 N. D. 264, 47 N. W. 375.

In option deals, the burden of proof is on him asserting the option. It is very slight and the court will scrutinize the contract very closely. Sprague v. Warren, 41 N. W. 1113; Barnard v. Backhaus, 6 N. W. 252, 9 N. W. 595.

Court takes judicial notice that a majority of the transactions on the boards of trade are purely fictitious, speculative and gambling in futures. Mohr v. Miesen, 49 N. W. 862; Dows et al. v. Glaspell, 4 N. D. 259, 60 N. W. 60.

The transaction was a mere gambling one. Dows v. Glaspell, supra.

If an agent disregards his principal's instructions and loss ensues, he is liable for such loss, and if he has made advances, in thus disobeying instructions, he cannot recover them or his commissions. Butts v. Phelps, 79 Mo. 302; Fuller v. Ellis, 39 Vt. 345; Whitney v. Express Co., 104 Mass. 152; Scott v. Rogers, 31 N. Y. 676; Galigher v. Jones, 129 U. S. 193.

Custom and usage will not authorize a departure from such instructions. Wonless v. McCandless, 38 Iowa, 20; Bliss v. Arnold, 8 Vt. 252; Catten v. Smith, 24 Vt. 85; Parsons v. Martin, 11 Gray, 115.

Guy C. H. Corliss, for respondent.

If a principal authorizes a broker to deal upon a known board of trade, such authority is to deal in accordance with the rules and usages of such board unless specifically instructed otherwise. Clews v. Jamieson, 182 U. S. 461; Bibb v. Allen, 149 U. S. 481, 489, 13 Sup. Ct. Rep. 950; 37 L. Ed. 819; Bailey v. Bremsley, 87 Ill. 556; Mechem on Agency, 485; Maxter v. Paine, L. R. 4, Ex. 210; Mitchell v. Newhall, 15 M. & W. 308; Nickalls v. Merry, L. R. 7, H. L. 530; Robinson v. Mellette, L. R. 7, H. L. 805, 826; Cotheam v. Ellis, 107 Ill. 419; Samuels v. Oliver, 130 Ill. 73; Bailey v. Bensley, 87 Ill. 559.

If the principal gives ambiguous instruction, he, not the agent, must suffer, if loss ensues thereby. Anderson v. Bank, 4 N. D. 182, 59 N. W. 1029; Mechem on Agency, sections 314, 315, 484.

An estoppel exists when the party against whom it is urged has been negligent and his negligence has misled the other party. Robbins et al. v. Blanding, 91 N. W. 844; Sterns v. Johnson, 19 Minn. 240; Mechem on Agency, sections 154-157.

The party claiming that a transaction is a wager has the burden of proof. Hill v. Levy, 98 Fed. 94; Irwin v. Williar, 110 U. S. 499, 28 L. Ed. 225; Boyle v. Henning, 121 Fed. 376; Johnston v. Miller, 53 S. W. 1052; Ponder v. Jerome Hill Cotton Co., 100 Fed. 373; 40 C. C. A. 416; Bibb v. Allen, supra; Rountree v. Smith, 108 U. S. 269, 27 L. Ed. 722; Clewes v. Jamieson, 182 U. S. 461, 488, 21 Sup. Ct. 845, 45 L. Ed. 1183.

The intention of one party not to make or receive a delivery, but to bet on the market, is not sufficient; both must intend to bet. Hill v. Levy, 87 Fed. 94; Bangs v. Hornisk, 30 Fed. 97; Ward v. Vosburg, 31 Fed. 12; Lehman v. Field, 37 Fed. 852; Parker v. Moore, 115 Fed. 799; Irwin v. Williar, 110 U. S. 499, 28 L. Ed. 225; Bibb v. Allen, supra; Ponder v. Jerome Hill Cotton Co., 100 Fed. 373; Clewes v. Jamieson, 182 U. S. 461, 489; Johnston v. Miller, 53 S. W. 1052; Boyle v. Henning, 121 Fed. 376; Parker v. Moore, 125 Fed. 807; Bibb v. Allen, supra; Irwin v. Williar, 110 U. S. 49, 28 L. Ed. 225; Parker v. Moore, 115 Fed. 799; Rountree v. Smith, 108 U. S. 269, 27 L. Ed. 722; Dows v. Glaspell, 4 N. D. 251; Ponder v. Jerome Hill Cotton Co., 100 Fed. 373; Clewes v. Jamieson, 182 U. S. 461, 21 Sup. Ct. 845, 45 L. Ed. 1183; Barnes v. Smith, 159 Mass. 344, 34 N. E. 403, 47 Central Law Journal, 172, 130 Fed. 507-512.

In the following cases it was held that there was no evidence to go to the jury: Ponder v. Jerome Hill Cotton Co., 100 Fed. 373;

Bibb v. Allen, supra; Johnston v. Miller, 53 S. W. 1052; Clews v. Jamieson, 182 U. S. 461, 494, 21 Sup. Ct. 845, 45 L. Ed. 1183.

Principal must indemnify agent for losses incurred in the course of the agency. Mechem on Agency, section 653; 1 Am. & Eng. Enc. Law, 1117.

FISK, District Judge. Appeal from a judgment rendered by the district court of Steele county upon a verdict directed for plaintiff. The facts necessary to a correct understanding of the questions involved are as follows: During the time covered by the transactions between the parties the plaintiff was a commission broker and member of the Duluth board of trade, engaged in buying and selling grain for other persons upon commission, and the defendant was engaged in operating an elevator at Dwight, in this state, and in buying and shipping grain to Duluth to be there sold. The plaintiff, through its president, John Miller, made arrangements with defendant in the month of August, 1902, whereby the defendant was to purchase grain at Dwight for shipment to plaintiff, at Duluth, to be sold upon the usual commission, the plaintiff to furnish defendant with the necessary funds to carry on such business at a rate of interest agreed upon. It was talked over and understood that the speculative feature of the business, by reason of fluctuations of the market, should be obviated by a system of "hedging," which means that the defendant would, for all grain purchased by him, sell, or, in other words, obtain a contract through his said brokers to sell a like amount to arrive or for future delivery. Selling to arrive and selling for future delivery have a well-defined meaning upon the board of trade and in the business world; the former expression meaning that the vender had fourteen days in which to make delivery of the warehouse receipts, and the latter expression meaning that he has any day during some specified month in the future in which to make such delivery. This system of "hedging" eliminates the risk of loss which otherwise might occur by a decline in the market price during the time necessarily consumed in transporting the grain to market. Of course, in order to make the "hedge" perfect, the grain sold to arrive or for future delivery should at all times just equal the amount of grain purchased by defendant and unsold. As soon as the grain shipped arrives at its destination and is sold, the "hedge" must be taken down; or, in other words, an equal amount of grain must be purchased for delivery at the same time as the

grain which was sold for such future delivery is to be delivered, and thus one is made to balance or offset the other. Such "hedging" transactions are consummated through the broker upon the board of trade upon instructions from the principal, and, when the shipment of grain against which there is a "hedge" arrives and is sold, the custom, under the undisputed evidence, is for the broker to remove the "hedge" if the shipment is not accompanied with instructions to the contrary; but, if the shipment is accompanied with instructions to sell on arrival, such instructions, under the universal custom, are equivalent to specific instructions to the broker not to apply such shipment on the outstanding sales for future delivery.

The undisputed evidence discloses that plaintiff, pursuant to instructions from time to time, sold for defendant, upon the Duluth board of trade, 17,000 bushels of wheat for December delivery, presumably intended by defendant as "hedges," and that pursuant to such arrangement between the parties the defendant, from time to time, shipped to plaintiff in the aggregate 21,000 bushels of grain, of which shipments only 4,000 bushels of wheat were applied on these "hedges;" the balance having been sold and the proceeds credited to defendant's account. The remaining 13,000 bushels sold for December delivery not having been delivered by defendant, as plaintiff contends, the plaintiff was required, under the rules of the board of trade, to fulfill its contract, which it did by purchasing a like amount for delivery at that time, and in doing so it incurred a loss, which, including commissions and interest, aggregates the sum sued for in this action. The undisputed evidence discloses that operations on the Duluth board of trade are restricted to actual transactions in the purchase and sale of grain, and that dealing in what is commonly called "options," which does not contemplate the delivery of the actual grain, but is a mere gambling transaction on the fluctuations of the market, is strictly forbidden. The evidence also discloses that there is a clearing house connected with the board through which all deals are adjusted each day by striking balances between the broker and such clearing house, also that all transactions upon the board are carried on in the names of the brokers without disclosing their principals, and that each broker becomes personally responsible for the fulfillment of all contracts made by him in behalf of his principal. The evidence discloses that accompanying or preceding each shipment of grain the defendant sent the plaintiff specific in-

structions as to the disposition of the same, except as to five cars aggregating something over 4,000 bushels of wheat, which shipments were not accompanied or preceded by any instructions or directions as to its disposition. Plaintiff concedes that as to these five cars, there being no directions from the defendant as to its disposition, that it was plaintiff's duty to apply the same to the extent of 4,000 bushels upon the December sales, which it did, but that as to the remaining shipments, which were accompanied by specific directions to sell on arrival, it had no authority from the defendant to apply the same upon such December sales. It is the defendant's contention that under the arrangement or agreement between the plaintiff and defendant it was the duty of the plaintiff to take down the "hedges" without express instructions from the defendant, as soon as the shipments were received and sold.

The defense interposed by defendant is, first, that the transactions or deals alleged to have been made by plaintiff for and on account of defendant were merely gambling transactions and dealing in so-called "options," and that the delivery of actual wheat was never at any time contemplated by either of the parties; and, second, that the alleged transactions or deals were carried on under an agreement whereby plaintiff was to protect defendant by buying back the future wheat which defendant had sold as fast as actual wheat arrived, and that plaintiff failed and neglected to act and do as it had agreed, and because of such failure the loss for which plaintiff seeks to recover was incurred, and not otherwise. The defendant contends that there was sufficient evidence to require a submission of the issues to the jury, and hence that the trial court erred in directing a verdict in favor of the plaintiff. This is the sole error complained of. In disposing of this assignment of error, we must keep in mind the well-settled rule that a motion made at the close of the trial for a directed verdict is in the nature of a demurrer to the evidence, and hence all fair inferences from the evidence must be drawn in favor of the party against whom such verdict was directed, and where honest and intelligent men may fairly differ in their conclusions from the evidence upon any material fact in the case it is error to withdraw the evidence from the consideration of the jury. Tested by this rule, we are unable, after searching the record diligently, to find any evidence sufficient to go to the jury in support of either of the defenses urged by the defendant, and we think, therefore, that the action of the trial court in granting plaintiff's motion to direct a verdict for the plain-

tiff was proper and must be sustained. It is true, as contended by counsel for appellant, that the sum sued for in this action represents the difference between what the December "hedges" were sold for and what it costs the plaintiff to buy such "hedges" back, with commissions and interest added, and the plaintiff's right to recover must stand or fall upon the nature of such "hedge" transactions, and, if, as alleged in defendant's answer, there was no intention by either party to deliver the actual grain on these "hedges," but that they were intended to be merely speculative and gambling transactions, there could be no recovery under the doctrine announced in Dows & Co. v. Glaspell, 4 N. D. 251, 60 N. W. 60. But what does the evidence disclose as to the nature of these "hedge" transactions, and as to the intention of the parties? What the secret or undisclosed intention of the defendant was is not controlling, so that, even conceding that defendant intended merely to gamble in so-called options, still where is there a scintilla of evidence showing that plaintiff so understood the defendant? The undisputed evidence shows that such a transaction could not be consummated upon the Duluth board of trade, for under its by-laws the same was strictly prohibited. The plaintiff could have no possible incentive to do otherwise than follow implicitly the instructions of defendant, and the undisputed evidence shows that it did do this. The fair construction to be placed upon the defendant's testimony is that because he contemplated that these "hedges" would be removed by purchasing a like amount of wheat for future delivery and offsetting one contract against the other, instead of delivering the actual wheat, that therefore the transaction was a mere wager, and illegal. This position is inconsistent even with defendant's testimony. On page 49 of abstract defendant testified: "I am not a gambler, and do not believe in gambing. I believe in legitimate business transactions. I never intended to make any other transaction in this case, except legitimate business transactions." He does not pretend that he ever gave plaintiff any kind of notice or intimation that he was merely making wager deals, and plaintiff was fully justified in believing that he intended that plaintiff should make actual sales for him on the board of trade. Defendant was seeking protection by actual sales in the form of "hedges" to offset purchases made by him. He testifies that it was the understanding between him and John Miller at Dwight that such "hedges" should be kept up as a protection, and it is, to say the least, extremely inconsistent for him to take the posi-

tion now that such "hedges" were intended as a mere gambling transaction. As before stated, the evidence is conclusive that no other kind of sales could be made upon the board, except actual sales, and the undisputed evidence shows that plaintiff made actual sales pursuant to instructions. Furthermore, immediately after making each sale plaintiff reported the same to defendant in writing, and each report had printed thereon in a conspicuous place the following notice: "These transactions are made subject to the rules and customs of the exchange at the place of contract, and contemplate the actual delivery of the specified commodity, and the right is reserved to close the transactions when margins are exhausted, or nearly so, without giving further notice."

In the face of these facts it would be a strange rule which would permit the defendant to urge his secret purpose to gamble as a defense, especially when such secret purpose was concealed from plaintiff. Defendant's testimony upon this point is so repugnant to his sworn purpose in creating these "hedges," and to all the other evidence and circumstances in the case, that we hold it to be insufficient to warrant submitting the same to the jury, especially in view of the positive testimony of plaintiff's witnesses. For similar cases holding that there was no evidence to go to the jury, see Hill v. Levy (D. C.) 98 Fed. 94, 99; Parker v. Moore (C. C.) 125 Fed. 807; Ponder v. Jerome Hill Cotton Co., 100 Fed. 373, 40 C. C. A. 416; Bibb v. Allen,; 149 U. S. 481, 490, 13 Sup. Ct. 950, 37 L. Ed. 819; Johnson v. Miller (Ark.) 53 S. W. 1052; Clews v. Jamieson, 182 U. S. 461, 494, 21 Sup. Ct. 845, 45 L. Ed. 1183. We are not unmindful of the doctrine announced in Dows & Co. v. Glaspell to the effect that the courts will carefully scrutinize these transactions for the purpose of ascertaining the real intention of the parties, and will pierce the disguise usually resorted to in order to clothe the transaction in the garb of legitimate business dealing; but, when thus scrutinized, we are unable to say, from the evidence, that the transactions were not strictly legitimate. The law presumes that they were legitimate, and the burden of proof is on the party making the claim that the transaction was a mere wager to show that such is the fact. Hill v. Levy (D. C.) 98 Fed. 94; Irwin v. Williar, 110 U. S. 507, 4 Sup. Ct. 160, 28 L. Ed. 225; Boyle v. Henning (C. C.) 121 Fed. 376; Johnston v. Miller (Ark.) 53 S. W. 1052; Ponder v. Jerome Hill Cotton Co., 100 Fed. 373, 40 C. C. A. 416; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; Roundtree v. Smith, 108 U. S. 269, 2 Sup. Ct. 630,

27 L. Ed. 722; Clews v. Jamieson, 182 U. S. 461, 488, 21 Sup. Ct. 845, 45 L. Ed. 1183. The argument of appellant's counsel to the effect that the terms of the contracts for these December sales were not reduced to writing or disclosed in the record, as well as his argument that the names of the purchasers are not set forth, also that the parties in fact settled such "hedge" contracts by purchasing a like amount of grain for December delivery and making one contract offset the other, instead of producing the actual wheat, is unsound. The evidence shows that the transactions were in accordance with the universal usage and custom of the board of trade, and that the rules of such board require the contracts to be made in the name of the broker without disclosing the principal, and the fact that the broker adjusts the two transactions through the clearing house by offsetting one against the other, instead of going through the formality of making and exacting a delivery of the actual grain, does not show the transaction to be a mere gambling one. The test is, did the parties have the legal right to demand and receive or deliver the actual wheat, or did they contemplate and agree that no actual wheat should be delivered? What the parties may have done, or what they may have contemplated doing in the matter of delivery of actual grain, is not controlling, but, rather, what they believed and contemplated they had a legal right to do under the contract in this regard is the test. Any other rule would greatly hamper the millions of legitimate transactions taking place every week in the business world, and would do away with the great convenience of the clearing houses. The essence of a gambling transaction is that the particular transaction shall contemplate no delivery, without reference to the making of any other deal. If the sales were to be mere bets on the market price, there was no occasion for a counter transaction, but all that would remain to be done would be for the parties to settle according to the price at the time specified in the contract. If an order to sell for future delivery is a gambling deal merely because the seller contemplates that he will later on buy the grain to fill the order, then "hedging" is impossible, and practically every trade on all the boards of trade in the country is illegal. See Ponder v. Jerome Hill Cotton Co., 100 Fed. 373, 40 C. C. A. 416; Clews v. Jamieson, 182 U. S. 461, 494, 21 Sup. Ct. 845, 45 L. Ed. 1183; Barnes v. Smith, 159 Mass. 344, 34 N. E. 403; Board of Trade v. Kinsey et al., 130 Fed. 507-512, 64 C. C. A. 669.

The whole scope of defendant's evidence is an expression of his opinion against objection of counsel, that "hedging" does not contemplate the actual delivery of the grain. Such evidence was insufficient to warrant the submission to the jury of the question whether the transaction was a gambling transaction. It was a mere conclusion of the witness, and is entitled to no weight when considered in the light of his other testimony in the case. It is apparent from defendant's testimony that he does not base his contention that the so-called "hedges" were illegal because they contemplated a mere bet on the market price of the grain, but because the person hedging contemplates that, instead of delivering the grain, he will buy later on the same amount of grain for delivery at such future time and offset one contract against the other. Such a transaction will be legitimate unless the parties both contemplated that no grain should be actually delivered. We find no evidence sufficient to require submission to the jury that such was the contemplation of both parties. As before stated, the fact that one of the parties may intend that, in lieu of a delivery or acceptance of the grain, he may later on make a counter trade and offset the two legal contracts against each other will not operate to invalidate the transaction. Both parties must have understood and agreed that this would be done in lieu of a delivery or acceptance of actual grain. See foregoing authorities. As above stated, the law presumes that these hedging contracts were legal, and also that each order given to plaintiff by defendant to sell these futures was intended to relate to an actual sale, and that actual sales were made, and the burden of proof was therefore upon defendant to establish the contrary. Hill v. Levy (D. C.) 98 Fed. 94; Irwin v. Williar, 110 U. S. 507, 4 Sup. Ct. 160, 28 L. Ed. 225; Boyle v. Henning (C. C.) 121 Fed. 376; Johnston v. Miller (Ark.) 53 S. W. 1052; Ponder v. Jerome Hill Cotton Co., 100 Fed. 373, 40 C. C. A. 416; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; Clews v. Jamieson, 182 U. S. 461, 488, 21 Sup. Ct. 845, 45 L. Ed. 1183. Without further discussion of the questions involved, we conclude, that the record discloses no error in directing a verdict for the plaintiff.

The judgment is accordingly affirmed. All concur.

ENGERUD, J., having been of counsel in the court below, took no part in this decision; Judge C. J. FISK, of the First Judicial District, sitting by request.

(105 N. W. 164.)

LEVI B. HANSON v. JOSEPH E. SKOGMAN.

Opinion filed October 2, 1905.

Counterclaim — Conversion by Mortgagee.

1. Under subdivision 1, section 5274, Rev. Codes 1899, which authorizes a defendant to counterclaim upon "a cause of action arising out of the * * * transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action," a mortgagor of chattels may counterclaim for their conversion by the mortgagee when sued upon the note secured by the mortgage.

Same — Judgment Upon Counterclaim.

2. Where, in such case, the value of the property converted does not exceed the amount of the mortgage debt, an affirmative judgment upon the counterclaim cannot be sustained.

Refusal of Mortgagee to Return the Mortgaged Property in His Possession, or Foreclose, Is Conversion.

3. The finding of a jury of a conversion is not without support in the evidence, when it appears that the mortgagee, after taking possession of the property, refused to return it to the mortgagor or to foreclose his mortgage, and used the property as his own.

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

Action by Levi B. Hanson against Joseph E. Skogman. Judgment for defendant, and plaintiff appeals.

Reversed.

Charles S. Ego and *Guy C. H. Corliss,* for appellant.

The tort was not connected with the subject of the action so as to make it the subject of a counterclaim. Braithwaite v. Akin, 3 N. D. 365, 56 N. W. 133; section 5274, subdivision 1, Rev. Codes 1899.

The property was turned over to the plaintiff as security in the nature of a pledge, with the condition that he might sell, if he could get enough to pay the debts secured, and plaintiff was not to be accountable for the use, nor defendant for the keep, of the horses. Defendant must comply with the conditions of the pledge if he would get possession, or sue in equity for a redemption. Plaintiff has the right to sue on the note and still retain possession of the horses. Wilson v. Burhans, 71 N. W. 879.

Rourke, Kvello & Adams, for respondent.

That a counterclaim has been filed in an action in which it is not permissible is not a statutory ground for demurrer; it must be met by a motion to strike out or by objection to evidence under it. Howlett v. Dilts, 30 N. E. 313.

Conversion of horses, for which a note was given, and for the judgment of which they were pledged, was a proper subject of counterclaim in a suit on the note. Ainsworth v. Bowen, 9 Wis. 348; Rush v. First Nat. Bank, 71 Fed. 102, 17 C. C. A. 627; Hyman v. Jockey Club Co., 48 Pac. 671; Paxton v. Vincennes Mfg. Co., 60 N. E. Rep. 583; First Nat. Bank v. O'Connell et al., 51 N. W. Rep. 163.

A statute authorizing counterclaims should be liberally construed. First National Bank v. Parker, 28 Wash. 234, 92 Am. St. Rep. 828, 68 Pac. 756.

The defendant's counterclaim was "connected with the subject of the action," and proper. Gordon v. Bruner, 49 Mo. 570; Vilas v. Mason, 25 Wis. 310; Smith v. Fife, 2 Neb. 10; Goebel v. Hough, 26 Minn. 252; Littleman v. Coulter, 7 N. Y. Supp. 1; First Nat. Bank v. Parker, 28 Wash. 234, 92 A. S. R. 828.

A motion for a new trial is not available procedure to reach defects in pleading. Ross v. Wait et al., 51 N. W. 866; Mason et al. v. Austin, 46 Cal. 385; Jacks v. Buell, 47 Cal. 162; Spelling, New Trial & App., vol. 1, section 6.

YOUNG, J. Action upon a promissory note for $135, dated May 20, 1902, and due October 1, 1902, with interest at the rate of 12 per cent per annum. The note was given by defendant to one Banish in payment for two horses, and was transferred to the plaintiff in due course. The answer consists of three paragraphs. The first admits the execution and transfer of the note and its nonpayment, and alleges that at the maturity of the note the defendant delivered the horses purchased into the possession of the plaintiff, upon an agreement that he might keep and use them until the spring of 1903, at which time the defendant might again have them by paying his note in cash or delivering bankable paper: that he has not been able to make said payment; that plaintiff still retains possession of the horses, and has refused and still refuses to surrender the same to the defendant—by reason of which facts he alleges that "the original contract of purchase and sale of said horses has been wholly canceled and rescinded." In the second paragraph the defendant alleges as a counterclaim, among

other things, that he executed a mortgage upon the horses purchased to secure the note in suit; that the plaintiff wrongfully took possession of said horses and converted them to his own use, and that the value of the use is $1.50 per day or $500 in the aggregate. The third paragraph, also pleaded by way of counterclaim, in its allegations does not differ from, and is a mere repetition of, the preceding paragraph, except that it makes no reference to the mortgage and alleges the value of the horses to have been $150. Both paragraphs allege that the plaintiff converted the horses. The answer concludes with a prayer for the return of the horses, and demands damages for their detention, or, in case a delivery cannot be had, for "$150, the value thereof, besides the sum of $500 for their wrongful detention, for costs and disbursements, and further relief." The plaintiff demurred to the second and third defenses and counterclaims upon the ground that the "pretended counterclaims do not arise from either of the causes or sources enumerated in section 5274, Revised Codes." The demurrer was overruled. A trial was had to a jury, and a verdict was returned for defendant for $85. Plaintiff moved for a new trial upon a statement of the case, which motion was denied, and judgment was entered on the verdict. Plaintiff has appealed from the order denying his motion for a new trial and also from the judgment.

It is urged that the court erred in overruling the demurrer. In our opinion no error was committed. The second paragraph of the answer alleged, in substance, that the note in suit was secured by a chattel mortgage upon the horses for which the note was given, and that the plaintiff converted the horses so mortgaged to his own use. This states a cause of action in defendant's favor and one which we think may be asserted as a counterclaim in the action upon the note under subdivision 1, section 5274, Revised Codes 1899, which authorizes the defendant to counterclaim upon "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action." Courts and text writers have expended much time and learning in attempting to define the meaning of the word "transaction" and of the phrase "subject of action," as used in this statute, which is common to many states, and, it must be confessed, without marked success. Bliss on Code Pleading, section 371, in referring to this provision, says: "Three classes of counterclaims are here provided for: First, a demand existing in favor of the defendant and against the plaintiff, which arises

out of the contract upon which the plaintiff has based his action; second, a demand so existing, which arises out of the transaction —a broader term than contract—upon which the plaintiff has based his action; and, third, a demand so existing which need not necessarily arise out of either the contract or the transaction involved in the action, but is sufficient if it is connected with the subject of the action." The "transaction" upon which the plaintiff's action is based included the chattel mortgage as well as the note. The obligations and liabilities of the parties arise out of that transaction. It is sufficient to say that under the settled construction of this statute the defendant's cause of action for the conversion of the mortgaged property was a proper subject of counterclaim under either the second or the third grounds; i. e., because it arose out of the "transaction," or because it was "connected with the subject of the action." McHard v. Williams, 8 S. D. 381, 66 N. W. 930, 59 Am. St. Rep. 766; Ainsworth v. Bowen, 9 Wis. 348; Hyman v. Jockey, etc. (Col. App.) 48 Pac. 671; Rush v. Bank, 71 Fed. 102, 17 C. C. A. 627; Bank v. O'Connell (Iowa) 51 N. W. 162, 35 Am. St. Rep. 313; Streeper v. Thompson (Tex. Civ. App.) 23 S. W. 326. See, also, Bliss on Code Pleading, sections 372 to 377 and cases cited.

Counsel for appellant rely upon Braithwaite v. Akin, 3 N. D. 365, 56 N. W. 133, to sustain the broad contention that a cause of action for conversion cannot be set up as a counterclaim in an action upon a contract. The case, as we read it, does not so hold. The court merely held that the cause of action for conversion attempted to be set up in that case "had no connection, however slight," with the transaction upon which suit was brought. The answer in this case is not a model pleading. The first paragraph states no defense, and the prayer is for relief not legally possible, in view of the counterclaim for conversion set up in the second and third paragraphs. The point of the demurrer, however, that the facts set up in these paragraphs do not constitute a counterclaim under the statute was not well taken, and the demurrer was therefore properly overruled.

It was contended, in support of the motion for a new trial, that there is no evidence of a conversion, and that the verdict for defendant is in this respect without support. The record does not sustain this contention. There is evidence that after the spring of 1903 the plaintiff used the property as his own. This was without right or authority. Under his agreement with the defendant he

could use the horses until the spring of 1903 without incurring any liability. After that time his rights were merely those of a mortgagee in possession after default, with power to forclose in the manner provided by law. His use of the property was inconsistent with the rights of the mortgagor, and it cannot be said as a matter of law, upon the record, that the jury was not warranted in finding that the plaintiff had converted the horses by using them. As to what unauthorized use of property will amount to a conversion, see 28 Am. & Eng. Enc. Law (2d Ed.) p. 695, and cases cited. Also Howry v. Hoover, 97 Iowa, 581, 66 N. W. 772. The other errors specified and urged as ground for a new trial are without merit, and do not require consideration.

However, there is error upon the face of the judgment roll which requires a reversal. The defendant has a verdict and judgment for $85. This is based upon the plaintiff's conversion of the mortgaged property. The answer admits that the note secured by the mortgage is wholly unpaid. With interest to the date of the conversion it amounted to about $150. The horses converted are alleged to have been of the value of $150. In other words, the value of the horses converted did not exceed the amount of the mortgage debt. The defendant therefore sustained no loss. There is, then, no legal ground upon which a verdict and judgment for any sum can rest. As to the rule of damages, see Lovejoy v. Bank, 5 N. D. 623, 67 N. W. 956, and section 4695, Rev. Codes 1899. Upon this state of facts a new trial is not necessary.

The district court will set aside the judgment appealed from and enter judgment for defendant, with costs of the district court. Plaintiff will recover his costs upon appeal.

All concur.

(105 N. W. 90.)

SIMON P. HEALEY v. FRANK N. FORMAN.

Opinion filed October 13, 1905.

Public Lands — Jurisdiction of Land Department and Courts as to Title.

1. Until the title to public land passes from the United States to a homestead claimant, the Land Department has exclusive jurisdiction of the question of title. The jurisdiction of the court arises after the title passes, and not before.

Same.

2. In an action for the possession of real estate, the defendant, in a counterclaim, sought to have the plaintiff declared a trustee of the title and required to convey the same to him, basing his right thereto upon certain erroneous rulings of the Land Department in canceling his entry and sustaining that of the plaintiff. His pleading showed that the title had not yet passed from the United States. *Held*, that the demurrer to the counterclaim was properly sustained.

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

Action by Simon P. Healey against Frank N. Forman. Demurrer to answer sustained, and defendant appeals.

Affirmed.

Ink & Wallace and *Purcell, Bradley & Devit*, for appellant.

One person cannot enter upon the possession of another for the purpose of acquiring title from the government. Quimby v. Conlan, 104 U. S. 420, 26 L. Ed. 800; Kendall v. Watters et al., 8 Pac. 510; Hambleton v. Duhain, 71 Cal. 136; Atherton v. Fowler, 96 U. S. 513, 24 L. Ed. 732; Trenouth v. San Francisco et al., 100 U. S. 251, 25 L. Ed. 626; Goodwin v. McCabe, 75 Cal. 584, 17 Pac. 705.

Redress may be had where fraud or deception have been practiced, which affects the judgment or decision of the officers of the land department. 26 Am. & Eng. Enc. Law, 382; Stinson Land Co. v. Hollister, 75 Fed. 941; Freese v. Scouton, 53 Kan. 347.

Where fraud or imposition, necessarily affecting the judgment of the land department, has been practiced by the patentee, the courts will compel the transfer of the title to him who, but for the fraud, would have received the patent. 26 Am. & Eng. Enc. Law, 399; Starks v. Starrs, 6 Wall. 402; Lytle et al. v. Arkansas et al., 23 How. 193; Garland v. Wynn, 20 How. 8; Lindsey v. Howes, 2 Black. 559; Moore et al. v. Robbins, 96 U. S. 530; Rector v. Gibbon et al., 111 U. S. 276, 28 L. Ed. 427; Corbet v. Wood, 32 Minn. 509; Bernier et al. v. Bernier et al., 147 U. S. 242, 13 Sup. Ct. Rep. 244.

Where a patent is issued by mistake or misconstruction of the law to one who is not entitled to it, he will be declared a trustee and compelled in equity to convey to the rightful owner. 26 Am. & Eng. Enc. Law, 399; Curtner v. United States, 149 U. S. 662, 13 L. Ed. 1041; Silver v. Ladd, 7 Wall. 219, 19 L. Ed. 138; Barnard et al.

v. Ashley et al., 18 How. 43, 15 L. Ed. 285; Minnesota v. Bachelder, 1 Wall. 109, 17 L. Ed. 551; Johnson et al. v. Towsley, 13 Wall. 72, 20 L. Ed. 485; Shepley et al. v. Cowan et al., 91 U. S. 330, 23 L. Ed. 424; Moore et al. v. Robbins, 96 U. S. 530, 24 L. Ed. 848; Quimby v. Conlan, 104 U. S. 420, 26 L. Ed. 800; St. Louis, etc., Co. v. Kemp et al., 104 U. S. 636, 26 L. Ed. 875; Rector v. Gibbon, 111 U. S. 276, 28 L. Ed. 427; Bernier v. Bernier, 147 U. S. 242, 13 L. Ed. 244; Manley v. Tow, 110 Fed. Rep. 241; Starks v. Starrs, 6 Wall. 402, 18 L. Ed. 925; Marques v. Frisbie, 101 U. S. 473, 25 L. Ed. 800.

Mistake of law by registers and receivers may be corrected by the courts. Hosmer v. Wallace, 47 Cal. 461; Hess v. Bolinger, 48 Cal. 349.

So as to commissioner of the general land office. Parsons v. Venzke et al., 4 N. D. 452, 61 N. W. 1036, 164 U. S. 89, 17 Sup. Ct. Rep. 27.

So where title is secured by false swearing. 26 Am. & Eng. Enc. Law, 399, 400; Garland v. Wynn, 20 How. 6; Lytle et al. v. Arkansas et al., 22 How. 193; Aldridge v. Aldridge, 37 Ill. 32; Climer v. Selby, 10 La. Ann. 182.

Equity will set aside for fraud a decision of the register and receiver confirmed by the commissioner. Mezer v. Greer, Fed. Cases No. 9, 520.

Chas. E. Wolfe, for respondents.

Legal title to public land remains in the United States until patent issues, unless the receipt is canceled for cause by the land department. Parsons v. Venzke, 4 N. D. 452; affirmed in 164 U. S. 89; Guaranty Savings Bank v. Bladow, 6 N. D. 108; affirmed in 176 U. S. 448.

Fraud in acquiring title to public lands is solely a question between plaintiff and the United States, and cannot avail defendant as a defense. Clark v. Lockwood, 21 Cal. 220; Paldi v. Paldi, 54 N. W. 903; Depuy et al. v. Williams et al., 26 Cal. 309; Lestrade v. Barth, 19 Cal. 660; Bloom v. Robertson, 24 Cal. 128.

While legal title to public land remains in the government, the land department has sole jurisdiction to try title, and the courts will not interfere. An equitable title, set up in an action of ejectment, must be such as may be ripened into legal title by the decree. Lestrade v. Barth, 19 Cal. 660; Bloom v. Robertson, 24 Cal. 128.

YOUNG, J. The plaintiff brought this action to recover possession of eighty acres of land situated in Richland county. The defendant's answer, in addition to a general denial, contains twenty-five paragraphs, in which he sets forth facts which he contends furnish grounds for the equitable relief prayed for, to wit, that the plaintiff be decreed to hold the title in trust for the defendant, and that he be required to convey the same to him. A demurrer to this portion of the answer was sustained, and defendant appeals from the order.

The answer, which consists of twenty-seven printed pages, alleges in substance that the land in question was, on April 1, 1896, a part of the public domain; that on said date the defendant established a residence thereon, and has since continuously resided on the same; that on May 4, 1896, he presented his homestead entry to the land office at Fargo; that, at a hearing had on October 1, 1896, relative to the priority of settlement, the local land office decided in favor of the defendant; that upon appeal this decision was reversed by the commissioner of the general land office, and a decision rendered in favor of the plaintiff; that upon appeal from the latter decision to the secretary of the interior it was reversed, and, on February 7, 1899, a decision was rendered awarding the land to the defendant, which decision is set out in full and made a part of the answer; that plaintiff's petition for a rehearing was denied on March 17, 1899; that on April 20, 1899, the land department, by an order through the secretary of the interior, closed the case and directed that the defendant's application be received; that on April 27, 1899, the defendant made his homestead entry and received a register's and receiver's receipt; that on May 8, 1899, the local land office pretended to order a rehearing on charges of abandonment preferred by the plaintiff, and on September 19, 1900, the local land office decided in favor of the plaintiff, canceling the defendant's entry and awarding the plaintiff the right to file; that upon appeal the foregoing decision was sustained by the commissioner of the general land office and by the secretary of the interior; that a review was denied and the case closed, and on December 8, 1900, the defendant's entry was canceled; that the plaintiff made his homestead filing on December 19, 1900; that on May 24, 1902, the plaintiff, over defendant's protest, made final proof, which was accepted by the local land office and approved upon appeal. In view of the conclusion hereinafter stated, the particular facts alleged in the answer as grounds for the equit-

able relief sought need not be set out. The prayer of the answer is that the "plaintiff be decreed to be the trustee of defendant of said land; that plaintiff be decreed to transfer and convey to defendant all his right, title and interest to said land;" and for general relief. The demurrer attacked the answer upon the ground that "the facts pleaded therein are insufficient to constitute any defense or counterclaim to plaintiff's cause of action or against the plaintiff herein," and upon the "further ground that the same show upon their face that all matters therein pleaded, as between plaintiff and defendant, have been fully and finally determined and adjudicated in a tribunal of competent jurisdiction."

In our opinion the demurrer was properly sustained. The defendant seeks to have the plaintiff declared a trustee of the legal title and required to convey the same to him. As a basis for this relief, he has alleged in great detail fraud on the part of the plaintiff, and various errors of law on the part of the officials of the land department. There is, however, no allegation that a patent has been issued to the plaintiff. Without this allegation, or its equivalent, it is entirely clear that the part of the answer attacked by the demurrer does not state facts sufficient to constitute a defense or counterclaim. Until the patent issues the title is in the United states and the land department has complete control of the question. Bank v. Bladow, 6 N. D. 108, 69 N. W. 41; s. c., 176 U. S. 448, 20 Sup. Ct. 425, 44 L. Ed. 540. The facts pleaded show that the legal title is in the United States and not in the plaintiff. There is, then, no basis of fact for the relief sought, for the plaintiff cannot be declared a trustee, or be compelled to convey title which he does not possess. "After the United States has parted with its title and the individual has become vested with it, the equities subject to which he holds may be enforced, but not before." Marquez v. Frisbie, 101 U. S. 473, 25 L. Ed. 800. Prior to that time "the interior department is the tribunal constituted by law and authorized to hear and determine all questions pertaining to the rights of the respective parties to the patent." Grandin v. LaBar, 3 N. D. 446, 57 N. W. 241, and cases cited; 26 Am. & Eng. Enc. Law (2d Ed.) 379, and cases cited. But the courts have power, after the title to land has passed to a private party, to correct the errors of the officers of the land department which have resulted from the fraud, mistake or erroneous views of the law, and to declare the legal title to the land to be held in trust for those who have the better right thereto, and to compel a conveyance accord-

ingly. Parsons v. Venzke, 4 N. D. 452, 457, 61 N. W. 1036, 50 Am. St. Rep. 669, affirmed 164 U. S. 89, 17 Sup. Ct. 27, 41 L. Ed. 360.

In this case, however, the title had not passed. The facts alleged do not show, therefore, that the defendant is entitled to the relief sought in his alleged counterclaim. Whether the allegations of the answer are otherwise sufficient we need not determine. The omission above referred to is fatal.

Order affirmed. All concur.

(105 N. W. 233.)

J. D. BACON v. ROBERT MITCHELL AND CHARLES MITCHELL.

Opinion filed October 13, 1905. Rehearing denied January 5, 1906.

Attorney and Client — Authority to Appear.

1. The legal presumption is that an attorney has authority to appear for the person for whom he assumes to act.

Same — Client Cannot Disclaim Authority When.

2. A suitor who does not disclaim the authority of an attorney who assumes to represent him in an action, when it is his duty to do so, may not do so afterwards. He cannot take the hazard of a trial, and, when unsuccesful, allege as ground for vacating the judgment that the attorney who conducted the trial had no authority.

Same — Attorney's Control of Remedy Is Exclusive.

3. Under his general authority an attorney has the exclusive control of the remedy, and he may discontinue the action by a dismissal without prejudice, and his client is bound by his act.

Attorney's Error No Ground for Vacating Judgment.

4. An attorney's mistake of judgment as to the law or his ignorance of facts which he ought to have known is not sufficient ground for vacating a judgment of dismissal entered upon his motion.

Appeal from District Court, McHenry county; *Palda,* J.

Action by J. D. Bacon against Robert Mitchell and Charles Mitchell. Judgment for defendants, and plaintiff appeals.

Affirmed.

A. M. Christianson and *C. J. Murphy,* for appellant.

An attorney cannot delegate his authority or substitute another attorney in his place. Johnson v. Cunningham, 1 Ala. 249; Hitch-

cock v. McGehee, 7 Port. 556; Hendry et al. v. Benlisa, 37 Fla. 609, 34 L. R. A. 283; Morgan v. Roberts, 38 Ill. 65; Porter v. Elizalde, 57 Pac. 899; Cornelius v. Wash, 1 Ill. 98, 12 Am. Dec. 145; Crotty et al. v. Eagle, 35 W. Va. 143, 13 S. E. 59; Buckley v. Buckley, 18 N. Y. S. 607; Clegg v. Bamberger, 110 Ind. 536, 9 N. E. 700; McDowell v. Gregory et al., 14 N. W. 899; Antrobus v. Sherman, 21 N. W. 579; Danley v. Crawl, 28 Ark. 95; Kellogg v. Norris, 10 Ark. 18; Dickson v. Wright, 52 Miss. 585, 24 Am. Rep. 677; O'Connor v. Arnold, 53 Ind. 203; Masecar v. Chambers, 4 U. C. Q. B. 171.

Bringing suit without authority does not bind plaintiff. Atkinson v. Howlett, 11 Ky. L. Rep. 364; Hurste v. Hotaling, 20 Neb. 178; Robson v. Eaton, 1 T. R. 62.

One dealing with an agent must ascertain the fact and extent of his agency. Corey v. Hunter et al., 10 N. D. 5, 84 N. W. 570; Fargo et al. v. Cravens, 70 N. W. 1053.

An attorney, acting under a general employment, has no implied powers or authority to dismiss or compromise an action. Biglier v. Toy, 28 N. W. 17; Luce et al. v. Foster et al., 60 N. W. 1027; Erskine v. McIlrath, 62 N. W. 1130; Mayer v. Sparks et al., 45 Pac. 249; Porter v. Elizalde, 57 Pac. 899; Kilmer v. Gallagher, 84 N. W. 697; 3 Am. & Eng. Enc. Law (2d Ed.) 358; Flanagan v. Elton, 51 N. W. 967; Rhutasel v. Rule, 65 N. W. 1013; Steinkamp v. Gaebel, 95 N. W. 684; Hallack v. Loft, 34 Pac. 568.

An attorney cannot enter a retraxit or discontinuance concluding a client's rights except by express authority. 3 Am. & Eng. Enc. Law, 360; Crotty v. Eagle, supra; Flanagan v. Elton, supra; Steinkamp v. Gaebel, supra; Hallack v. Loft, supra.

Nor can he compromise client's case. McClintock v. Helberg, 48 N. E. 145; Dalton v. West End St. Ry. Co., 34 N. E. 261; Lewis v. Duane, 36 N. E. 325; Cox v. Adelsdorf, 51 S. W. 616; McMurray v. Marsh, 54 Pac. 852; Stoll v. Sheldon, 13 N. W. 201; Bigler v. Toy, 28 N. W. 17; Pitkin et al. v. Harris, 37 N. W. 61; Martin v. Capital Ins. Co., 52 N. W. 535; Smith v. Jones et al., 66 N. W. 19; Fosha v. Proser et al., 97 N. W. 925.

Where one compromises a claim or takes less than the full amount due thereon, he must investigate the authority of the attorney dealing with him. McClintock v. Halberg, supra.

One deals with an agent at his peril. Corey v. Hunter, supra.

In the absence of a statute, exhibit need not be attached to and returned with depositions, and may be identified by parol. Weeks

on Dep., sections 527, 358, 194; Dailey v. Green, 15 Pa. St. 118; Mobley v. Leonart, 51 Ala. 587.

Same as to a pleading. Whitworth v. Malcomb, 82 Ind. 455; Carper v. Kitt, 71 Ind. 24; Wall v. Garvin, 80 Ind. 447; Read v. Broadbelt, 68 Ind. 91.

The judgment was rendered against the plaintiff herein, and the cause dismissed through inadvertance, mistake or surprise; and the judgment should have been vacated and the cause reinstated under the provisions of section 5298, Rev. Codes 1899. Downing v. Still, 43 Mo. 309; 1 Black on Judgments, 77, 319; Palace Hardware Co. v. Smith, 66 Pac.. 474; Brackett v. Banegas, 34 Pac. 344; Vermont Marble Co. v. Black, 38 Pac. 512; Flannagan v. Elton, supra; Holbrook v. Nichol, 36 Ill. 161; Farnham v. Jones, 32 Minn. 7; Shaw v. Henderson, 7 Minn. 480, 7 Gil. 386.

Negligence of an attorney is sufficient ground to vacate a judgment, if client himself is not directly at fault. Hanson v. Mikelson, 19 Wis. 498; Babcock v. Perry, 4 Wis. 31; 1 Black on Judgments, section 341; Ordway v. Suchard, 31 Iowa, 481; Benwood v. Tappan, 56 Miss. 659; People v. New York, 11 Abb. Pr. 74; Sharp v. Mayor, 31 Barb. 578; Baron v. Cohen, 62 How. Pr. 367; Herbert v. Lawrence, 21 Civ. Pro. 336; Quin v. Lloyd, 36 How. Pr. 378; Dalton v. West End St. Ry. Co., supra; Flannagan v. Elton, supra; Palace Hardware Co. v. Smith, supra; Hine v. Grant et al., 96 N. W. 796; Norton v. Atchison, T. & S. F. Co., 97 Cal. 388, 30 Pac. 585.

Although there be no fraud or mistake, a court may relieve from a stipulation, or judgment entered thereon, inadvertently, unadvisedly or improvidently entered into, to one's prejudice, if the parties can be restored to the existing condition at time of the agreement. 20 Enc. Pl. & Pr. 664; McClure v. Sheek's Heirs, 4 S. W. 552; Ward v. Clay, 23 Pac. 50; Porter v. Holt, 11 S. W. 494; Keens v. Robertson, 46 Neb. 837, 65 N. W. 897.

LeSueur & Bradford, for respondent.

Christianson was employed to try the case, as appears from his and Murphy's affidavit. He has conducted this appeal alone, and where his attorney began or ended does not appear, but he is in charge of this appeal. When an attorney has an appointment in two places at the same time, he may hire another to attend at one of them.

YOUNG, J. Action upon a promissory note. Issue was joined by service of answer November 27, 1901. In March, 1903, by leave of court, an amended answer was served. The case came on for trial regularly before a jury at Towner, McHenry county, at a regular term of the district court of that county, on June 27, 1903. At the request of C. J. Murphy, an attorney at law, residing in the city of Grand Forks, who was plaintiff's attorney of record, one A. M. Christianson, an attorney, residing in Towner, appeared and conducted the trial for plaintiff. After introducing considerable evidence, both oral and documentary, but before the case was formally submitted, Christianson moved to dismiss without prejudice, a course which was induced by the imperfect condition of certain depositions which he deemed essential to establish the plaintiff's case, and judgment of dismissal was duly entered. Thereafter an order was issued to defendants to show cause why the judgment should not be set aside and the case reinstated for trial. The grounds of the motion were set out in a number of affidavits made by Christianson, Murphy and others, in which it was made to appear that the plaintiff did not engage Christianson to try the case; that he was merely engaged by Murphy, and had, therefore, as plaintiff's counsel contend, no legal authority to act for plaintiff or to move to dismiss; and that unless the judgment of dismissal is set aside, and the case reinstated, the statute of limitations will be a complete defense to another action on the note. The motion to vacate was denied, and plaintiff appeals from the order.

We are of opinion that the court did not err in making the order in question. In reaching this conclusion is it unnecessary to discuss the extent of an attorney's authority to employ a substitute or subordinate. Upon the facts of this case the correctness of the order does not turn upon that question. The real question is whether the plaintiff can be heard to say that Christianson was without authority to represent him. We are agreed that he cannot. Christianson is a regularly licensed attorney. Presumptively an attorney has authority to represent the person whom he assumed to represent. Weeks on Attorneys, section 196, and cases cited. Also, 4 Cyc. 928, and cases cited. The business of the courts is transacted upon this assumption. It is not necessary, in the first instance, for the court or counsel for the adverse party to demand proof of the authority of an attorney to act. "The burden is upon the person denying the authority." In this case it was upon the plaintiff. He did not disclaim Christianson's authority, but permitted the

case to proceed to trial without objection to his appearance. The trial judge and defendant's counsel assumed that he had authority to represent the plaintiff. They had a right to rest upon the presumption of authority. The plaintiff instituted the action and invoked the jurisdiction of the court. The case was regularly reached for trial. The record does not show affirmatively that the plaintiff was present at the trial. That fact, however, is not material. It was his duty to attend the trial in person, or by an authorized representative. A failure to appear is deemed an election to become nonsuit. Thompson on Trials, section 2229; Nordmanser v. Hitchcock, 40 Mo. 179. If Christianson had, in fact, no authority to appear for him, it was his duty to disclaim his assumption of authority. He cannot be permitted to say, after taking the hazard of a successful issue of a trial, that the attorney who assumed to represent him had in fact no authority. See Bingham's Trustees v. Guthrie, 19 Pa. 418, 424; Christman v. Moran, 9 Pa. 487. He is in no worse position than he would have occupied had Christianson not assumed to represent him.

It is also urged that the general authority of an attorney does not include the power to discontinue the action, and that the judgment of dismissal without prejudice, which was entered on Christianson's motion, should therefore be set aside. This contention is based upon an erroneous view of an attorney's general authority. True the cause of action itself is under the control of the client. Paulson v. Lyson, 12 N. D. 354, 97 N. W. 533. But the attorney "has the free and full control of a case in its ordinary incidents. * * * He has the exclusive conduct and management of the suit. He cannot give a release or discharge the cause of action; but he has exclusive control of the remedy, and may continue or discontinue it." Weeks on Attorneys, section 220. "He may discontinue an action because that relates to the conduct of the suit and is within his retainer, and not to the cause of action." Barrett v. Railroad Company, 45 N. Y. 628, 635; Gaillard v. Smart, 6 Cow. (N. Y.) 385; McLeran v. McNamara, 55 Cal. 508; Simpson v. Brown, 1 Wash. T. 247; Nightingale v. Company, Fed. Cas. No. 10,264. The Supreme Court of Iowa, in Rhutasel v. Rule, 65 N. W. 1013, said that authority to dismiss must be specially conferred; and in Steincamp v. Gaebel (Neb.) 95 N. W. 684, the language of the Iowa court was quoted with approval. In our opinion that view is unsound in principle and against the weight of authority. The question as to whether an action shall be dismissed relates to

the conduct of the suit and to the remedy—a question frequently arising in all courts, and is one peculiarly addressed to the skill, knowledge and judgment of the attorney. When the alternative is presented of a probable defeat upon the merits, as in this case, or a dismissal without prejudice, thus saving the cause of action, it is for the attorney to decide, as one of the incidents of the trial, and in the performance of his duty to his client, which course to pursue. In this case the attorney elected to dismiss. In so doing he did not destroy his client's cause of action. The fact that the statute of limitations has run, if that is the fact, and may be pleaded in another action, does not affect the question. The plaintiff's cause of action is intact. The statute of limitations relates solely to the remedy, and does not destroy the cause of action. Col. & U. S. Mortgage Co. v. Northwest Thresher Co., 14 N. D. 147, 103 N. W. 915, 918. Even if the dismissal was in fact ill advised and was made without a realization on Christianson's part that the evidence he had offered and had at hand was sufficient to prove the plaintiff's case, and in ignorance of the fact that the statute of limitations would be available as a bar in another action, as stated in the moving affidavits, still this does not furnish sufficient reason for vacating the judgment. It merely presents a mistake of judgment as to the law or ignorance of facts which he ought to have known. The following language of the Supreme court of Wisconsin, in Juneau County v. Hooker, 67 Wis. 322, 30 N. W. 357, a similar case, in denying an application to reinstate, is directly applicable and meets our full approval: "It was ignorance of either the law or of a fact that the learned counsel of the respondent ought to have known, and might readily have known, before the discontinuance of the action. Suppose a plaintiff should voluntarily discontinue his suit because at the time he should be of the opinion that he could not maintain it, and he afterwards had formed a different opinion; would such a reason be a good one for reinstating the action, and for the court to treat the defendant 'as being in court and out of court at the same time,' and for the court 'to suffer the proceedings to be trifled with, even if parties were disposed to back and fill and to vacillate in the conduct of the suit,' as the present chief justice said in his opinion in the above case in 12 Wis.?"

In moving to dismiss without prejudice an attorney acts within his authority, and the client is bound by his act. If the client is injured, his remedy, if any he has, is against the attorney alone.

Weeks on Attorneys, section 220, and cases cited at note 5. We find no abuse of discretion in the refusal to vacate the judgment. The order appealed from is accordingly affirmed. All concur. (106 N. W. 129.)

I. E. MILLS v. THOMAS FORTUNE.

Opinion filed October 17, 1905.

One Claiming a Lien Upon an Estray Must Show Strict Compliance With the Statute.

1. One who claims a lien upon an animal as an estray must show a full and strict compliance with every requirement of the statute under which the lien is claimed.

Same — Failure Forfeits Lien.

2. If the person taking up an estray fails to observe all the requirements of the estray law, he is in the position of a mere trespasser, and can claim no lien for compensation.

Same — The Vicinity of Residence.

3. An estray can be taken up as such only when found in the vicinity of the residence of the person taking it up.

Same — Appraisement — When Made.

4. The demand for appraisement required by section 1578, Rev. Codes 1899, must be made within a reasonable time after the estray is taken up.

Same — Proof of Ownership.

5. The person taking up an estray has no right to demand more proof of ownership on the part of the claimant than that prescribed by section 1575, Rev. Codes 1899.

Same — Statutory Proof of Ownership.

6. If the person holding an estray refuses to surrender the estray unless the claimant furnishes other evidence of ownership than that prescribed by section 1575, Rev. Codes 1899, such denial of the claimant's right works a forfeiture of the estray lien, if the claimant is in fact the owner.

Same — Sufficiency of Evidence to Sustain Verdict.

7. Evidence examined, and *held* insufficient to justify a verdict, which found that the defendant was entitled to the possession of a horse as an estray.

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

Action by I. E. Mills against Thomas Fortune. Judgment for defendant, and plaintiff appeals.

Reversed.

Newton & Dullam, for appellant.

The procedure in taking up estrays is ex parte and in invitum and the statutory requirements must be strictly pursued. If defendant was not qualified to take up the estray when he did, or failed in pursuing the statutory requirements, he was a trespasser. Section 1576, Rev. Codes 1899; James v. Fowler, 90 Ind. 563; Bucher v. Wagoner, 14 N. W. 160; Weber v. Hartman, 7 Col. 13; Dierks v. Weilage, 24 N. W. 728.

Defendant took up the estray wrongfully, as it does not appear that he was a householder in the county, and is presumed not to be. Weber v. Hartman, supra; Shepard v. Hawley, 4 Ore. 206; Newton v. Hart, 14 Mich. 233.

The verdict cannot be sustained because nothing shows that defendant ever sought to have the horse appraised. Section 1577, Rev. Codes 1899. And because he failed to make the affidavit before a justice as provided in section 1575, Rev. Codes 1899; and, further, because the description of the horse and brands in the notice was insufficient. Section 1572, Rev. Codes 1899.

Defendant's conduct was so remiss that he lost whatever lien he may have had. Bucher v. Wagoner, 14 N. W. 160; McGrossin v. Davis, 100 Ala. 631; Harryman v. Titus, 3 Mo. 302; Haffner v. Barnard, 123 Ind. 429; Davis v. Calvert, 17 Ark. 85.

Estray proceedings are stricti juris and claimant of title thereunder must show strict compliance with the statute. Dillard v. Webb, 55 Ala. 468; Cory v. Dennis, 93 Ala. 440; Stewart v. Hunter, 16 Ore. 62; Fort Smith v. Dodson, 57 Ark. 447; 2 Am. & Eng. Enc. Law (2d Ed.) 378; 2 Cyc. L. & Pr. 360-363.

F. H. Register, for respondent.

Defendant was qualified to take up an estray. He was a householder and resident of Burleigh county, N. D. Section 1571, Rev. Codes 1899. The estray was taken up in the vicinity of plaintiff's place, trespassing upon his leased land. Section 1571, supra. On substantial compliance, the proceedings regarding estrays will be liberally construed. Dierks v. Weilage, 24 N. W. 728; Bucher v. Wagoner, 14 N. D. 160.

In claim and delivery, possession, not right of property, is the issue, and plaintiff must show exclusive possession in himself as against the defendant. 20 Am. & Eng. Enc. Law (1st Ed.) 1050.

The burden of proof lies on the plaintiff to do this. Hamilton v. Iowa Nat. Bank, 40 Iowa, 307; Cartside v. Nixon, 43 Mo. 138; Mathias v. Sellers, 86 Pa. St. 466; Harwood v. Suet, Hurst, 29 N. J. L. 195.

A householder is a head of a family; a person who occupies a house and has charge of and provides for a family. 15 Am. & Eng Enc. Law (2d Ed.) 774; Katzenberg v. Lehman, 80 Ala. 514; Griffin v. Sutherland, 14 Barb. 456.

ENGERUD, J. This is an action of replevin for a horse of which plaintiff is admitted to be the owner. The plaintiff claims that he took and retains possession of the horse as an estray, and has a lien on the animal to the extent of $25, which he asserts is a reasonable charge for the trouble and expense of keeping it. There was a trial before a jury, and a verdict for defendant. A motion for a new trial was denied, and plaintiff appeals from the judgment. Besides specifying numerous errors of law, the appellant also, by proper specifications, challenges the sufficiency of the evidence to justify the verdict.

It is conceded that plaintiff is the owner of the horse, and that defendant refused to comply with plaintiff's demand for possession. The burden, therefore, was upon defendant to establish his alleged right to possession of the horse as an estray. Examination of the evidence convinces us that the defendant failed to establish his right to possession. The following facts are undisputed, and are established by the defendant's own testimony: The defendant found the horse in question, with another stray horse, trespassing upon a tract of pasture land of which he was lessee, about two miles from his residence in Bismarck, during the summer or fall of 1903. The strays broke into the pasture and mingled with several head of horses belonging to defendant. In September, 1903, defendant brought the horses from the pasture to his barn in town, and the strays accompanied the bunch. It is not clear from the testimony whether defendant took up the strays at the pasture, and drove them with his own horses to town, or whether they followed his horses to town, and he then took them up as estrays. He thereupon advertised the estrays, and we think the advertisement was sufficient. On April 15, 1904, the plaintiff appeared and

claimed the horses. One horse was surrendered to him on payment of $25. The defendant refused to surrender the horse in question because, as he claimed, the plaintiff had failed to establish ownership to his (defendant's) satisfaction. The plaintiff, before seeing the horse, had stated that if the stray belonged to him, he would be branded —| in one place, and 2V in another. The horse, when examined, corresponded in all other respects with the description plaintiff had given, but the 2V brand could not then be found. Defendant thereupon absolutely and peremptorily refused to recognize plaintiff as owner, and declined all further talk with him on the subject. Plaintiff tendered $10 in payment of charges, and defendant declined to accept it. There is no evidence that the defendant ever applied to have the property appraised. The plaintiff testified that when the defendant expressed doubts as to the former's ownership of the animal, he (plaintiff) offered to go before a justice and make the required affidavit of ownership and appoint arbitrators to settle the amount of the lien, but the defendant refused to accompany him; whereupon he went to the justice alone, and made the affidavit, and showed it to defendant, who still declined to recognize plaintiff's ownership. The defendant flatly denies this, but admits that he never suggested any affidavit of ownership or arbitration, but peremptorily refused to consider plaintiff's claim of ownership, unless the 2V brand could be found. Shortly afterwards, but after the commencement of the action, the 2V brand was discovered by defendant himself, but he did not then offer to arbitrate the amount of his lien or in his answer admit plaintiff's ownership. The court instructed the jury that the only disputed proposition upon which the right to possession depended was whether the $10 tendered was sufficient in amount to satisfy and discharge the lien. The trial court held, as a matter of law, that the lien was established. The instructions were duly excepted to.

It is well settled that a person who claims a lien upon an animal for having taken it up as an estray must show a full and strict compliance with every requirement of the statute creating such a lien. McCrossin v. Davis, 100 Ala. 631, 13 South, 607; Stewart v. Hunter, 16 Ore. 62, 16 Pac. 876, 8 Am. St. Rep. 267, and see note to report of this case in 8 Am. St. Rep. 271 et seq. If he fails to do so, he is in the position of a mere trespasser ab initio. Weber v. Hartman, 7 Col. 13, 1 Pac. 230, 49 Am. Rep. 339. The law relating to estrays is found in sections 1571-1584, Rev. Codes 1899. It

was incumbent on the defendant to allege and prove that he was a resident and householder in Burleigh county, that he found and took up the estray in the vicinity of his place of residence, that he advertised the same properly, that he caused the same to be appraised. The answer alleges that he took up the estray on the leased land, and the evidence discloses that that land is two miles from defendant's residence in Bismarck. It is needless to say that a place two miles out in the country is not "in the vicinity of" defendant's residence in town. Assuming that in the absence of objections for variance, evidence was admissible to show that the animals were straying in the vicinity of the residence and there taken up, the evidence on that subject is so ambiguous that it is impossible to know where the animal was taken up. Section 1578 requires the person taking up an estray to notify the board of county commissioners to appraise or appoint a person to appraise the estray. No time is fixed for such notice. By other sections of the estray law, it is provided that if the value of the estray is not over $50, the person taking it up becomes the owner thereof after one year, if no claim is made to it within that time. If the estray is appraised for more than $50, and remains unclaimed for a year, it must be sold to satisfy the charges against it; and provision is made for disposition of the proceeds if they exceed the amount of the lien.

Respondent contends that because the statute does not fix the time within which the demand for appraisement shall be presented, therefore, such demand may be made at any time within the year. We are unable to accept that view of the statute. The value of an estray may very materially decrease during a year, and if the disposition of the estray were to depend upon its value at the end of the year, it would be to the interest of the keeper that it should decrease to $50, or less. We have no hesitation in saying that the statute contemplates an appraisement as soon after the taking as it can conveniently be done, and that it requires that the person taking up the estray shall notify the board of county commissioners within a reasonable time. In this case the estray was kept at the county seat, and it was clearly incumbent on the defendant to notify the board at the first meeting after the taking. We further hold that defendant had no right to demand further proof of ownership than that prescribed by section 1575; and by so doing, he lost all right he otherwise might have had to a lien. It is true that the statute says that the person taking up the estray

and the claimant "may go before a justice." The use of the word "may," however, is not decisive of the meaning of the section, and the word "may" will be construed to mean "shall" when the context or purposes of the statute require it. It is plain that it was the object of this section to provide a convenient and speedy method of proving ownership, and at the same time protect the person holding the estray from liability for an erroneous decision as to ownership. The affidavit of ownership filed with the justice was a complete authority to surrender the estray to the claimant. If the defendant demanded more proof than that provided by statute, he did so at the peril of his lien if the claimant was in fact the owner. It is plainly the intent of section 1575 that, as between the holder of the estray and claimant, the ownership shall be sufficiently evidenced by the prescribed affidavit, and that the amount of the lien, if disputed, shall be settled by arbitration. We think it was the intent of the law that these speedy and inexpensive methods of determining the rights of the parties should be obligatory upon them.

The position taken by the defendant was that he would not, under any circumstances, acknowledge plaintiff's rights, unless evidence satisfactory to his mind was produced. The only acceptable evidence, apparently, was the 2V brand. If defendant entertained doubts of the ownership, it was his duty to demand and his right to be shown the evidence which the statute says shall be sufficient. That was the extent of his duty and right, and if he arbitrarily assumed to fix a different kind and quality of evidence, he forfeited his lien if the claimant was the true owner, and it is now conceded he was. Consequently whether the plaintiff did or did not formally offer to make the affidavit was immaterial, because the offer to do so would have been unavailing.

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

(105 N. W. 235.)

BERTHA M. COTTON v. J. C. BUTTERFIELD AND JOHN DEMARIS.

Opinion filed October 18, 1905.

Where an Equitable Counterclaim Is Pleaded in an Action at Law, Issue Thereon Must Be First Tried.

1. Where, in an action at law, the answer interposes an equitable counterclaim, the issues arising on the latter should be heard and determined by the court before a trial of the legal issues, as if the counterclaim were a separate suit in equity.

Same — Final Determination.

2. If the decree entered on the equity side of the case renders unnecessary the trial of any question arising on the law side, then such decree is the final determination of the action.

Same — Cause Triable De Novo on Appeal.

3. The cause of action was at law and the counterclaim in equity, but the issues on the equity side of the case involved all disputed questions on the law side. The action was tried as if both the cause of action and counterclaim were in equity. *Held*, that the case is triable de novo on appeal.

Where There Is No Rescission by Vendee, Vendor Is Entitled to Specific Performance.

4. Evidence examined, and *held*, that there has been no rescission by the plaintiff of her contract to buy defendants' land, and that the latter are entitled to specific performance thereof.

Same — Deduction of Value of Use or Net Profits from Purchase Price — Decree.

5. Where a decree of specific performance of a contract, under which the vendee is not entitled to possession until conveyance, is awarded to the vendor, who appears to have used some or all of the land after the time when, as determined by the decree, the conveyance should take effect, the value of such use or the net profits thereof, as the vendee may elect, will be deducted from the purchase price remaining unpaid.

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

Action by Bertha M. Cotton against J. C. Butterfield and John F. Demaris. Judgment for plaintiff, and defendants appeal.

Reversed.

Geo. W. Lynn and *G. N. Williamson*, for appellants.

By commencing an action on the contract for damages, plaintiff ratified it, and by accepting said benefits under it, as were in his favor, will be held bound by all of its obligations. Sections 3864-3865, Rev. Codes 1895; Morris v. Ewing et al., 8 N. D. 99, 76 N. W. 1047; Wyckoff v. Johnson, 48 N. W. 837; Union Trust Co. v. Phillips et al., 63 N. W. 903.

Where a contract calls for the payment of a stipulated sum, and the execution of notes and mortgage for balance, a tender of all is necessary before the vendor can be put in default. Arnet v. Smith, 11 N. D. 55, 88 N. W. 1037.

Plaintiff can put defendant in default only by tender of performance on his part of his portion of the agreement. Englander v. Rogers, 41 Cal. 420; Dennis v. Strassburger, 26 Pac. 1070; Bakeman v. Pooler, 5 Wend. 637; Strong v. Blake, 46 Barb. 227; Dunham v. Jackson, 6 Wend. 22, 35; 2 Warv. Vend., p. 880, section 32.

Under a contract where time is not of its essence, and is not made material by the offer of the other party to fulfill and a request for a conveyance, the vendor will be allowed a reasonable time and opportunity to perfect his title, however defective it may have been at the time of the agreement. Anderson v. Strassburger, 92 Cal. 38, 27 Pac. 1095; Easton v. Montgomery, 27 Pac. 280; More v. Smeburgh, 8 Paige, 600; Mitchell v. Allen, 6 S. W. 745; Dodson et al. v. Hays et al., 2 S. E. 415; Logan v. Bull, 78 Ky. 607; Dresel v. Jorden, 104 Mass. 407.

H. A. Armstrong and *F. H. Register,* and *I. C. Fenninger,* of counsel, for respondents.

Vendor cannot have specific performance, although court of appeals approves title, if vendee in good faith is not satisfied with it. 22 Am. & Eng. Enc. Law, 962; Averett v. Liscombe, 76 Va. 404.

Vendee has the right not only to a good, but to an indubitable title, and one that exposes him to litigation is not a marketable title. Swayne v. Leyon, 67 Pa. St. 436; Emmert v. Stouffer, 94 Md. 543.

It was incumbent upon defendants to furnish abstract of title satisfactory to plaintiff within the time designated by the contract of purchase, and a good and sufficient warranty deed conveying the land to plaintiff, on deposit with their depository, when she notified the latter on the day fixed by the contract that she was ready and willing to perform her part. The law will not require of plaintiff the performance of an idle act as a condition precedent to her right to rescind. Primm v. Wise & Stern, 102 N. W. 427; Bartle v. Curtis, 68 Iowa, 202; Goetz v. Walters, 34 Minn. 241; Gregory v. Christian, 42 Minn. 304; Hopwood v. Corbin, 63 Iowa, 218; Clark v. Weis, 87 Ill. 438; White v. Mann, 26 Me. 361.

Rescission may be made by him who has the right by notifying the other of his intentions. Mullin v. Bloomer, 11 Iowa, 360; Tilfield v. Adams, 3 Iowa, 487; Mahoney et al. v. Gano, 27 N. E. 315; Thompson et al. v. Peck et al., 18 N. E. 16.

The rule that the institution of legal proceedings for the recovery of the consideration effects a rescission, applied to contracts of sale. Mahoney et al. v. Gano et al., 27 N. E. 315.

Parties may introduce into their contract an agreement, that upon failure of one to fulfill, the other may treat it as void. 3 Am. & Eng. Enc. Law, 893.

A void contract needs no rescission. Wright v. Dickenson, 35 N. W. 164.

If a party seeking specific performance has been guilty of gross negilgence in performing the contract on his part, and there has arisen a material change of circumstances affecting the rights, interests and circumstances of the parties, a court of equity will refuse a specific performance. Callan v. Ferguson, 29 Pa. St. 247; 2 Am. & Eng. Enc. Law, 1029; Dubois v. Baum, 46 Pa. St. 537.

If to compel specific performance will work injustice or hardship, it will not be ordered. 22 Am. & Eng. Enc. Law, 1028; Eaton v. Eaton, 64 N. H. 403; Rushton v. Thompson, 35 Fed. Rep. 635; Society, etc., v. Butler, 12 N. J. Eq. 498.

ENGERUD, J. Plaintiff brought this action in district court to recover a sum of money which she claims to be entitled to by reason of the alleged failure and refusal of defendants to perform a contract for the sale by them to her of a farm. The answer, besides putting in issue some of the facts constituting the plaintiff's cause of action, pleaded a counterclaim for the specific performance of the contract, upon which the plaintiff based her cause of action, and the plaintiff replied. The action was tried by the court without a jury, and resulted in a judgment for plaintiff. Defendants have appealed from the judgment, and in addition to a demand for a new trial of all the issues, under section 5630, Rev. Codes 1899, numerous specifications of errors have been incorporated in the settled case, aimed at certain alleged errors of law at the trial, and also challenging the sufficiency of the evidence to sustain the findings. The action was tried after the taking effect of chapter 201, p. 277, Laws 1903, amending section 5630, so as to exclude from its operation cases "properly triable with a jury." The complaint states a cause of action at law for the recovery of money only, and hence, to the extent of the issues arising on the complaint and the defensive parts of the answer, the action was one properly triable with a jury. The issues arising on the counterclaim and reply, however, were equitable, and were properly triable by the

court without a jury. We are therefore confronted with a question as to the extent of our jurisdiction on this appeal. Is the action one "properly triable without a jury," to be heard and determined under the provisions of section 5630, or are we limited to a review of errors only as in jury cases?

In this case the adjudication of the issues arising on the counterclaim and reply necessarily determine all the disputed facts essential to plaintiff's right to recover. As pointed out in Arnett v. Smith, 11 N. D. 55, 88 N. W. 1037, which was a case very similar to this, "the established procedure is that, when an equitable defense is presented, it is to be decided by the court as if it were an equitable proceeding before other issues are determined, because the determination of the equitable issues in favor of the defendant would put an end to the litigation and obviate the necessity of trying the legal issues involved." That statement of the rule is, perhaps, too broad. It is more correct to say that the equitable issues should be first heard and disposed of by the court, as in a suit in equity, when the answer presenting such a defense is in the nature of a bill in equity containing the essential averments of such a pleading, and requiring the interposition of a court of equity to afford the relief sought. Estrada v. Murphy, 19 Cal. 248, 272; Lombard v. Cowham, 34 Wis. 486; Du Pont v. Davis, 35 Wis. 631. This case comes fully within that rule. The issues on the counterclaim and reply were to be first tried and disposed of by the court in the same manner as if the counterclaim were the complaint in an action commenced by the defendant. The equity side of the case should proceed to a final decree. The contents of that decree would determine whether all the issues on the law side of the case were foreclosed or not. If the decree left any part of the legal issues still open to litigation, then such issues are for trial as in a law action. Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365, and cases supra. In this case, as already stated, the determination of the equitable counterclaim left nothing further to litigate, and hence the decree was the final determination of all the issues in the action. In such a case as this, the amount of plaintiff's recovery would be an issue triable by a jury if the amount were in dispute; but the pleadings admit the amount and date of the payment of the $500 which plaintiff recovered. Plaintiff concedes that the recovery of this sum was all she was entitled to. All questions arising on the law side of the case were eliminated by the trial of the equity side, and hence it seems clear to us that this appeal

is from a final judgment in an action properly triable without a jury, and is here for trial de novo.

In passing, however, it may be well to call attention to the erroneous practice pursued in the trial of this case. When the case was called for trial, the plaintiff proceeded to introduce evidence in support of her cause of action, and the whole case was tried as if it were one triable under section 5630, both as to the cause of action in the complaint, and the counterclaim. In such a case as this, when the answer calls for a separate trial of the equitable issues, the trial should be confined to those issues alone, and the proceedings on the trial should be the same as if the defendant were plaintiff. Enc. Pl. & Pr. p. 811, and cases cited in note 2.

We come now to the merits of the case. As already indicated, the question to be decided on this appeal is whether or not the defendants have shown themselves entitled to a decree for specific performance of the contract in suit. It is unnecessary to set forth the pleadings. It is sufficient to say that the defendants allege the making of the contract hereinafter described, and that they have performed or offered to perform, and are now ready, able and willing to perform the same. The plaintiff claims that the defendant failed to tender performance within the stipulated time, and that the contract had been rescinded before defendants tendered performance. The contract is as follows:

"Received of Bertha A. Cotton Five Hundred no-100 dollars ($500.00) as earnest money and in part payment for the purchase of the following described property situated in the county of Emmons and State of North Dakota, viz: West half of section fifteen, east half of section ten, southeast quarter of section nine, all in township one hundred thirty-four, north of range seventy-six, west of 5th P. M. which I have this day through owners J. C. Butterfield and J. F. Demaris sold and agreed to convey to said Bertha A. Cotton for the sum of six thousand and eight hundred no-100 dollars ($6,800.00) on terms as follows, viz.: Five hundred no-100 dollars ($500.00) in hand paid as above, and $3,300.00 January 1st, 1903, with 8 per cent interest from date; $3,000.00 on or before January 1st, 1908, as stated below, payable on or before the dates as named above, or as soon thereafter as a warranty deed conveying a good title to said land is tendered, time being considered of the essence of this contract. And the above three thousand no-100 dollars shall be secured as follows: $1,500.00 first mortgage on E. ½ of Sec. 10-134-76. $550.00 first mortgage on N. W. ¼ of

Sec. 15-134-76. $550.00 first mortgage on S. W. ¼ of Sec. 15-134-76. $400.00 first mortgage on S. E. ¼ of Sec. 9-134-76. Interest at 8 per cent per annum from date. And it is agreed that if the title to the said premises is not good, and cannot be made good within thirty days from date hereof, this agreement shall be void, and the above title of above land shall rest upon abstract satisfactory to second party. Five hundred no-100 dollars ($500.00) refunded. But if the title to said premises is now [not?] good, in the names of J. C. Butterfield and John Demaris within thirty days, and said purchaser refuses to accept the same, said five hundred no-100 dollars ($500.00) shall be refunded to the said Bertha A. Cotton and contract null and void. But it is agreed and understood by all parties to this agreement, that said forfeiture shall in no way affect the right of either party to enforce the specific performance of this contract. Possession of above land to be given March 1st, 1903. Second party is to accept or reject abstracts within thirty days after delivery of abstracts to Emmons Co. State Bank, Braddock, N. Dak. J. C. Butterfield. [Seal.] John F. Demaris.

"I hereby agree to purchase the said property for the price and upon the terms above mentioned and also agree to the conditions of forfeiture and all other conditions therein expressed. Bertha A. Cotton, by F. H. Cotton, Agent."

The contract was not subscribed by the plaintiff personally, but her name was signed thereto by her husband, F. H. Cotton, who acted for and represented the plaintiff in all negotiations concerning the contract, both before and after the making of the agreement. Although there was no evidence of written authority from her to him to make the contract for her, yet the complaint itself is an express recognition of her husband's agency to make the agreement. After the contract was signed it was, by consent of both parties, left with H. W. Allen, the assistant cashier of the Emmons County State bank. In about two weeks thereafter, the abstract of title was furnished to plaintiff, and she submitted it to a firm of attorneys for their opinion. The attorneys gave a written opinion of the title. Neither the abstracts nor the opinion thereon are in evidence, and there is nothing to disclose the contents of the opinion, except that it pointed out defects in the defendants' record title to the land. There is nothing in the record disclosing what the defects were, but it is conceded that at the time of the commencement of this action the defendants had fully perfected their title. The attorneys' opinion was, on October 29th,

transmitted to the defendant Butterfield, with the following letter: "At Mr. F. H. Cotton's request, an opinion rendered to him upon the abstracts of title to certain lands owned in part by you is enclosed herewith. He wishes to say to you that he will take the land upon the terms agreed upon, if you will make the amendments and clear up the defects suggested in the opinion of the attorney. Yours truly, H. W. Allen, Ass't Cashier." Mr. Allen wrote this letter at the request of Mr. Cotton, who was acting for the plaintiff. Mr. Cotton testified that he told Allen that he would take the land provided the defendants could clear up the title and give a deed on or before January first, next; and that Mr. Allen was defendant's agent in all these negotiations. His testimony, however, as to Allen's agency was a mere conclusion, and incompetent as such, and it is very clear from the record that such was not in fact Mr. Allen's position. On the evidence as a whole it might be claimed with more reason that Allen was plaintiff's agent rather than defendants.' The view most favorable to the plaintiff is to consider Mr. Allen as a messenger between the parties, each employing him in turn to transmit communications to the other. It is apparent, therefore, that if Mr. Allen incorrectly transmitted the message, the consequences must fall upon the party who employed him.

It must be taken as a fact, therefore, that the plaintiff unconditionally elected to proceed with the execution of the contract, notwithstanding the defective title, instead of canceling or terminating the agreement and demanding the return of the earnest money, as she had a right to do under that clause of the agreement which made it optional with her to do so within thirty days after the abstracts were furnished. The view just expressed renders it unnecessary to consider whether or not the conditions which the plaintiff claims were part of the terms upon which she agreed to proceed further with the agreement would have any different effect on the rights of the parties than an unconditional election to proceed with the proposed purchase notwithstanding the defective title. In consequence of the letter of October 29th, the contract between the parties stood as if the provisions for a termination thereof at the option of plaintiff had never been made, because those provisions had been acted upon, and their purpose fully accomplished. After that date, then, the agreement on the part of the plaintiff was to buy the land and pay the balance of the purchase price, on the following conditions: $3,300 and interest at 8 per cent

per annum from the date of the contract, to be paid on or before January 1, 1903; and in settlement of the remaining $3,000, notes secured by mortgages were to be given in the several amounts, and secured on the respective tracts stated in the contract. These notes were to be made payable on or before January 1, 1908, and were to bear interest at 8 per cent per annum from their date. These notes and mortgages were to be executed and delivered on or before January 1, 1903, "or as soon thereafter as a warranty deed conveying a good title to said land is tendered. The stipulations with respect to the payment of the last $3,000 payable in notes are crudely expressed, but when read and construed with the contract as a whole, the meaning is clearly as we have above indicated. As to whether the $3,300 cash payment was payable unconditionally on or before January 1, 1903, or as plaintiff claims, the payment of this sum was, like the notes, to be made on or before that date, "or as soon thereafter as a warranty deed conveying good title to said land is tendered," it is unnecessary to decide. We may assume for the purpose of this case that the plaintiff's construction of this part of the contract is right. Adopting that construction, which is most favorable to plaintiff, we have substantially the same conditions as were presented in Arnett v. Smith, 11 N. D. 55, 88 N. W. 1037, with reference to which the court said, at page 62 of 11 N. D., page 1040 of 88 N. W.: "The covenants contained in the written contract were mutual and dependent. The defendant was obliged to furnish an abstract, showing merchantable title, as a condition precedent to his right to demand and receive payment and the notes and mortgage. The plaintiff, on the other hand, was bound to pay or tender the sum named in the contract, and to execute the notes and mortgage therein referred to as a condition prerequisite to his right to demand and receive the title and conveyance bargained for."

Under the contract in the case at bar, even if time were of the essence of the contract in that respect, the defendants were not required to convey until January 1, 1903. Long after that date the plaintiff continued to treat the contract as still in force. In the latter part of January the defendants sent to Mr. Allen for delivery a deed for the land executed by them. The deed was what is termed a special warranty deed, and plaintiff declined to accept it, because the warranties were not general and in the usual form. She did not put her rejection on the ground that it came too late, and her acts on this occasion can only be construed as a demand

for a better deed. Afterwards, without defendants' consent, plaintiff secured possession of the contract from Mr. Allen, and had it recorded in the office of the register of deeds. Negotiations continued by correspondence between the parties concerning the contract for some time apparently. Although the letters, or some of them, were in court, they were not offered in evidence, and we are not informed of their contents. There is no evidence that the plaintiff made an offer of performance, or took any steps to rescind. The only attempted proof of that nature consists of some loose statements to the effect that the plaintiff informed Allen that she was ready and willing to pay provided good title was furnished, and also told him that she wanted the earnest money returned to her, because the defendants had not furnished the deed in time. It does not appear, however, that these statements were ever communicated to the defendants. It is needless to say that such testimony was not sufficient to show a rescission, or even an offer of performance, which was a condition precedent to the right to rescind. Arnett v. Smith, 11 N. D. 55, 88 N. W. 1037. There is nothing to indicate that the plaintiff could not have had possession of the land if she had so desired on March 1, 1903. Neither is there any evidence from which we would be warranted in holding that the defendants had been unreasonably dilatory in perfecting their title. It is conceded that the title was perfect when this action was commenced, and that defendants have tendered full performance. We think the decision in Arnett v. Smith, 11 N. D. 55, 88 N. W. 1037, is decisive of this case, and that the defendants are entitled to have the contract specifically performed.

One point more remains to be noticed. There is no evidence as to whether the land in question is occupied or not. There is an allegation in the counterclaim, however, to the effect that after plaintiff's refusal to perform the contract defendants plowed and seeded to grain the cultivated parts of the land, and that they did this in order to prevent a depreciation of its value, which would result if the cultivated land was permitted to remain uncultivated. There is a prayer for an accounting, and for compensation for the expense so incurred. No mention was made of this feature of the pleading in the court below so far as the record discloses, and it has not been referred to by either counsel in this court. Inasmuch, however, as the counterclaim discloses that some part of the land was used by the vendors after the time

when, if the contract had been performed, the plaintiff was entitled to possession, we think we should take notice of the point. The effect of the decree for specific performance which we shall order in this action will be to require plaintiff to pay interest on the unpaid part of the purchase price during the time that has elapsed since the deed was tendered; and if the plaintiff complies with the decree, and pays the purchase price, her title to the land will take effect as of the date of the tender of the deed in April, 1903. It is therefore apparent that if the defendants have had the use of the land or part of it during all or part of the time since the spring of 1903, and that fact were not taken into consideration in framing the decree, the result would be that defendants would have the use of the land and interest on the purchase price also, and the plaintiff would suffer a corresponding detriment. The principles which govern the adjustment of the rights of the parties under the circumstances of this case, if the facts are as alleged in the counterclaim, are plain. If the plaintiff complies with the decree for specic performance, her title then acquired relates back to the time when she ought to have performed, namely, when the deed was tendered. Consequently, if, during any part of that time, the defendants have had the use of any part of the land, they must be regarded as trustees thereof. It was not obligatory upon them to assume that obligation. They were not required to farm the land pending the action, and hence can recover no compensation for any loss incurred in so doing. To the extent that they did so, they must be regarded as voluntary trustees, and, as such, liable to the plaintiff, either for the value of such use and occupation, or for the net profits which they have obtained from the occupation. The plaintiff has the right to elect which of the two measures of compensation she will adopt. Rev. Codes, section 4273; Berry v. Evendon (N. D.) 103 N. W. 748; Finlayson v. Peterson, 11 N. D. 45, 89 N. W. 855. If anything is found to be due to plaintiff for the use and occupation, or for profits, that sum should be applied in reduction of the cash payment on the purchase price, which the decree requires of the plaintiff. As we are unable to make this adjustment, by reason of the absence from the record of any evidence on the subject, we shall provide an opportunity to the plaintiff to have this matter adjusted by the district court before the decree is entered.

The judgment appealed from is reversed, and the cause remanded to the district court, and that court will enter a judgment

dismissing the plaintiff's cause of action on the merits, and decreeing in the usual form a specific performance of the contract. The cash payment required of plaintiff is $3,300, with interest at the rate of 8 per cent per annum from September 22, 1902, the date of the contract, to the day the money is paid to the defendants, or into court for them; but from this amount will be deducted such sum, if any, which it may be shown the plaintiff is entitled to, by reason of the use and occupation of the premises by defendants since April 30, 1903. The notes for the balance of the purchase price, aggregating $3,000, are to be for the several amounts, and secured on the respective tracts specified in said contract. They should be dated April 30, 1903, be payable on or before January 1, 1908, and bear interest from April 30, 1903, at the rate of 8 per cent per annum. The plaintiff should be allowed sixty days in which to pay the money and execute and deliver the notes and mortgages, after notice of the entry of the decree and deposit in court of the defendants' deed, offered in evidence as Exhibit 8, and abstract of title. The defendants will recover the taxable costs and disbursements of both courts. Instead of granting an ex parte order for judgment upon the receipt of the remittitur, in this case, the district court will require eight days' notice to the plaintiff of the application, and if the plaintiff shall make it appear that she claims any deduction should be made from the purchase price to be paid in cash by reason of the use of the premises by the defendant, then the district court will, by order, provide for the hearing and determination of that question, in accordance with the rule above stated, and stay proceedings on the remittitur for such reasonable time as may be required to determine the question. Each party to pay their or her own costs incurred on such hearing. All concur.

(105 N. W. 236.)

LARS LARSON v. JOHN CHRISTIANSON, AND ALL OTHER PERSONS UNKNOWN, CLAIMING AN ESTATE OR INTEREST IN, OR LIEN OR INCUMBRANCE UPON, THE PROPERTY DESCRIBED IN THE COMPLAINT AND THEIR UNKNOWN HEIRS.

Opinion filed October 21, 1905.

Quieting Title — Judgment on the Pleadings — Denial of Plaintiff's Title Creates an Issue.

1. In an action to determine adverse claims under chapter 5, p. 9, Laws 1901, the granting of plaintiff's motion for judgment on the

pleadings is error, when the answer denies plaintiff's title to real estate, although it does not set forth a valid adverse interest.

Intoxicating Liquors — Lien of Fine and Costs — Execution Upon Judgment Thereof.

2. On a conviction for keeping and maintaining a nuisance, in violation of section 7605, Rev. Codes 1899, the court adjudged that the fine imposed and costs accrued should be a lien on the real estate on which the nuisance was kept, pursuant to section 7610, Rev. Codes 1899. These premises were owned by the plaintiff in this action, who was not a party in the criminal action. Execution was issued on the judgment in the criminal action, and plaintiff's land levied on and sold to defendant. *Held,* that the sale was void, as based on a judgment or proceeding to which plaintiff was not a party.

Same — Enforcement of Lien for Fines and Costs.

3. The enforcement of the lien for fines and costs assessed under section 7610, Rev. Codes 1899, should be by action, and not by execution, in cases like the one under consideration.

Same — Nuisance — Knowingly Permitting.

4. The word "permit" as used in section 7610, Rev. Codes 1899, is to be construed as authorizing the enforcement of a lien on the premises on which a nuisance is maintained in violation of section 7605, Rev. Codes 1899, when the proof shows that the owner knowingly permitted such use.

Appeal from District Court, McHenry county; *Palda, Jr.,* J.

Action by Lars Larson against John Christianson and others. Judgment for plaintiff, and defendant Christianson appeals.

Reversed.

A. M. Christianson, for appellant.

In actions to determine adverse claims to real estate, general denial puts plaintiff's title in issue, and if he fails to prove it, he cannot question defendant's interest, liens or claims. Dever v. Cornwell et al., 86 N. W. 227, 10 N. D. 123; Wakefield v. Day, 41 Minn. 344, 43 N. W. 71; Jellison v. Halloran, 40 Minn. 485, 42 N. W. 392; Pennie v. Hildreth et al., 81 Cal. 127, 22 Pac. 398; Flint v. Dulaney et al., 37 Kan. 332, 15 Pac. 208; Beale v. Blake, 45 N. J. Eq. 668; Peacock v. Stott, 104 N. C. 155; Sklower v. Abbott, 19 Mont. 228, 47 Pac. 901; Mitchell v. McFarland et al., 47 Minn. 535, 50 N. W. 610; Dyer v. Baumeister, 87 Mo. 137; Churchill v. Onderdonk, 59 N. Y. 137.

All defenses legal and equitable may be proved under general denial. Mason v. Roll, 30 Ind. 260; Jackson et al. v. Neal, 136 Ind. 173, 35 N. E. 1021.

Section 7610, Rev. Codes 1899, creates a valid lien. Hardten et al. v. State, 32 Kan. 637, 5 Pac. 212; State v. Snyder et al., 34 Kan. 425, 8 Pac. 860.

Fine and costs constitute a paramount lien upon the premises. Cordes v. State, 14 Pac. 493; Snyder et al. v. State, 20 Pac. 122; section 7610, Rev. Codes.

Nuisance may be abated summarily and costs fixed upon the property. Baumgartner v. Hasty, 100 Ind. 575; Kennedy v. Phelps, 10 La. Ann. 227.

A purchaser at a void judicial sale becomes equitable assignee of the owner of the lien upon which the sale is made. Brown v. Smith, 116 Mass. 108; Freeman, Void Jud. Sales, section 50; Hoffman v. Harrington, 33 Mich. 392; Frische v. Kramer's Lessee, 16 O. 126; Stark et al. v. Brown, 12 Wis. 572; Moore v. Cord, 14 Wis. 214; Robinson v. Ryan et al., 25 N. Y. 320; Johnson v. Sandhoff et al., 30 Minn. 197; 20 Enc. Law, 1030; Wiltsie on Mortgage Foreclosures (1st Ed.) 34-35; Hart v. Wandle et al., 50 N. Y. 381; Smith v. Gardner, 42 Barb. 356; Probst v. Brock, 10 Wall. 519, 19 L. Ed. 1002.

Permitting one to acquire title under a proceeding estops the person permitting to question its validity. Bryan v. Pinney et al., 31 Pac. 548; Roeder v. Fouts et al., 31 Pac. 432; Fallen v. Worthington, 22 Pac. 960; Wright v. E. M. Dickey Co., 50 N. W. 206; Edwin v. Lowry, 7 How. 172, 12 L. Ed. 655; Kirk v. Hamilton, 102 U. S. 68, 26 L. Ed. 79; Close et al. v. Glenwood Cemetery, 107 U. S. 466, 27 L. Ed. 408.

J. E. Burke, for respondents.

Section 7610, Rev. Codes 1899, is unconstitutional. Con. N. D., art. 1, sections 7, 13; Colon v. Lisk et al., 47 N. E. 302; Lawton et al. v. Steele, 23 N .E. 878; Campbellsville v. Odewalt, 60 L. R. A. 723; People v. Warden of City Prison, 39 N. E. 686.

In an action to quiet title judgment may be attacked collaterally. 17 Am. & Eng. Enc. Law (2d Ed.) 1065; Phelps v. McCallam, 10 N. D. 536, 88 N. W. 292.

Under section 7610, even if court can render a valid judgment, a separate action must be had to enforce the lien of the judgment.

Brown v. Denver, 7 Col. 305; 10 Am. & Eng. Enc. Law (2d Ed.) 297.

The word "permit" carries with it consent or license to do a certain thing. Ahern v. Steele et al., 5 L. R. A. 449; Wason v. Pettit, 5 L. R. A. 794; Lufkin v. Zans, 17 L. R. A. 251; State v. Speyer, 29 L. R. A. 573; Cameron v. Kapinos, 56 N. W. 677; Buckham v. Grape et al., 17 N. W. 755; Wing v. Benham et al., 39 N. W. 921; Cox v. Newkirk, 34 N. W. 492; Snedaker v. Jones, 37 N. W. 175; Putney v. O'Brien, 4 N. W. 891; Loon v. Hiney et al., 4 N. W. 865.

MORGAN, C. J. Action to determine adverse claims to real estate. The complaint alleges that plaintiff is the owner in fee simple of the lot involved in the suit, and, so far as the other allegations of the complaint are concerned, the same are in compliance with the provisions of chapter 5, p. 9, Laws 1901, which provides what the allegations of the complaint may be. The answer of John Christianson, the only defendant who has answered, "denies generally and specifically all and singular each and every allegation, matter, fact and thing in said complaint alleged, set forth and contained, not hereinafter specifically admitted, qualified or explained." The answer further sets forth an alleged lien in favor of said defendant, and particularly sets forth each step or proceeding by which it is claimed that said lien was created and under which the defendant claims that he acquired an interest in and lien upon said lot. The facts set forth in said answer are, in substance, as follows: That one Armstrong was in possession of said lot between January 1, 1901, and April 3, 1902; that during said period said Armstrong kept and maintained a nuisance upon said lot, contrary to the provisions of section 7605, Rev. Codes 1899, and was thereafter convicted of the offense of maintaining a nuisance by selling intoxicating liquors in a place kept on said lot, contrary to the provisions of said section; that said Armstrong was sentenced to imprisonment and to pay a fine of $200 and the costs of the prosecution, taxed at the sum of $100; and that said fine and costs, aggregating the sum of $300, were by the court declared, adjudged and decreed to be a lien upon the lot on which said nuisance was maintained, and that said lot was sold on execution issued under such judgment to the defendant and a certificate of sale thereof duly issued to him, and that he is the owner and holder of said certificate. The plaintiff moved for judgment on the pleadings in

this action. The trial court granted the motion, and judgment was entered in favor of the plaintiff. The judgment declared the plaintiff to be the owner of the lot, and that the defendant's alleged lien on the lot was null and void and conferred no rights upon him. The defendant has appealed from the judgment.

A statement of the case was settled and made a part of the judgment roll. The errors specified therein relate solely to the alleged error in granting the motion for judgment. Appellant attempts to sustain his contention upon two grounds: (1) That there was an issue made by the answer as to the plaintiff's ownership of the lot. (2) That defendant had a valid lien upon the lot by virtue of the certificate of sale issued to him.

Upon the latter contention it may be said that the lien is claimed to have been based upon proceedings under section 7610, Rev. Codes 1899, which reads as follows: "All fines and costs assessed against any person or persons for any violation of this chapter shall be a lien upon the real estate of such person or persons until paid; and in case any person or persons * * * shall permit the same to be used and occupied for the sale of intoxicating liquor contrary to the provisions of this chapter, the premises so leased and occupied shall be subject to a lien for and may be sold to pay all fines and costs assessed against any such occupant for any violation of this chapter; and such lien may be enforced by civil action in any court having jurisdiction * * *." The lot in question was sold to the defendant at an execution sale. The execution was issue on the judgment entered against Armstrong in the criminal case. There was no action brought to enforce this lien, and the plaintiff was not a party to any proceedings as to the judgment or as to the sale. It is clear to us that the sale was a nullity. Section 7610 clearly provides for an action to enforce liens in cases like the one under consideration. Unless enforced by action, the owner of the real estate is deprived of an opportunity to establish that the conditions under which such liens may be created did not exist. His property may be taken without an opportunity for a hearing if the lien can be enforced by execution. He is entitled to his day in court before his property can be taken from him. His property cannot be taken from him without due process of law. The lien cannot be adjudged to be binding upon the owner until he has had an opportunity of showing its invalidity in an action in which he is a party. United Lines Tel. Co. v. Boston Safe deposit & Trust Co., 147 U. S. 431, 13 Sup. Ct. 396, 37 L. Ed. 231;

Brown v. Denver, 7 Col. 305, 3 Pac. 455; Am. & Eng. Enc. Law (2d Ed.) vol. 10, p. 297, and cases cited.

The answer fails to set forth the facts necessary to a valid lien on the premises for the fine and costs in the criminal action. There is no lien unless the owner of the premises permits the occupant thereof to use them for the sale of intoxicating liquors. The word "permit," as here used, means that the unlawful use is allowed to continue after knowledge or notice thereof. It does not mean that the nuisance exists, but that it exists with the consent or acquiescence of the owner. There is no allegation in the answer that Armstrong was the owner of the real estate, nor that the then owner knowingly permitted the maintenance of a nuisance. These are necessary facts to be shown before there is a lien and before it can be enforced. Stuart v. State (Tex. Cr. App.) 60 S. W. 554; Gray v. Stienes, 69 Iowa, 124, 28 N. W. 475; State v. Pierce (Me.) 15 Atl. 68; Chicago v. Stearns, 105 Ill. 554; Wilson v. State (Ind. App.) 46 N. E. 1050; Territory v. Stone, 2 Dak. 155, 4 N. W. 697. For the reasons stated, the court had no jurisdiction to adjudge that the fine and costs be a lien upon the premises as against the plaintiff or the owner, and its action in the premises was a nullity. As the answer fails to show that there was a lien on the premises, the question argued that the defendant was subrogated to the state's rights to the lien is disposed of. The allegation that Armstrong was in possession of the premises is not equivalent to an allegation of his ownership.

It was error, however, to enter judgment in favor of the plaintiff. The answer denied the plaintiff's title to the lot. There is no proof in the record on the question of ownership or title. Before the plaintiff becomes entitled to have an adverse title quieted, he must first show that he is entitled to maintain the action. He must have an interest of some kind, by lien or otherwise, in the real estate to which adverse claims are made. Section 5904, c. 5, p. 9, Laws 1901. Unless he has some interest or estate therein, the defendant is not compelled to set forth his claims. Dever v. Cornwell, 10 N. D. 123, 86 N. W. 227. By the weight of authority, and we think by the better reasoning, which is more in consonance with the general rules of pleading, it is held that a denial of plaintiff's title or right to maintain this kind of an action precludes an entry of judgment on motion, although the defendant's adverse claim fails. See cases cited in volume 17, Am. & Eng. Enc. Law (2d Ed.) pp. 350, 362. The motion for judgment on the plead-

ings was submitted to the court under a stipulation by the attorneys in open court. This stipulation provided that, if plaintiff's motion was denied, judgment should be entered for the defendant for the relief therein prayed for, and, if the motion was granted. that the answer was not to be amended and the judgment should be final so far as the defendant was concerned, subject to the right of appeal. It further provided that the motion should be heard subject to the rules of law applicable to motions for judgment on the pleadings. Because of the latter stipulation, judgment cannot be entered for the plaintiff. There is no admission on defendant's part that the allegations of the complaint are true. It is only stipulated that the court may enter a final judgment in plaintiff's favor if the rules of law applicable to motions for judgment on the pleadings will warrant it. As the judgment is reversed on a point not connected with the facts alleged as a defense, no costs will be allowed on the appeal.

The judgment is reversed, and the cause remanded for further proceedings. All concur.

(106 N. W. 51.)

W. A. CURRIE, TRUSTEE OF SYLVESTER G. LOOK, BANKRUPT, v. HELENA E. LOOK.

Opinion filed October 21, 1905.

Trustee in Bankruptcy Succeeds to Bankrupt's Title to His Property and Can Enforce a Trust.

1. Under section 70 of the national bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), a trustee in bankruptcy is vested with the title of all the bankrupt's property as of the date he was adjudged bankrupt, except exempt property, and he may enforce a trust in real estate existing in favor of the bankrupt.

Trusts — Involuntary Trustee — Property Gained by Fraud.

2. It is a settled doctrine in equity, and one declared by section 3386, Rev. Codes 1899, that "when a transfer of real property is made to one person, and the consideration thereof is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made," and under section 4263, Rev. Codes 1899, "one who gains a thing by fraud" is an involuntary trustee * * * for the benefit of the person who would otherwise have had it."

Bankruptcy — Conveyance to Wife — Recovery by Trustee.

3. Upon the facts stated in the opinion, and upon a review of the entire case in this court, in an action prosecuted by a trustee in bank-

ruptcy to subject certain real estate which had been transferred to the bankrupt's wife to the payment of his debts, it is *held* (1) that the bankrupt's wife was merely a trustee of the title, and (2) that the plaintiff is entitled to a decree transferring title to him.

Appeal from District Court, McHenry county; *Palda,* J.

Action by W. A. Currie, trustee of Sylvester G. Look, bankrupt, against Helena E. Look. Judgment for plaintiff, and defendant appeals.

Modified.

A. M. Christianson and *Charles D. Donnelly,* for appellant.
Murphy & Duggan, for respondent.

YOUNG, J. The plaintiff, Currie, as trustee in bankruptcy of Sylvester G. Look, bankrupt, brought this action to cancel a deed of certain real estate executed by Sildia A. Pendroy and husband to Helena E. Look, the bankrupt's wife, upon the ground that the conveyance was without consideration and a fraud upon his creditors. The findings of the trial judge were in plaintiff's favor and a judgment of cancellation was entered. The bankrupt's wife, the grantee in the conveyance in question, appeals, and demands a review of the entire case in this court.

The property in question consists of two lots in the town of Denbigh, McHenry county, which were formerly owned by Sildia A. Pendroy. Some time in 1901, through the agency of her husband, she contracted to convey the same to S. G. Look, the bankrupt, by warranty deed, upon the payment of $1 and the erection thereon of a store building of a certain description. The consideration was paid and building erected. On January 22, 1902, Sildia A. Pendroy and her husband joined in a deed of the premises to Helena E. Look, the defendant herein, which deed was placed upon record. On April 10, 1902, Look was adjudged a voluntary bankrupt by the United States District Court for North Dakota, and the plaintiff was named as trustee. The bankrupt included the property here in question in his schedule of assets, and in his statement of liabilities stated that Helena E. Look was a creditor to the amount of $6,000 for cash received, and that his obligation therefor was evidenced by written contract. The plaintiff commenced this action on October 30, 1903. He alleges, among other things, that the deed was made without the knowledge or consent of the bankrupt or his creditors, and that the defendant

obtained the deed with knowledge of her husband's insolvency, and by fraud, deceit and misrepresentation, and with the purpose of cheating and defrauding the bankrupt and his creditors, and that the deed was wholly without consideration, and prayed that the defendant be required to set forth her claim of title, that it be adjudged that the defendant has no right or title, that the deed in question be canceled, and "for such other and further relief as may be just." The defendant alleges in her answer that the deed was given for a valuable consideration, and that "this defendant is the absolute owner in fee simple of the above described property for the said consideration paid by this defendant," and prays that "it be decreed that she is the absolute owner of the above described land in fee simple," and that the plaintiff be forever barred from asserting any claim thereto.

The trial judge found that Pendroy's contract for the sale of the lots was with Look, the husband, and that the consideration therefor was paid by the latter; further, that before the deed in question was executed Look was negotiating with his creditors with a view to transferring to them all of his property, including these lots, in payment of his debts, and in fact had executed a trust deed which included these lots; that all of these facts were known to the Pendroys and to his wife, Helena E. Look; that the deed procured by the latter was obtained for the purpose of cheating her husband's creditors and to prevent the application of this property to the payment of his debts. The findings of fact, in our opinion, have ample support in the evidence. The appellant's contention that the contract for the purchase of the lots, which was oral, was her contract, and not her husband's, and that she paid the consideration, is not sustained. In our opinion the evidence shows that the contract was with her husband and that he paid the consideration. It is true she furnished a large part, if not all, of the money which her husband used in erecting the building; but the sums so advanced by her were to her husband by way of loans to enable him to perform his contract. She was simply his creditor. Her husband was her debtor for the sums she had advanced to him to carry out his contract, and these amounts were evidenced by his written obligation. The consideration for the deed was paid by Look. No consideration passed from her for the deed which she obtained from the Pendroys. Do these facts entitled this plaintiff to equitable relief? An affirmative answer must be given to this question. Under section 70 of the

national bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), the plaintiff, as trustee in bankruptcy, becomes vested with the title of the bankrupt as of the date he was adjudged bankrupt, except as to exempt property. Whatever rights Look then had in the property passed to the trustee and he may enforce them. 16 Am. & Eng. Enc. Law, 730, and cases cited in note 7; Loveland on Bankruptcy, section 163.

What were Look's rights? He had purchased the lots and had paid for them. The vendor, instead of transferring the title to him, transferred it to his wife, the defendant herein. Upon these facts it is clear that the defendant received and held the title of the property in trust for her husband under the well-settled equitable doctrine declared in section 3386, Rev. Codes 1899, which reads as follows: "When a transfer of real property is made to one person and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." This presumption is not rebutted. It is true the fact that the grantee is the purchaser's wife raises a presumption that a gift or settlement was intended, and in such case a trust will not arise unless the presumption of intent is overcome. Beach on Trusts and Trustees, section 160; Perry on Trusts, section 145. The evidence in this case, however, conclusively negatives this intent. The defendant makes no such claim. Her only claim, and it is not sustained by the evidence, is that she herself bought and paid for the property. It follows that the defendant was merely the trustee of the title for her husband and that the plaintiff is entitled to enforce the trust. If it be said that her husband did not give his assent to the execution of the deed to her by the Pendroys, and that she obtained it without his knowledge or assent, and the evidence would indicate that to be the fact, so as to render the foregoing statutory presumption of intent inapplicable, still this fact places her in no better position. If she in fact obtained the deed without his knowledge or assent, she acquired it fraudulently, and the result is the same, for she is then a trustee of the title under section 4263, Rev. Codes 1899, which reads as follows: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust or other wrongful act is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it." See Prondzinski v. Garbutt, 8 N. D. 191, 77 N. W. 1012; Persons v. Persons,

25 N. J. Eq. 250. In either view the defendant is a mere trustee of the title and may be compelled to transfer the same to the plaintiff who has succeeded to the rights of her husband.

It is urged, however, that the property was and is the family homestead under the laws of this state, and that the plaintiff, for this reason, acquired no interest therein by reason of his appointment as trustee in bankruptcy. There is no basis for this claim either in the pleadings or in the evidence. The defendant in her answer stands upon an allegation of purchase. She does not allege or attempt to allege that she has a homestead interest. It seems to be a well-settled rule of pleading that one who wishes to avail himself of a homestead right must allege the facts which entitle him to it. Thompson on Homesteads, section 702; 10 Am. & Eng. Enc. Pl. & Pr. 81, and cases cited. Were the rule different, still the defendant must fail, for the evidence—and it was admitted over objection that it was not within the issues—wholly fails to show that this property was a homestead when this action was commenced, or for a long time prior thereto. On the contrary, it clearly appears that it was not a homestead. The bankrupt's family consisted of himself and his wife. They were married in 1901. In the latter part of that year they occupied rooms in the rear part of the store building. Early in 1902, and at the time of her husband's failure, family differences arose. It does not appear that they have lived together since, or that either of them has occupied the premises since the execution of the trust deed on January 23, 1902. Look has since resided at Berwick. As husband he was the head of the family, and could "choose any reasonable place or mode of living and the wife must conform thereto." Section 2764 and subdivision 8, section 2740, Rev. Codes 1899. No facts are shown which in law would entitle the defendant to maintain a homestead right while living apart from her husband, and there is in fact no evidence tending to show that she has actually occupied these premises since January, 1902.

The remaining questions discussed by appellant's counsel are rendered immaterial by the views already expressed. The trial court was correct in finding that the plaintiff was entitled to relief, but it will appear from what we have already said that the relief awarded—i. e., cancellation of the deed—is neither adequate nor appropriate. Under the facts the plaintiff is entitled to a conveyance of title from the defendant, and this may be granted under his general prayer.

The district court is directed to modify its decree accordingly, and, as thus modified, it will be affirmed, with costs to respondent. All concur.

(106 N. W. 131.)

IN RE WHITTEMORE.

Opinion filed October 23, 1905.

Attorney — Disbarment — Corrupt Conduct.

1. Evidence examined, and *held* not to sustain charges of corrupt conduct on the part of the accused attorney.

Application of Otis Kolstad for the disbarment of Guy L. Whittemore.

Proceeding dismissed.

Guy C. H. Corliss and *Tracy R. Bangs,* for prosecutors.
Scott Rex and *McClory & Barrett,* for defendant.

ENGERUD, J. This is a proceeding instituted in this court for the disbarment of Guy L. Whittemore. The accusation against him alleges in substance that in December, 1901, one Otis Kolstad employed the firm of Whittemore & Torson, and paid them $15 to file and foreclose a mechanics lien upon a mill in Rugby, owned by one Leistikow, to secure the sum of $34 due to Kolstad for labor; that the accused, falsely and with intent to deceive Kolstad, repeatedly represented that an action to foreclose the lien had been commenced and had been noticed for trial, but in fact no foreclosure proceedings had ever been commenced; that the accused, on or about August 17, 1903, collected the amount due on the lien, and satisfied and discharged the same of record, and willfully concealed that fact from his client and embezzled the amount so collected.

The evidence was taken before a referee. Numerous witnesses were examined, and the examination of each witness, even as to the most trivial circumstances, was most exhaustive. The result is a mass of testimony, much of it wholly irrelevant or immaterial. It would require an opinion of unprecedented length to discuss the evidence in detail. Such a discussion would serve no useful purpose.

It is very clear from the evidence that no part of the sum claimed to be due on the mechanic's lien has ever been collected; and hence the charge of embezzlement is wholly refuted.

There is some room for doubt as to whether the action to foreclose the lien was ever commenced, as the evidence on that subject is not entirely satisfactory. The unsatisfactory character of the evidence on that subject is explained, however, by the fact that all the records and files in Whittemore & Torson's office were destroyed by fire after the time the accused claims the action was commenced; and by the further fact that Mr. Leistikow, the defendant in that action, is dead, and the deputy sheriff who, it is claimed, made the service, had left the country. The fact that no papers in the action had been filed with the clerk of court is of no significance except to show that the action had not been noticed for trial, because every practitioner in this jurisdiction knows that it is a very common practice to delay the filing of papers until a case is noticed for trial. Neither side attempted to show that the sheriff kept any record of service or had any recollection on the subject; but this omission is as much chargeable to the prosecution as to the defense, because the sheriff's records, as well as his testimony as to his personal recollection of the transaction, if he had any on the subject, was equally accessible to either party. The accused is to some extent corroborated in his testimony as to service of the papers. Whatever doubt the testimony leaves in our minds on the subject should be resolved in favor of the accused. In re Eaton, 4 N. D. 514.

We are fully convinced that Whittemore & Torson would have been justified in advising the abandonment of the action and the acceptance of the terms of settlement proposed by Leistikow, as Whittemore testifies was done. In view of that fact and the small amount involved there is a strong probability that such advice was given; and it is very improbable, as Kolstad claims, that nothing of that kind was ever said or written. The probability of Whittemore's testimony on this subject, and the improbability of Kolstad's claim, as well as the absence of any adequate inducement to deceive, convinces us of the truth of Whittemore's claim that Kolstad acquiesced in their advice to abandon the action and get what they could for Kolstad out of the collection which Leistikow left in their hands for that purpose.

From this view of the evidence it follows that the subsequent release of the mechanic's lien by the accused was not wrongful,

however much his conduct with respect to the handling of the claim and the release of the lien may be subject to criticism for loose business methods. His fault in that respect, however, is to a great extent excusable in view of the fact that he was admitted to the bar only in 1900 and had had very little experience as a lawyer.

The evidence is wholly insufficient to show that the accused wrote or was responsible for the letters from the firm of Whittemore & Torson to Kolstad, in which it was stated that the action would soon be tried. The direct proof relied upon to prove his authorship of these letters is little better than conjecture, and the circumstances indicate the contrary. There was no sufficient motive for such misrepresentations on his part; while if it is true, as Whittemore claimed, that one of the collections to be applied upon Kolstad's claim was a debt due from Torson to Leistikow, the motive for Torson to misrepresent the facts for the purpose of delay is apparent. The undisputed evidence as to the latter's personal and business habits, we regret to say, renders it not improbable that he might write such letters even though he may have had no actual corrupt intent in so doing.

After the evidence on the original accusation had been completed, application was made to reopen the case and file an additional and supplemental accusation charging the defendant with subornation of perjury. This application was granted, the defendant consenting thereto. This supplemental accusation was based upon a document purporting to have been signed by the accused, and was in the form of a written contract between the accused and one of the witnesses who had testified in his behalf, whereby the accused agreed to pay the witness $250 and all expenses for the latter's "honest testimony." The document was of such a character that, if genuine, it clearly indicated a bargain for false testimony. This document came into the hands of the person most deeply interested in the prosecution, and he procured it from a worthless character who promptly disappeared after receiving $100 for the delivery of the document. After examining the evidence on this subject we have no hesitation in declaring that the document is a forgery.

We find the accused not guilty of all the accusations against him and this proceeding is dismissed.

All concur.

THE STATE OF NORTH DAKOTA v. LEWIS O. HAZLETT.

Opinion filed October 26, 1905.

Permitting Leading Questions Is Error Only When the Discretion Is Abused to the Prejudice of a Party.

1. Whether leading questions shall be permitted or not is very largely discretionary with the trial court, and its rulings in that respect will not be disturbed unless it is apparent that the discretion was abused to the prejudice of the appellant.

Same — New Trial.

2. If it clearly appears that the departure from the general rule against leading questions was unwarranted and prejudicial to the appellant, a new trial will be granted.

Same — Rape — Age of Witness — Discretion of Court.

3. Where, in a rape case, the record discloses that almost the entire direct testimony of the prosecutrix, who was apparently a willing witness over fifteen years of age, was elicited by extremely leading questions, without any attempt to obtain her answers in some other way, an abuse of discretion is shown.

Criminal Law — Conduct of Trial Judge — Expression of Opinion by the Court.

4. Misconduct warranting a new trial is shown where the trial judge unnecessarily and repeatedly interrupted the cross-examination of the state's witnesses by questions and remarks which hindered effective cross-examination and tended to create the impression that the trial judge was convinced of the truthfulness of the witness and the merits of the state's case.

Same — Examination of Witness by the Court.

5. It is proper for the trial judge to question witnesses whenever he deems necessary, but the right should be cautiously exercised, so as to avoid giving expression, directly or indirectly, to any opinion on the merits of the case.

Rape — Cross-Examination of Prosecutrix.

6. On the trial of a charge of rape, where the state's case depends almost wholly on the testimony of the prosecutrix, ample latitude in cross-examination should be allowed.

Same.

7. It was error to so restrict the cross-examination of the prosecutrix as to not afford full inquiry into facts and circumstances which might aid the jury in determining the weight and credibility of her testimony.

Rape — Evidence — Age of Prosecutrix — Family Bible as Evidence of Age.

8. A family Bible formerly belonging to the prosecutrix's deceased grandfather, in which the latter had recorded the dates of birth of his own children and also of the prosecutrix and her brothers, was competent evidence of the prosecutrix's age.

Witness — Impeachment.

9. It was error to exclude impeaching testimony for which sufficient foundation had been laid in the cross-examination of the prosecutrix.

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

Lewis O. Hazlett was convicted of rape, and appeals.

Reversed.

H. E. Plymat and *John Burke,* for appellant.

Upon examination in chief leading question are not allowed. 1 Green on Ev. (Wig. Ed.) 434; Hardtke v. State, 30 N. W. 723; Cannon v. People, 30 N. E. 1027; Proper v. State, 55 N. W. 1038; State v. Watson, 46 N. W. 868; State v. Porath, 63 N. W. 1061.

The same rule applied to leading questions asked by the court. Hopperwood v. State, 9 Tex. 15; State v. Crotts, 60 Pac. 403; People ex rel. Lauchantin et al. v. Lacoste, 37 N. Y. 192; So. Covington & St. R. Co. v. Stroh, 57 L. R. A. 875; Hudson v. Hudson, 90 Ga. 851.

The court erred in interrupting cross-examination of witnesses and in remarks made in reference thereto. 1 Gr. on Ev. 446; In re Mason, 14 N. Y. S. 434; Wheeler v. Wallace, 19 N. W. 33; Fager v. State, 35 N. W. 195; Sharp v. State, 14 Am. St. Rep. 33; McMinn v. Whelan, 27 Cal. 300; People v. Williams, 17 Cal. 142; People v. Moyer, 43 N. W. 928; People v. Hull, 49 N. W. 288; Jones on Ev. Par. 821, note 6 and cases, Par. 837, note 7; 2 Taylor Ev. Par. 1428; Patrick v. Crowe, 15 Col. 543; State v. Lee, 80 N. C. 484; Lycan v. People, 107 Ill. 423; Hubbard v. State, 108 Ga. 780; Manning v. State, 37 Tex. Crim. Rep. 180; Starkie Ev. 160.

The complaint in a prosecution for rape should be permitted to state only the fact that she made early complaint and not its terms or details. Griffin v. State, 76 Ala. 29, 31; People v. Mayers, 6 Pac. 691; Roscoe's Crim. Ev. 24; 1 Russell on Crimes, 922; People v. State, 15 Ark. 694; People v. Lambert, 52 Pac. 307; Paulson v.

State, 35 N. E. 907; McMurrin v. Rigby, 45 N. W. 877; State v. Curran, 85 Me. 106; State v. Shuttleworth, 18 Minn. 208; State v. Jones, 61 Mo. 232; Matthews v. State, 19 Neb. 330; State v. Knapp, 45 N. H. 148; Baccio v. People, 41 N. Y. 265; Harmon v. Tern, 49 Pac. 55; Hannon v. State, 36 N. W. 1; Oleson v. State, 9 N. W. 38.

Entries in a family bible on the ground of family acknowledgments and of their publicity are admissible. 1 Taylor on Ev. 650; 1 Gr. on Ev. sections 104-5; Campbell v. Wilson, 76 Am. Dec. 67; Carskadden v. Poorman, 10 Watts, 82, 36 Am. Dec. 145; Supreme Council v. Conklin, 41 L. R. A. 449; Lewis v. Marshall, 5 Pet. 470, 8 L. Ed. 195; People v. Ratz, 46 Pac. 916; People v. Slatter, 51 Pac. 957; Jones on Evidence, pars. 319, 320; People v. Mayne, 50 Pac. 654.

In laying the foundation for impeachment by proof of contradictory or inconsistent statements, exact precision as to time, place and person is not necessary. 10 Enc. Pl. & Pr. 283; Donahue v. Scott, 30 S. W. 385; Ry. Co. v. Williams, 113 Ala. 620; State v. Glynn, 51 Vt. 579; People v. Gardner, 32 Pac. 880; People v. Lambert, 52 Pac. 307; People v. Turner,, 4 Pac. 553; People v. Bosquet, 47 Pac. 879.

C. R. Gailfus and *J. J. Kehoe,* for the respondent.

There are cases which warrant the court, in the exercise of its discretion, to permit and even require leading questions to be put to one's witness, as when the witness is reluctant or a child of tender years, or persons of old age, ignorance or of other infirmity, who are unable to state important facts without some aid or suggestion. Jones on Ev., section 818; Moody v. Rowell, 28 Am. Dec. 322; Turney v. State, 47 Am. Dec. 77; Bannen v. State, 91 N. W. 107; People v. Bernor, 74 N. W. 184; Porath v. State, 63 N. W. 1061.

Permitting leading questions is in the discretion of the trial court, subject to exception only for improper exercise of the discretion. Jones on Ev., section 819; Proper v. State, 55 N. W. 1035; State v. Peterson, 82 N. W. 329.

It is within the discretion of the trial judge to put leading questions to a witness if necesary to elicit the truth. Long v. State, 95 Ind. 481; Huffman v. Cauble, 86 Ind. 591; Vernedoe v. State, 58 Am. Rep. 465; Harris v. State, 47 Miss. 318.

The rule that prosecutrix' complaint to parties after the rape will not be permitted in detail is often relaxed, where the circumstances of the case render it inapplicable. People v. Gage, 28 N. W. 835; People v. Glover, 38 N. W. 874; People v. Bernor, 74 N. W. 184; State v. Watson, 46 N. W. 868; State v. Cook, 61 N. W. 185; Welsh v. State, 82 N. W. 368; State v. Peterson, 82 N. W. 329.

Some authorities allow statements of prosecutrix detailing the circumstances. Territory v. Godfrey, 6 N. D. 46, 50 N. W. 481; Phillips v. State, 49 Am. Dec. 709; Benstine v. State, 31 Am. Rep. 593; State v. Kinney, 26 Am. Rep. 436.

Entries in a family bible are hearsay evidence and subject to the general rule by which that class of evidence is governed, that the fact sought to be proved cannot otherwise be established. People v. Mayne, 50 Pac. 654.

Before a witness can be impeached by proof of contradictory or differing statements, foundation must be laid by asking him if he made such statements. Jones on Ev., section 848; Steamboat Charles Morgan v. Kouns, 115 U. S. 69, 29 L. Ed. 316; State v. Hughes, 66 N. W. 1076.

ENGERUD, J. The defendant was tried and convicted of the crime of rape in the section degree, and sentenced to imprisonment at hard labor for a period of eleven years. He appealed from the judgment.

The facts, as claimed by the state, are that the prosecutrix, who is the defendant's niece, was at the time of the rape only 15 years of age, and resided in the same house with defendant, and usually slept in a bed in the same room where defendant had his bed; that the defendant, on three occasions during the year before the rape was committed, got into bed with the prosecutrix and attempted to have intercourse with her, but desisted without accomplishing his purpose; that about the time of her fifteenth birthday, which was on June 9, 1903, he against visited her bed and committed the crime with which he is charged; that a short time afterwards he got into bed with her again and took indecent liberties with her person, but did not have intercourse; that the prosecutrix ran away from defendant's home that same night and informed her elder brother and others of the defendant's acts. She testified that the reason she ran away was partly because the defendant whipped her that day and partly because of his indecent conduct towards

her, but the chief reason was the whipping. The testimony of the prosecutrix as to defendant's alleged misconduct was wholly uncorroborated, except so far as the complaint she made to her brother and others the night she ran away may be considered as corroboration. The defendant positively denies that he ever got into bed with the prosecutrix, and likewise denies that he ever had intercourse with her or was guilty of any misconduct whatsoever. He further asserts that she was 16 years old, instead of 15, on the 9th day of June, 1903.

There are 151 errors assigned, but they may be grouped into five classes: First, those which complain of the leading questions; second, those which complain of the misconduct of the trial judge in the examination of witnesses and remarks prejudicial to the defendant and his evidence; third, those challenging the propriety of the court's rulings in unduly limiting the cross-examination; fourth, those which complain of the court's rulings in excluding evidence offered by the defendant; fifth, those based on exceptions to the giving and refusing to give certain instructions to the jury. The record discloses that almost the entire direct examination of the prosecutrix, and especially in relation to the most material and essential facts necessary to establish the crime charged, consisted of a series of leading questions. In fact, the witness was hardly required to do more than merely assent to the statements made by the prosecuting attorney, as he related, question by question, all the facts and circumstances which went to prove the crime charged. It does not appear that any attempt was made to have the witness state the facts in her own language in response to proper questions before the leading questions were resorted to. The first question asked in reference to defendant's improper conduct was a "forked" question, which assumed a fact as to which there had as yet been no proof and asked the witness to state when it occurred. The question was: "When did Lewis O. Hazlett first come over to your bed?" Thereupon the prosecuting attorney, often aided by the trial judge, continued the examination of the prosecutrix with respect to the revolting details of the alleged crime by asking questions extremely leading in form. Throughout the entire direct and redirect examination there was hardly a single question asked which did not directly suggest the answer desired, or which gave the witness an opportunity to state any of the facts in her own language.

Whether leading questions shall be permitted or not is necessarily very largely discretionary with the trial court, and its rulings in that respect will not be disturbed, unless it is apparent from the record that the discretion was abused to the prejudice of the appellant. It is often necessary to resort to leading questions in order to elicit facts from a witness, who, because of hostility, ignorance, diffidence or other reasons will not or cannot give fair and full answers. It is often proper and commendable to direct the witness' attention to the subject of inquiry, or to refresh his recollection as to some omitted detail, by a leading question. The general rule, however, is that leading questions should not be allowed. The sound reasons for that rule are so familiar that it is needless to state them. The rule is a salutary one, and should never be departed from unless the circumstances are such as to warrant an exception; and while the question as to whether the circumstances of a given case warrant a departure from the general rule is one which must of necessity be left largely to the determination of the trial judge, yet his discretion in this respect is not unlimited. If the record shows that the circumstances did not in fact justify the departure from the rule, and the violation of the rule is such that prejudice to the objecting party may be reasonably inferred, the appellate court will not hesitate to reverse on that ground. Hardtke v. State (Wis.) 30 N. W. 723; People v. Mather, 4 Wend. 229, 248, 21 Am. Dec. 122; Turney v. State, 8 Smedes & M. (Miss.) 104, 47 Am. Dec. 74; Coon v. People, 99 Ill. 368, 39 Am. Rep. 28; Underhill on Criminal Evidence, section 211. To hold otherwise would make the rule of little value. It would be a rule which the trial court could apply in one case, and arbitrarily decline to follow in another. It would be a rule merely for the convenience of the trial court, instead of one for the benefit and protection of the parties. We think this record discloses that the method of examination pursued in this case was prejudicial error. The prosecuting witness was nearly 16 years of age at the time of the trial according to the claim of the state, and nearly 17 if the defendant's evidence as to her age is true. She was certainly old enough to tell what she knew in her own language. She was clearly not a hostile or unwilling witness.

It is claimed, however, that she was so ignorant and diffident that it was extremely difficult to elicit from her any statement of the distressing facts. It does not appear, however, that any attempt was made to have her state the facts in her own way. We

have nothing but counsel's statement to show that she was ignorant or diffident, and there is nothing in the record to substantiate his statement. There are three or four instances in the direct examination where the questions appear unanswered, and some instances where two or three questions were apparently asked in rapid succession, each more leading than the other; but, instead of indicating hesitation in answering, it appears to us that the questions were repeated in rapid succession without waiting for an answer. The question in each instance appears to have been repeated in a more clear and leading form in explanation of the first question asked, and the examiner apparently expected no answer until after the last interrogatory was added to the former ones. While some of the leading question may have been and doubtless were permissible, we can discover no sufficient reason for permitting practically all the facts to be suggested to the witness by such questions. If ample latitude in cross-examination had been permitted, the leading questions on direct examination might have been rendered less objectionable; but the record discloses that the cross-examination was confined to such narrow limits and was improperly interfered with by the trial court to such an extent that it was rendered almost wholly ineffective.

We shall not discuss in detail the numerous errors in which appellant complains that he was greatly prejudiced, because the trial court was unduly active in the examination of witnesses, and especially by its frequent interruption of the cross-examination with suggestive questions and remarks. We think the appellant's complaint in this respect is well founded. The trial court took a very active part in both the direct and cross-examination of all the witnesses for the state and the defendant. In the cross-examination of the prosecutrix, especially, he very frequently interrupted defendant's counsel by questions which necessarily suggested to the witness the proper answers to make to avoid possible inconsistencies and minimize improbabilities in her statements. His occasional remarks, also, in reply to objections by counsel or in ruling thereon, were often of such a character that the jury could hardly fail to infer that the judge was fully convinced of the truthfulness of the prosecutrix and the merits of the state's case. Such was the necessary effect of the numerous suggestive questions, interruptions and remarks by the trial judge, although, in justice to him, we will say that we are convinced that no such result was intended. It does not appear that there was any real necessity for such active

participation by the court in the examination of witnesses. The prosecuting attorney seems to have conducted the prosecution with zeal and ability ,and it does not appear that the attorneys for the defense exceeded the limits of propriety in the manner or extent of the examination or cross-examination of the witnesses, or in the form of questions asked. It requires no argument to show that this conduct on the part of the trial court was prejudicial to the defendant. The right, and even the duty, of the trial court to ask questions of the witness, for the purpose of eliciting ,fully and clearly all the facts within the witness' knowledge, cannot be questioned; but the right should be exercised with great caution, so as to avoid, if possible, anything from which the jury might infer that the trial judge had any opinion or leaning in favor of one side or the other. As every practitioner knows, the jury are usually quick to seize upon and be guided by any opinion which they think the trial judge entertains as to the merits of the case or the weight of any particular evidence. The statutes of this state prohibit the expression of any opinion on the facts by the trial judge. Sections 8176, 8217, Rev. Codes 1899. These provisions were discussed by this court in Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003, and again in State v. Barry, 11 N. D. 428, 92 N. W. 809. In those cases the instructions of the court were held to be objectionable because they indicated the opinion of the trial judge as to the facts. But it is apparent that the trial judge's opinion as to the merits of the case may be manifest by conduct or remarks in any other stage of the trial, as well as by the express language in the charge, and it is equally a violation of the spirit of the statutory prohibitions, whichever way the opinion is indicated. Wheeler v. Wallace (Mich,) 19 N. W. 33; Sharp v. State, 51 Ark. 147, 10 S. W. 228, 14 Am. St. Rep. 27. See valuable note to this case in 14 Am. St. Rep. 38 et seq. See, also, collection of cases in note "h," under Street Ry. v. Stroh, 57 L. R. A. 882.

The errors assigned relating to alleged improper restrictions upon the cross-examination of the state's witnesses are too numerous to be discussed in detail. We think the errors in this respect will be sufficiently guarded against on the new trial by the observance of the general rules which ought to govern such examination. The cross-examination was unduly limited in scope. The state's case depended wholly on the testimony of the prosecutrix, who was almost wholly uncorroborated, and her testimony had been elicited by extremely leading questions. While such an

accusation as this is often difficult of proof, it is also often still more difficult to refute. The prosecutrix is generally, as in this case, the only witness who can give direct testimony as to the facts constituting the crime, and the defendant alone, as in this case, can directly deny those facts. In the nature of things, therefore, the verdict to be given depends almost entirely upon the relative weight and credibility of the conflicting testimony of these two witnesses. This case, therefore, is one which especially demanded latitude of cross-examination, because that was to a great extent the only effective means by which to determine the weight and credibility of the two principal opposing witnesses. It was important that the cross-examination should extend to every fact and circumstance within reasonable limits which might tend to disclose improbabilities or inconsistencies in the witness' narrative of the facts, or which might tend to discredit the witness generally, or detract from the weight or credibility of his or her testimony in the particular case by reason of improper influences which might induce him or her to falsify. We had occasion to discuss this in the recent case of State v. Malmberg (decided at this term) 105 N. W. 614, and what was said there with respect to the scope of cross-examination is applicable here.

A few examples will suffice to show how the cross-examination of the prosecutrix was unduly limited. The prosecutrix, in response to leading questions, asserted that the defendant and she regularly occupied different beds in the same room in the house, while the other members of the family slept in the barn. The defendant attempted to show, by cross-examination of her, that the defendant always slept in the barn with the other men, except when visitors slept in the house, and in that event he occupied the room with the visitors. The testimony bore directly upon the probability of any opportunity to commit the crime without detection. The court sustained objections to this line of cross-examination, remarking that it made no difference where he slept, because the question was whether he got into bed with the witness on the particular occasions in question. The defendant also sought to obtain from the prosecutrix an admission that her brother and others had instigated the prosecution solely from ill will toward the defendant, and had "coached" the witness what to testify to, etc. It was evidently the claim of the defense that the charge was a trumped up one, and that the prosecutrix had been induced to make the accusation falsely by the defendant's enemies. This was not per-

mitted. So, also, the court would not allow inquiries as to why the prosecutrix wore shorter dresses at the trial, and by whom and for what reason she had been advised to do so, although she admitted that she had worn long dresses before and had been advised to put on short ones before the trial. The prosecutrix professed to be unable to remember even approximately the date when the crime was committed, not even the month. In view of the dispute as to whether she was 15 or 16 years old on June 9, 1903, it was highly important to know whether the crime occurred before or after that date; and the girl's professed utter lack of any recollection of the time, although the prosecution was commenced soon after she ran away from defendant's home, and the trial occurred the following spring, was a strikingly significant fact which would naturally tend to detract from her credibility, but the trial judge permitted scarcely any cross-examination on the subject. So, also, very little cross-examination was permitted of the prosecutrix with reference to her conduct and language, and the surrounding facts and circumstances, to test her fairness, truthfulness and intelligence, and to disclose any inconsistency or improbability in her statements, in the light of the circumstances and her own statements and conduct. Objections to most of the questions asked for the purposes mentioned were apparently sustained on the theory that they related to collateral matters disconnected with the issues made by the pleadings, and were therefore irrelevant and immaterial, or related to facts not brought out in the direct examination. As we explained in State v. Malmberg, supra, cross-examination within reasonable limits as to matters collateral to the issues is always proper, if the facts inquired about affect the credibility of the witness.

We think the court also improperly excluded evidence offered by the defendant which ought to have been admitted. As already stated, it was a controverted question as to whether the prosecutrix was over or under the age of consent when the intercourse occurred. The exact date of the act does not appear. The circumstances, however, so far as they were permitted to appear, indicate very strongly that, if the act occurred as claimed by the prosecutrix, it must have been in June, and probably after the 9th of that month. The state claims she was 15 on that date, while the defense claims she was 16. The point was decisive of the case, because there was not sufficient evidence to show a rape accomplished by force or threats, and it is admitted that the prose-

cutrix was in possession of all her faculties and knew the nature of the act; hence, if the act took place on or after her sixteenth birthday, there was no rape. In corroboration of the testimony of the defense as to the prosecutrix's age, the family Bible was offered in evidence. This proof was excluded as incompetent, and we think the ruling was erroneous. It had been shown that the parents of the prosecutrix died when she was very young; and she, with her brothers, had lived in the home of her mother's father since she was less than three years old, and she and her brothers continued to live with their grandfather as members of his family until his death, which occurred some time before this action arose. The Bible produced was the grandfather's family Bible, and contained entries in the grandfather's handwriting showing the names and dates of the birth of his children, and also showing the names and dates of the birth of the prosecutrix and her brothers. According to this record, the prosecutrix was born June 9, 1887, and was therefore 16 years old in 1903, as claimed by the defense. The trial court held that the book was not the family Bible of the prosecutrix's family, and hence was not admissible. If the testimony identifying the book was true, it clearly was the Bible of the prosecutrix's family in every sense of the term. After her parents' death she became a member of the family of which the grandfather was the head. The book was his Bible, in which he recorded the names and birthdays of the several members of his family. It was a book of record, open to the inspection of all the members of his family, including the prosecutrix and her brothers. But a record of this character of family history would not necessarily be incompetent, even if the prosecutrix had not become technically a member and inmate of her grandfather's household. Such records of notorious facts of family history, such as the birth of children and the like, kept by the grandfather, who was naturally conversant with the facts, made and kept by him so as to be open to the inspection of every one interested, under circumstances which negative any motive to falsify, are clearly competent. 1 Greenleaf on Evidence (16th Ed.) 114d; Wigmore on Evidence, vol. 2, sections 1480-1503.

The court also erroneously excluded the testimony of Mrs. Underwood, by whom the defense sought to show that the prosecutrix had, in a conversation with the witness, stated in effect that her brother and others had urged her to prosecute the defendant but she told them it was useless because the defendant had not com-

mitted the crime and she would tell the truth. The prosecutrix's attention had been specifically called to these alleged statements with abundant particularity as to person, time and place, during the cross-examination, and she denied making the statement. It was clearly impeaching testimony, and abundant foundation had been laid for the question to Mrs. Underwood. In this connection we will say that the abstract as printed shows only that the prosecutrix's attention was called to a similar statement to Mr. Underwood, and not to the statement to Mrs. Underwood. The abstract clearly indicates, however, that there was an error in the printed abstract in this respect, and examination of the original statement of the case in the record on file shows the fact as we have stated it.

Inasmuch as there must be a new trial, at which the evidence may be different, it is unnecessary to discuss the assignments of error based on the instruction and refusals to instruct.

The judgment is reversed, and a new trial ordered. All concur. (105 N. W. 617.)

STATE OF NORTH DAKOTA v. MARIE HARRIS.

Opinion filed October 26, 1905.

Contempt Proceedings — Unless Prompt Objection Is Made to an Unauthorized Appearance of an Attorney It Is Waived.

1. Unless an objection is promptly made to the appearance of an attorney without authority, in contempt proceedings growing out of a violation of an injunctional order, the defendant waives the right to make an objection to such appearance thereafter.

Same — Proceedings to Punish — Affidavits Upon Information and Belief Sufficient, if Facts Warranting Same Be Given.

2. The fact that the affidavits on which a warrant is issued in contempt proceedings state some conclusions upon information and belief will not warrant the setting aside of the warrant, when the affidavits state positively the facts from which the conclusions are drawn.

Same — Interrogatories.

3. The interrogatories to be filed under section 5942, Rev. Codes 1899, in contempt proceedings must relate to, and are intended to elicit, facts in respect to the contempt charged and to no other offense.

Same — Affidavits Upon Proceeding to Punish.

4. The affidavits on which a warrant is issued in contempt proceedings are admissible in evidence on the hearing.

Appeal — Incompetent Evidence — Error Without Prejudice.

5. The admission of immaterial and incompetent evidence is error without prejudice in trials to the court, where the evidence sustains the judgment without consideration of the incompetent evidence. In such cases the trial court will be presumed to have disregarded the inadmissible evidence.

Same.

6. Evidence considered, and *held* to sustain a conviction for contempt for a violation of an injunctional order.

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

Marie Harris was adjudged guilty of contempt, and appeals.

Affirmed.

M. A. Hildreth, for appellant.

Affidavits upon information and belief without personal knowledge are usually condemned. State v. McGahey et al., 12 N. D. 547, 97 N. W. 865; Swart v. Kimball, 43 Mich. 451; Kaeppler v. Red River Valley Nat. Bank, 8 N. D. 411, 79 N. W. 869; Thomas v. People of the State of Col., 9 L. R. A. 569.

Objections to the interrogatories should have been sustained. Section 5942 contains provisions that are mandatory. Noble Tp. v. Aasen, 10 N. D. 265, 86 N. W. 742, 57 Am. St. Rep. 568; State v. Root, 5 N. D. 487, 67 N. W. 590.

In contempt proceedings the acts of the asserted contempt must be stated with the certainty required in the statement of an offense in a criminal action, and upon the personal knowledge of the affiant. Herdman v. State, 74 N. W. 1097; State v. Sweetland, 54 N. W. 415; Bloom v. People, 48 Pac. 519; Freeman v. City of Huron et al., 66 N. W. 928; O'Chandler v. State, 64 N. W. 373; Zimmerman v. State, 64 N. W. 375; State v. Galup, 42 Pac. 406; State ex rel. Olson et al., v. Allen et al., 45 Pac. 644; Cooper v. People of Col., 6 L. R. A. 430; Batchelder v. Moore, 42 Cal 415.

Contempt proceedings are quasi criminal, and guilt must be established with the sufficiency of proof required in criminal cases, evidence clear and satisfactory; a mere preponderance is insufficient. In re Buckley, 10 Pac. 69; Prehohl et al. v. O'Sullivan, 80 N. W. 903; Haight v. Lucia et al., 36 Wis. 355; 5 Crim. Law Mag. and Rep. 508-509.

No presumptions or intendments are indulged. Burdick v. Marshall, 8 S. D. 308, 66 N. W. 462; Ex parte Hollis, 59 Cal. 405;

Ex parte Gould, 21 L. R. A. 751; State v. Sweatland, 54 N. W. 415; Howes v. State, 64 N. W. 699.

Offense is not established beyond a reasonable doubt. Hydock et al. v. State, 80 N. W. 902; Haight v. Lucia et al., supra; Boyd et al. v. U. S., 116 U. S. 616, 29 L. Ed. 746; Ex parte Gould, supra; Ex parte Hollis, supra.

B. D. Townsend, for respondent.

Statements upon information and belief may be disregarded and affidavits are sufficient without them. State v. Root, supra; Noble Tp. v. Aasen, supra.

Evidence of the general character of a house is competent to prove it a bawdy house. Hanson v. State, 5 Cr. Law Mag. & Rep. 693; Territory v. Stone, 2 Dak. 155, 4 N. W. 697; Territory v. Chartland, 1 Dak. 379, 46 N. W. 583.

MORGAN, C. J. This is an appeal from an order of the district court of Cass county, finding the defendant guilty of a violation of an injunctional order issued by said court on June 3, 1904. The injunctional order was issued in an action between Andrew Johnson and other as plaintiffs and Marie Harris and others as defendants. The order which it is claimed that the defendant has violated is as follows, so far as material, to wit: "It is ordered that the defendant * * * be * * * hereby enjoined, restrained and forbidden from in any manner using or occupying or permitting to be used or occupied any part of the premises described in the complaint for or as a house of prostitution or place of resort for prostitution until the further order of this court." The regularity of the proceedings in the action in which the injunctional order was issued is not questioned, nor is any question raised as to the service upon defendant of said injunctional order. In December, 1904, contempt proceedings were instituted in the district court pursuant to sections 5936 and 5937, Rev. Codes 1899, based upon affidavits charging that the defendant had violated said injunctional order. The district court thereupon issued a warrant of attachment for the defendant, and she was brought into court and pleaded that she was not guilty of a violation of the commands of the injunctional order. Thereupon written interrogatories were submitted to the defendant for written answers. Upon filing such answer and after hearing other evidence submitted by witnesses sworn in court, and upon the original affidavits, the court found the defendant

guilty of willfully violating the injunctional order, and ordered that she be punished by being imprisoned in the county jail for thirty days and by paying a fine in the sum of $250. There are numerous specifications of error, but they can be disposed of under the following general assignments: (1) That the contempt proceedings were not conducted by the state's attorney of Cass county, nor by the attorney general of the state, as provided by the provisions of section 9, c. 178, p. 235, Laws 1901. (2) That the evidence is insufficient to sustain the conviction. (3) That the affidavits on which the warrant was issued did not state facts sufficient to confer jurisdiction on the court. (4) That the interrogatories were not in compliance with section 5942, Rev. Codes 1899. (5) That errors were committed in the admission of the evidence at the hearing.

Upon the first specification it is contended that the contempt proceedings were conducted by an attorney who was not the state's attorney of Cass county, or his assistant, or the attorney general of the state, or his assistant, and was not appointed by the court under chapter 178, p. 234, Laws 1901. No objection was made to the attorney who conducted the proceedings until the costs were being taxed. The objection was then made as a ground for the disallowance of all costs. The objection that was then made was to "any hearing being had on the subject of costs * * * on the further ground that Mr. Tenneson, who appears in these proceedings, had no authority to appear in behalf of the state at no stage of the proceedings, and has no authority to conduct this prosecution, or to ask for the allowance of any costs." The objection came too late, even if conceded to be meritorious if made in time. By permitting the attorney to conduct the proceedings without challenging his authority promptly, the defendant waived the want of authority and consented to the appearance of the attorney. State ex rel. Donovan, 10 N. D. 610, 88 N. W. 717. It does not, however, appear in the record that Mr. Tenneson had no authority to appear as attorney in the contempt proceedings.

It is also urged that the affidavits on which the warrant of attachment was issued will not sustain such warrant, for the reason that the facts set forth in the affidavits are stated upon information and belief. The affidavits are too voluminous to be set forth in the opinion. A careful reading of them shows the point not to be well founded as a matter of fact. There are statements in the affidavits based on information and belief, but in every instance they

pertain to the affiant's conclusions as to the purposes for which persons entered the house owned by the defendant. This purpose was alleged upon information and belief. Without these allegations the affidavits stated sufficient facts on which to base a warrant of attachment. The purpose for which persons entered the house, as given in the affidavit, might have been stricken out, and sufficient facts would remain stated in the affidavits to sustain a warrant based thereon. The affidavits contained positive statements of facts sufficient to confer jurisdiction on the court to issue the warrant.

It is next urged that the interrogatories as filed did not comply with the terms of section 5942, Rev. Codes 1899, which provides that the "court or judge must, unless the accused admits the offense charged, cause interrogatories to be filed specifying the facts and circumstances of the offense charged against him." The objection urged to the interrogatories is that they do not in any way specify the facts and circumstances of the offense, as provided by the language of the statute. If the section could be construed to mean that the interrogatories must specify the facts and circumstances of the offense, then the statute provides that the defendant is entitled to two specifications of what the offense charged is. The affidavits on which the warrant is issued take the place of a complaint, and must state facts showing the offense complained of as a contempt. State v. Root, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568. To provide for another charge or complaint would answer no purpose. The meaning to be given to the section is that the interrogatories must inquire of, and relate to, the facts of the contempt charged, and not to any other offense or contempt. Construing the whole section together, it is clear that it means that the interrogatories shall be so framed as to elicit answers from the defendant as to the facts and circumstances of the contempt, and that it cannot be construed to mean that the filing of interrogatories shall add to, or enlarge or explain the charge already made by the moving affidavits. The use of the word "interrogatories" precludes the idea that the intention was that there should be another charge or specification of the ingredients of the offense or contempt.

It is further objected that it was error to receive in evidence the original affidavits on which the warrant was issued. There are cases so holding, but they are not based on statutes like or similar to ours. Section 5942, Rev. Codes 1899, provides that "upon

the original affidavits, the answer and subsequent proofs the court or judge must determine whether the accused has committed the offense charged." Section 5954, Rev. Codes 1899, relating to the procedure in contempt cases on appeal to this court, provides that "upon such appeal the Supreme Court may review all the proceedings had and affidavits and other proof introduced by or against the accused." Under these provisions, it seems too clear for discussion that affidavits may be used and considered on the hearing in contempt cases. The proceeding is not a trial. The defendant has no constitutional right to be confronted by the witnesses against him. The reception of affidavits to establish the offense is generally sustained by the authorities. Rapalje on Contempts, section 126.

It is further urged that error was committed in allowing the introduction of evidence as to the reputation of the house in question during certain months in the year 1904. The admission of such evidence is held error in many jurisdictions, and properly admissible in others. The authorities for and against such evidence are collected in 9 Am. & Eng. Enc. Law, p. 531. See, also, 14 Cyc. p. 510. In two cases decided by the territorial Supreme Court such evidence was held admissible. Territory v. Stone, 2 Dak. 155, 4 N. W. 697; Territory v. Chartrand, 1 Dak. 379, 46 N. W. 583. But we are not called upon to determine whether such evidence is competent in such cases. There is competent evidence in the record that amply sustains the conviction without considering the evidence that the reputation of the house was that of a house of prostitution. This evidence may be wholly disregarded and the conviction amply sustained by the positive facts proved in the case. This being true, the evidence will be deemed on appeal to be without prejudice in proceedings heard by the court, and to have been disregarded by the court in reaching its conclusion. Waldner v. State Bank (N. D.) 102 N. W. 169; Tolerton & Stetson Co. v. McClure et al., 45 Neb. 368, 63 N. W. 791; Bowman v. Sedgwick (Iowa) 82 N. W. 491; Livingston v. Swofford Bros. Dry Goods Co. et al., 12 Col. App. 320, 56 Pac. 351; Woodrow v. Hawving, 105 Ala. 240, 16 South. 720; Bowdle v. Jencks (S. D.) 99 N. W. 98; Clithero v. Fenner (Wis.) 99 N. W. 1027; 3 Current Law, p. 1584, and cases cited in note 21. It is true that the defendant denies that she kept or maintained the house or had anything to do with the running of it, or in any way violated the injunction after it was served. From a careful reading of the record we are

satisfied that the evidence clearly overcomes her testimony. It is clearly shown that the defendant knowingly permitted the house to be used as a house of prostitution after the injunction was served upon her. It is contended that in such cases the accused must be shown to be guilty of the contempt beyond a reasonable doubt. The proceedings being criminal in their character, some cases uphold that contention. The weight of authority, however, does not support that rule. The statute lays down no rule as to the degree of proof. It simply says that the court shall determine whether the accused has committed the offense. In contempt cases the rule generally followed is that the offense must be clearly shown to have been committed. 9 Cyc. p. 456, and cases cited.

On reviewing the evidence, as we are required to do when the sufficiency of the same to warrant a conviction is challenged and a statement of the case is settled, we have no hesitation in saying that the conviction was clearly shown by competent testimony not objected to.

It follows that the judgment must be affirmed. All concur.

ENGERUD, J., having been of counsel, did not sit on the hearing of the above-entitled cause, nor take any part in the foregoing opinion; Hon. CHARLES J. FISK, Judge of the First Judicial District, sitting in his place by request.

(105 N. W. 621.)

ROBERT RAE v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Opinion filed November 2, 1905.

General Power of Amendment — Same in Justice as District Court.

1. The general rules governing the exercise of the discretionary power of the court with respect to allowing amendments to pleadings are the same in justice court as in district court.

Same.

2. It was not error in justice court to allow a complaint, which alleged that plaintiff's cattle had been killed by the negligent running of defendant's train, to be amended before trial so as to allege that the injury was due to the failure of the defendant to keep its right of way fence in repair.

Same — Appeal from Justice Court — Specification of Error — Notice of Appeal.

3. Where the specifications of error in the notice of appeal from a justice's judgment on questions of law only do not raise any ques-

tion as to the sufficiency of the pleading, that question cannot be raised on appeal, where the defect in the pleading is a mere defective statement of the cause of action or defense, as distinguished from a failure to show any right of recovery or defense.

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

Action by Robert Rae against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment affirming a judgment in a justice court for plaintiff, defendant appeals.

Affirmed.

Ball, Watson & Maclay, for appellant.

The amendment proposed changed substantially the cause of action and should not have been allowed. 1 Enc. Pl. & Pr. 548, 569; Mares v. Wormington et al., 8 N. D. 328, 79 N. W. 441; Hansberger v. Railway, 43 Mo. 196; Box v. Chi., R. I. & P. Ry. Co., 78 N. W. 695; Exposition Cotton Mills v. Western A. Ry. Co., 10 S. E. 113; Bolton v. Georgia Pac. Co., 10 S. E. 352; City v. Hart et al., 57 Pac. 938; Swedish American National Bank v. Dickinson, 6 N. D. 222, 69 N. W. 455; section 5297, Rev. Codes 1899.

The judgment is void as the complaint does not state facts sufficient to constitute a cause of action. Wadsworth v. Union Pacific Ry. Co., 33 Pac. 515; Conway v. Railway, 19 Am. & Eng. Ry cases, 650.

Barnett & Richardson, for respondent.

The plaintiff, when damaged, can set out all the facts possible, which might have occurred or been proximate causes to the injury inflicted, and if he has omitted any, his right to amend is clear. Martin v. Luger Furniture Co., 8 N. D. 220, 77 N. W. 1003; Jeffersonville, Mo., I. R. R. v. Hendricks, Admr., 41 Ind. 48; Woodworth v. Thompson, 62 N. W. 450; Greer v. Louisville R. R. Co., 21 S. W. 649; Smith v. Bogenschutz, 19 S. W. 667; Smith v. Missouri R. R. Co., 56 Fed. 458; Buel v. Transfer Co., 45 Mo. 562; Kuhns v. Wisconsin R. R. Co., 40 N. W. 92; Wilhelms Appeal and Grubb's Appeal, 79 Pa. St. 120; Colley v. Gate City Coffin Co., 18 S. E. 817; Coby v. Ibert, 25 N. Y. Supp. 998.

Appellate tribunal will not review the action of the lower court in allowing an amendment, unless prejudice affirmatively appears. Martin v. Luger Furniture Co., supra; Scherar v. Prudential Co., 56 L. R. A. 611; Halloran v. Holmes, 13 N. D. 411, 101 N. W. 310;

Dunn v. Bozarth et al., 80 N. W. 811; Central City Bank v. Rice, 63 N. W. 60; Swift v. Mulkey, 12 Pa. 78; Knott v. Taylor, 96 N. C. 553; Kirstein v. Madden, 38 Cal. 158; Cheney v. O'Brien, 10 Pac. 479; Enc. Pl. & Pr. 533.

Amendments are in the discretion of the court in furtherance of justice, and the statutes allowing it are to be applied liberally. Martin v. Furniture Co., supra.

ENGERUD, J. Plaintiff recovered judgment in justice court for damages for the negligent killing of some cattle by the defendant. The original complaint averred that the cattle were run over and killed by reason of defendant's carelessness in the operation of its train. Before trial, and before defendants had filed any answer, the plaintiff was permitted to amend the complaint so as to allege that the negligence which caused the injury complained of was the fact that the defendant had neglected its statutory duty to keep in repair a fence erected by it on the line between plaintiff's pasture and the railroad right of way. The defendant objected to the allowance of the amendment on the ground that the matter alleged therein was a departure from the original cause of action and constituted a wholly new and different cause of action, which the defendant was not prepared to meet. After allowing the amendment the justice continued the case to a subsequent date. On the adjourned day the defendant again appeared and renewed its objection to the amendment of the complaint, and the objection was again overruled. The defendant thereupon stated that he declined to file any answer in the case, and would stand on the objections theretofore interposed. The justice heard the plaintiff's evidence and rendered judgment in his favor. The defendant appealed to the district court on questions of law, specifyifng as error the rulings of the justice allowing the amendment. The district court affirmed the justice's judgment, and defendant thereupon appealed to this court.

Appellant admits that the same general rules prevail in justice court as in district court with respect to the allowance of amendments, and we have recently so held in Morgridge v. Stoefer (decided at this term) 104 N. W. 1112. Appellant contends that it is never permissible to amend so as to add to or substitute for the original cause of action a new or different one, and that the amendment in this case was a violation of that rule, because the original complaint averred neglect of a common-law duty, and the amendment alleged omission of a statutory duty. It is doubtless true,

in a limited sense, that the amendment set forth a new and different cause of action and was a substantial departure from the cause of action originally alleged. The mere fact that the amendment constitutes a departure in pleading, or adds or substitutes a new or different cause of action in the strict sense of those terms, is no good reason for disallowing an amendment. The statute nowhere forbids such an amendment. It directs that amendments shall be allowed at any stage of the proceedings, "if substantial justice will be promoted thereby." Section 6666, Rev. Codes 1899. The only express statutory restriction with respect to the nature of the amendments to be allowed are those imposed by section 5295, defining failure of proof, and the last clause of section 5297, relating to amendments at or after the trial to conform to the proof. Section 5295 defines what shall be deemed a failure of proof, and in effect forbids amendments at the trial to cure a failure of proof. The last clause of section 5297 in effect forbids an amendment to conform the allegations to the proof, if the proposed amendment effects a substantial change in the "claim or defense." Subject to the restrictions just mentioned, it is the duty of the court to allow amendments whenever "substantial justice will be promoted thereby." The object of statutes of this character is to facilitate and insure a full, fair and speedy determination of the actual claim or defense on the merits by requiring the court to permit the pleading to be amended, if for any reason they do not fully and fairly present all the facts essential to the real merits of the claim or defense. It is clear, therefore, that an amendment of the complaint is not objectionable merely because it introduces a new or different cause of action in the technical meaning of that term. In Smith v. Palmer, 6 Cush. 513, in dealing with this question, it was said (page 519): "New counts are not to be regarded as for a new cause of action, when the plaintiff in all counts attempts to assert rights and enforce claims growing out of the same transaction, act, agreement or contract, however great may be the difference in the form of liability as contained in the new counts. In such cases all the various counts are but variations in the forms of liability, which is the very purpose and object of amendments." See, also, Connell v. Putnam, 58 N. H. 335; Daley v. Gates, 65 Vt. 591, 27 Atl. 193; Mayor v. Gear, 27 N. J. Law, 265; Spice v. Steinruck, 14 Ohio St. 213. In this case the amendment alleged the same injury as the original complaint, but presented a different version of the manner in which the injury was caused and the

liability incurred. The defendant clearly suffered no prejudice by the amendment. It was offered before trial, and the adjournment thereafter taken afforded more time to prepare for trial on the new issues tendered than lapsed from the issuance of the summons until the return day. We accordingly hold that the discretion of the justice was properly exercised.

The sufficiency of the facts pleaded to constitute a cause of action is questioned for the first time in this court. No error covering that point was specified in the notice of appeal from the justice's judgment, and no objection to the sufficiency of the pleading was made in justice court. On appeal from a justice only those rulings can be reviewed which are specified as error in the notice of appeal. Section 6771a, Rev. Codes 1899. Without determining whether or not the sufficiency of a pleading is open to question without proper specifications, if it discloses that no cause of action or defense is set forth, it is sufficient to say in this case that the alleged insufficiency is a mere defective statement of the cause of action, rather than a failure to show any ground for recovery.

The judgment is affirmed. All concur.

(105 N. W. 721.)

THE ROBERTSON LUMBER COMPANY v. THE STATE BANK OF EDINBURG, A CORPORATION.

Opinion filed November 2, 1905.

Mechanic's Lien — Subcontractors.

1. Subcontractors are entitled to a direct lien for work done or materials furnished under contract between contractors and the owner of the land or building, under section 4788, Rev. Codes 1899.

Same — Effect of Failure to File Within Ninety Days.

2. A claim for a lien by a subcontractor must be filed within ninety days after the materials are furnished or the work done, and, unless filed within said time, the lien is defeated as against purchasers and incumbrancers in good faith acquiring rights to the property after said time and before a lien is filed.

Same — Effect of Such Failure Upon the Owner.

3. If the claim or demand for a lien be not filed within ninety days, but is filed after said time, the lien is not defeated as against the owner, except as to payments made after the ninety days and before the claim or demand for a lien is filed.

Same — Pleading — Allegation of Amount Due.

4. A complaint setting forth all the facts necessary to create a lien states a cause of action, although it contains no allegation that there is anything due the contractor from the owner .

Same — Allegation of Payment — Answer Need Not Be Denied in Complaint.

5. The fact of payment, being an affirmative defense, is a matter to be alleged in the answer, and need not be negatived by an allegation in the complaint.

Same — Allegation of Notice — Pleading Conclusion.

6. An allegation of a complaint "that prior to the filing of said lien the plaintiff had notified defendant by registered letter that it had furnished said materials to the said * * * company" is not the statement of a conclusion, and is sufficient as an allegation of notice.

Appeal from District Court, Walsh county; *Fisk,* J.

Action by the Robertson Lumber Company against the State Bank of Edinburg. From a judgment for plaintiff, defendant appeals.

Affirmed.

H. A. Libby, for appellant.

In an action by a subcontractor or material-man he must allege that something was due the original contractor at the time the lien was filed. 13 Enc. Pl. & Pr. 980; Turner v. Strenzel et al., 70 Cal. 28, 11 Pac. 389; Wilson v. Barnard et al., 67 Cal. 422, 7 Pac. 845; Rosenkranz v. Wagner, 62 Cal. 154; Renten v. Connolly, 49 Cal. 187; Spangler v. Green et al., 21 Col. 505, 42 Pac. 674; Jenson v. Brown, 2 Col. 694; Epley v. Scherer, 5 Col. 536; Thomas v. Ill. Industrial University, 71 Ill. 310; Martin v. Morgan, 64 Iowa, 270; Leiegne v. Schwarzler, 10 Daly, 547; Parsley v. David, 106 N. C. 225; Mills v. Paul, 30 S. W. 558; Pillenwider v. Longmoor, 73 Tex. 480; McNeil Pipe Co. v. Bullock, 38 Fed. 565.

One claiming a mechanics' lien must by his pleading bring himself within the terms of the statute creating the right. 13 Enc. Pl. & Pr. 969, 970, 972; Goulding v. Smith, 114 Mass. 487; Crowl v. Nagle, 86 Ill. 437; Foster v. Poillon, 2 E. D. Smith, 556; Anderson v. Seamans, 49 Ark. 475; Cook v. Heald, 21 Ill. 425.

Complaint should set forth the contents of the notice to show the sufficiency under the statute. 13 Enc. Pl. & Pr. 985, 986; Russ Lumber Co. v. Garrettson, 87 Cal. 589, 25 Pac. 747; Schillinger

Cement Co. v. Arnott, 14 N. Y. Supp. 326; Kechler v. Stumme, 36 N. Y. Sup. Ct. 337; Pilz v. Killingsworth, 20 Ore. 432, 26 Pac. 305; Minor v. Marshall, 6 N. W. 194; 13 Enc. Pl. & Pr. 986, 987; Arkansas River Land Co. v. Flinn, 3 Col. 381; Cook v. Rome Brick Co., 98 Ala. 409.

Subcontractor must plead and prove funds in the owner's hands before he can recover. Red River Valley Lbr. Co. v. Friel et al., 73 N. W. 203.

Skulason & Skulason, for respondent.

Allegation that "due notice" was given would be sufficient. Boisot on Mech. Liens, 551.

If complaint were silent as to notice, it would still be sufficient, as it alleges the owner's knowledge and shows that notice would be superfluous. Boisot on Mech. Liens, par. 740; Andrews et al. v. Burdick et al., 16 N. W. 275; Gilchrist v. Anderson et al., 13 N. W. 290.

Two systems of legislation prevail in the United States. The New York, where a subcontractor's lien exists by reason of subrogation to the rights of the contractor. The Pennsylvania, where the lien of the subcontractor is direct. Boisot on Mech. Liens, Pars. 225, 227; 2 Am. & Eng. Enc. Law, 370, 444, 458, 460; Pomeroy v. White Lake Lbr. Co., 49 N. W. 1131.

Abandonment of contract by the contractor does not affect the material man. Red River Lbr. Co. v. Children of Israel et al., 7 N. D. 46, 73 N. W. 203.

MORGAN, C. J. The complaint alleges the following facts, to wit: That in May, 1900, O. A. Braseth & Co., contractors, entered into a contract with the defendant, by which that firm agreed to furnish all the materials for and erect a certain two-story bank building for said defendant for the sum of $2,918. The lumber and some other of the materials used in said building were purchased by said Braseth & Co. from the plaintiff at the agreed price, and were of the value of $631.72, and the defendant, "during all of said time * * * knew, was apprised of, and had full knowledge of the fact that the plaintiff * * * was furnishing the lumber and other building materials to the said Braseth & Co. * * * for use in and about the construction of the said defendants said building;" that said Braseth & Co. has not paid said sum to the plaintiff, nor has the defendant paid said sum to the

plaintiff; that on December 15, 1902, the plaintiff caused a claim for a lien against said building to be filed in the office of the clerk of the district court, which said claim for a lien contained a statement of all the facts necessary to be stated therein; that prior to the filing of said lien the plaintiff had notified the defendant by registered letter that it had furnished said materials to said Braseth & Co. The plaintiff demands a foreclosure of its lien, and the sale of said building to satisfy said lien, with costs. The defendant demurred to the complaint on the ground that it fails to state facts sufficient to set forth a cause of action against the defendant bank. The trial court overruled the demurrer, and defendant appeals from the order overruling it.

The defendant advances two grounds upon which it claims that the demurrer should be sustained: (1) That it fails to show that the defendant owes Braseth & Co. any money by virtue of the contract; (2) that the notice alleged to have been given to the defendant of the furnishing of the materials for the building is not properly pleaded.

It will be seen that Braseth & Co. were the contractors for the erection of the building under contract with the defendant, the owner. The plaintiff furnished materials for the building under contract with Braseth & Co., and was a subcontractor, under the provisions of the statute. Section 4800, Rev. Codes. The lien was not filed by the plaintiff until more than two years after the materials were furnished. The rights of subcontractors under liens filed under such circumstances are involved in the appeal. The defendant contends that subcontractors are not entitled to a direct lien for materials furnished, and cannot claim a lien, under the circumstances of this case, without alleging and proving that the defendant has money in its hands belonging to Braseth & Co. under the contract.

The statutes which control a decision in this case are as follows: Section 4788, Rev. Codes 1899, provides that "any person who shall perform any labor or furnish any materials * * * for the erecting * * * of any * * * buildings * * * upon land * * * under contract with the owner of such land, his agent, * * * contractor or subcontractor, or with the consent of such owner, shall, upon complying with the provisions of this chapter, have, for his labor done or materials * * * furnished, a lien upon such building * * * and the land belonging to such owner * * * to secure the payment. * * * The

owner shall be presumed to have consented to * * * the making of any such improvement if at the time he had knowledge thereof and did not give notice of his objection thereto to the person entitled to the lien." Section 4791, Rev. Codes 1899, provides that all claims for liens under the provisions of the chapter on mechanics' liens shall be filed in the office of the clerk of the district court within ninety days after the materials have been furnished; "but a failure to file the same within the time aforesaid shall not defeat the lien, except as against purchasers or incumbrancers in good faith and for value, whose rights accrue after the ninety days and before any claim for the lien is filed, or as against the owner except the amount paid to the contractor after the expiration of the ninety days and before the filing of the same."

The contention of the appellant is that these provisions do not directly and positively authorize a lien in favor of a subcontractor. The contention is that a subcontractor has only a conditional right to a lien, depending upon the fact whether there is money in the owner's hand due to the contractor when the lien is filed; in other words, that the subcontractor is entitled to a lien by subrogation only. We cannot agree with this construction of the statute. The language is plain that a subcontractor has a lien if he has furnished materials or done work on a building and files his claim therefor. The filing of it within ninety days after the materials are furnished makes the lien effective as against every one acquiring rights in the land or building. If filed after said ninety days, the lien is still preserved intact, except as to those in good faith acquiring rights to the property after the ninety days and before the lien is filed. The lien still remains as against the owner, except as to payments made to the contractor after the ninety days had expired and before the lien is filed. To construe these provisions as giving a lien by subrogation only would be to read into the statute what was not placed there, nor intended to be placed there, by the legislature. Giving to the language of these sections their plain meaning, they give to a subcontractor a lien without regard to the state of the account between the contractor and the owner. The owner must keep advised as to whether the materials used in his building are paid for or not, and if he pays the contractor during the ninety days after the materials are furnished, or thereafter, after a lien is filed, he does so at his peril. In other words, subcontractors are protected by the statute. This is not a hardship upon the owner. He can easily secure himself against the failure of contractors to

meet their obligations with those who furnish materials for or work on the building. However, we have nothing to do with the policy of the statute. That rests with the legislature. It has seen proper to protect subcontractors as against contractors in certain contingencies. It has adopted what is known as the "Pennsylvania system," as against the "New York system." Phillips on Mechanics' Liens, section 57; Boisot on Mechanics' Liens, section 225; Hunter v. Truckee Lodge, 14 Nev. 24; Colter v. Frese, 45 Ind. 96; Albright v. Smith, 3 S. D. 631, 54 N. W. 816; Laird v. Moonan, 32 Minn, 358, 20 N. W. 354; Spokane Lumber Co. v. McChesney, 1 Wash. St. 609, 21 Pac. 198; Merrigan v. English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837.

The appellant urges that the demurrer should be sustained for the reason that the complaint fails to show that the defendant, as owner of the building, has any money in its hands due to the contractors under the contract. The authorities that hold that a subcontractor has not a direct lien on the building seem to sustain such contention. Those authorities that construe the statutes to give a direct lien in favor of subcontractors hold such an allegation unnecessary. In the latter cases these facts are held to be matters of defense to be raised by answer. A defense of payment is an affirmative defense to be raised by answer. Such an allegation is not part of the cause of action for the foreclosure of a lien. This complaint sets forth all facts necessary to the creation of a lien, and that is sufficient. It is not necessary to negative the possible defense of payment. That is a fact resting within the knowledge of the defendant. If payments were made by the defendant between the expiration of the ninety days after the materials were furnished and the time of the filing of the lien after the ninety days had expired, it should be alleged as a defense, and need not be negatived by an allegation in the complaint. As stated by the court in Hunter v. Truckee Lodge, supra: "Our opinion is that it was the intention of the legislature to give the material-men and subcontractors claiming liens under the law the benefit of a presumption that contracts made with the original contractor were authorized by the owner of the premises; and if, under the statute or under the constitution, it is a good defense for the owner to show that he has paid in good faith and in pursuance of his contract all that he agreed to pay before notice of the claims of third persons, he is bound to allege and prove the fact." Phillips on Mechanics' Liens (2d Ed.) section 294; Boisot on Mechanics'

Liens, section 634. This is in harmony with the general rule of pleading, applicable to action on mechanics' liens as well as to others of a similar nature. Boisot on Mechanics' Liens, section 534; Doughty v. Devlin, 1 E. D. Smith (N. Y.) 625.

The defendant further urges that the allegation of the complaint, to wit, "that prior to the filing of said lien the plaintiff had notified the defendant by registered letter that it had furnished said materials to said A. O. Braseth & Co.," is the pleading of a conclusion only, and therefore cannot be sustained as against a demurrer. The statute provides that the subcontractor shall not be "entitled to file such lien unless he notify the owner of the land by registered letter previous to the completion of said contract that he has furnished said materials." Section 4788, Rev. Codes 1899. The complaint also alleges that the contract has not yet been completed. We hold the fact of the giving of the notice properly pleaded by such allegation. The words "said materials" refer to the materials previously described in the complaint. The complaint describes the materials furnished as consisting of lime, cement, lumber, brick, tiling, sash, doors, windows, carpet felt, moulding, etc. The price and value are given, as well as the time when furnished. Conceding the giving of such notice to be an essential allegation to the cause of action, we have no hesitation in holding that it pleads the necessary facts specifically, and not by statements of conclusions merely.

The question of the constitutionality of the statute granting direct liens to subcontractors as construed by us has not been argued, nor is its unconstitutionality seriously urged upon us. We will therefore not discuss the question, but will cite some of the cases holding such laws constitutional. Spokane Manufacturing & Lumber Co. v. McChesney, supra; Albright v. Smith, supra; Laird v. Moonan, supra; Boisot on Mechanics' Liens, section 23, and cases cited.

Order affirmed. All concur.

(105 N. W. 719.)

ANN JOHNSON v. NELS V. ERLANDSON ET AL., DEFENDANTS, AND NELS V. ERLANDSON, RESPONDENT.

Opinion filed November 4, 1905.

Notice — Facts Putting Upon Inquiry.

1. Where a person, by reason of actual notice of a given fact, is sought to be charged with notice of other facts which inquiry would disclose, there must appear in the nature of the case such a connection between the known fact and the fact with notice of which he is sought to be charged that the former may be said to furnish a reasonable and natural clue to the latter.

Vendor and Purchaser — Defect in Title — Constructive Notice.

2. The fact that a purchaser from B, who claimed title under a recorded deed from E, valid on its face, knew that the deed from a previous owner to E was missing and unrecorded, was not sufficient to charge such purchaser with constructive notice of the fact that B's deed had been wrongfully obtained by the latter.

Estoppel — Failure to Assert Title.

3. Where the grantor in a deed deposited in escrow knew that the grantee named therein had wrongfully obtained possession thereof and had it recorded, and negilgently permitted the grantee's apparent ownership to remain unchallenged for an unreasonable length of time, such grantor is estopped to deny the grantee's title as against an innocent purchaser from the latter.

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

Action by Ann Johnson against Nels V. Erlandson. Judgment for defendant, and plaintiff appeals.

Reversed.

James T. McCulloch and *John F. Philbrick*, for appellant.

Where one of two innocent persons must suffer, he whose negligence caused the loss must bear it. Blight v. Schenck, 10 Pa. St. 293; Noble v. Moses, 74 Ala. 604; Hill v. Howe, 6 Mackey, 428; McLelland v. Bartlett, 13 Ill. App. 236; Hertell v. Bogart, 9 Paige, 52; Wilson v. Scott, 13 Ky. Law Rep. 926; McDermott v. Barnum, 19 Mo. 204; Levy v. Cox, 22 Fla. 546, Id. 580; McNeal v. Jordon, 28 Kan. 7; Lawrence et al. v. Guaranty Investment Co., 32 Pac. 816; Simon v. Commerce Bank, 43 Hun. 156; Crosland v. Powers, 13 S. W. 722.

Where one discovers that his grantee is fraudulently in possession of a deed, and is holding himself out as the owner of the

land described therein, and fails to make known the fraud to the public, such grantor will not be protected against a bona fide purchaser. 1 Bigelow on Frauds, 613; McKenzie v. British Linen Co., 6 App. Cas. 82, 109; People v. Bank of North America, 75 N. Y. 584, 562; N. Y. & N. H. R. R. Co. v. Schuyler et al., 34 N. Y. 30; Bailey v. Crim, 9 Biss. 95; Quick v. Mulligan, 108 Ind. 419, 58 Am. Rep. 49; Bright v. Schenck, 10 Pa. St. 285, 51 Am. Dec. 478; Simpson v. Bank of Commerce, 43 Hun. 156, 120 N. Y. 632; Hubbard v. Greeley, 84 Me. 340; Haven v. Kramer, 41 Iowa, 384; Castello v. Meade, 55 How. Pr. 356; Gavagan v. Bryant, 83 Ill. 376.

A. T. Patterson, George E. Q. Johnson, for respondents, and *Newton & Dullam,* of counsel.

If the grantor deliver a deed to a third person as escrow to be by him delivered upon some future event, it is not the grantor's deed until the second delivery. Foster v. Mansfield, 3 Metc. 412, 37 Am. Dec. 154; Monroe v. Bowles, 187 Ill. 346; Arnegaard v. Arnegaard et al., 7 N. D. 475, 495, 75 N. W. 797; White v. Cove, 20 W. Va. 272.

A deed is not effective until delivered. 1 Wood on Conv. 193; Sheps. Touch. 57; Co. Litt. 356 b; Oliver v. Stone, 24 Ga. 63; Jackson v. Sheldon, 22 Me. 569; Armstrong v. Stowall, 26 Miss. 275; Corman v. Corman, 26 N. J. Eq. 316; Thatcher v. St. Andrews Church, 37 Mich. 264; Dwinnell v. Blis, 58 Vt. 356; Fairbanks v. Metcalf, 8 Mass. 230; Mitchell v. Bartlett, 51 N. Y. 453; Tuttle v. Turner, 28 Tex. 759; Blake v. Fash, 44 Ill. 302; City Bank of McClellan, 21 Wis. 113; Jackson v. Bard, 4 Johns. 230; Harrington v. Gage, 6 Vt. 532.

Delivery is a mixed question of law and fact. Easle v. Easle, 20 N. J. L. 347; Hurlbert v. Wheeler, 40 N. H. 73.

Delivery in escrow is not a present conveyance. Foster v. Mansfield, supra; Price v. P. & Ft. W. R. R., 34 Ill. 13; Hathaway v. Payne, 34 N. Y. 106; Cook v. Brown, 34 N. H. 465.

What is sufficient to put one upon inquiry is legal notice. Rupert v. Marks, 15 Ill. 540; 2 Pom. Eq. Jur. 597; Gress v. Evans et al., 1 Dak. 387, 399; Doran v. Dazey, 5 N. D. 167, 64 N. W. 1023; sections 5114, 5118, Rev. Codes 1899.

ENGERUD, J. The plaintiff brought this action to quiet title to 320 acres of land situated in McLean county. On and prior to April, 1892, the land was owned by one Emanuel Hogenson. On

the date last named Hogenson and wife conveyed it to Nels V. Erlandson by a deed of warranty, which has never been placed of record. On May 17, 1892, Erlandson and wife executed a deed to one Milton P. Baker and left the same in the possession of one Anders E. Anderson, to be delivered in case Erlandson approved of certain California property which Baker proposed to give him in exchange for the land in question. The proposed trade was rejected by Erlandson. Notwithstanding the fact that the trade was not completed or the conditions warranting the delivery of the deed performed, Baker obtained possession of the deed and placed it of record on September 28, 1892. On September 15, 1894, Baker conveyed the land to the plaintiff, Ann Johnson, by warranty deed which was placed of record on February 25, 1895. The plaintiff redeemed the premises from tax sales for the years 1892 and 1893, and has paid the taxes ever since, and is now, and has been for several years, in possession of the land through tenants. Previous to the time plaintiff took actual possession the land was unoccupied. The trial court found that Baker was not entitled to a delivery of the deed, and that the deed was not delivered to him, and that the plaintiff acquired no title through her deed from Baker, and entered judgment canceling said deed of record, and quieting defendant's title. Plaintiff appeals, and demands a review of the entire case.

It appears that Erlandson left the deed of the property in question with Anderson, who occupied the same office with Baker in Chicago, and that Baker also left with Anderson a deed to Erlandson of the California property, both to be delivered by Anderson, if Erlandson was satisfied with the California property. It is not clear how the deed came into Baker's possession. Baker is dead. Anderson testifies that he did not give it to him; that it was on his desk and disappeared from it without his knowledge or consent. It is clear that there was no authorized delivery, and, as between the parties, it did not, therefore, pass title. It is clear that, as between Erlandson and Baker, there was no delivery of the deed, but we think the defendant is estopped, as against this plaintiff, to deny Baker's title or right to convey. The evidence shows beyond question that the plaintiff, in the utmost good faith, paid Baker full value for the land, and accepted a conveyance from him believing him to be the owner. The negotiations which resulted in the conveyance from Baker to plaintiff were conducted in behalf of plaintiff by one Edwards. Baker furnished Edwards with an

abstract of title which disclosed that no deed had been recorded from Hogenson, the former owner, to Erlandson. In explanation of this apparent defect, Baker stated that Erlandson had a deed from Hoganson, but had lost it, and, to remedy the defect in the record title, he (Baker) had procured from Hogenson and wife an affidavit in which they both deposed that they had duly conveyed the land to Erlandson by a warranty deed dated on or about May 1, 1892, which deed they both had voluntarily executed and delivered to Erlandson. The affidavit had been recorded, and the original accompanied the abstract. Edwards deemed the affidavit sufficient evidence to account for the missing deed, and the trade thereupon consummated. In 1902 Mrs. Johnson sought to mortgage the land to secure a loan, and the lender evidently declined to accept the Hogenson affidavit as a sufficient explanation of the absence from the record of the Hogenson deed. This action was thereupon commenced to clear the title. The plaintiff then learned for the first time that Baker's title was denied by Erlandson, and that the latter had not lost the Hogenson deed, but had kept it off the record on the theory that his rights were thereby protected.

It is urged by respondent that the failure to record the deed from Hogenson to Erlandson was sufficient as a matter of law to put Edwards on inquiry as to Erlandson's rights; and that, inasmuch as Edwards was the agent of plaintiff, the latter is chargeable with notice of the facts which inquiry of Erlandson would have disclosed. We cannot agree with this argument. The fact that the record failed to show that Hogenson had ever parted with his title was constructive notice of Hogenson's rights and nothing more. The only subject of inquiry suggested by that fact was the question as to whether or not Erlandson had unconditionally acquired Hogenson's title. It is admitted that such is the fact. There was nothing on the record suggesting any question as to the validity of Erlandson's deed to Baker. While it is a general rule that one who has knowledge of facts sufficient to put him on inquiry is deemed to have notice of the facts which reasonable inquiry would disclose, that rule does not impute notice of every conceivable fact and circumstance, however remote, which might come to light if every possible means of knowledge were exhausted. It was well said by Judge Wright, in Birdsall v. Russell, 29 N. Y. 250: "There must appear in the nature of the case such a connection between the facts discovered and the further facts to be discovered that the former may be said to furnish a reasonable

and natural clue to the latter." See also, cases cited in note Am. & Eng. Enc. Law, vol. 21, p. 585. The fact that Hogenson's deed to Erlandson was missing would not create any reasonable or natural ground for suspecting that Erlandson's deed to Baker was invalid. It is true that inquiry of Erlandson for the missing deed would doubtless have led to the discovery of Baker's want of title; but we do not think that it can be held on the facts of this case that it was the legal duty of the plaintiff to hunt up Erlandson to ascertain from him why the deed had not been recorded. It was not incumbent on the plaintiff to exhaust every possible source of information. It is undisputed that neither she nor her agent knew Erlandson, or had any knowledge of his whereabouts. She had been assured by the sworn statement of Hogenson and wife that they had conveyed their title to Erlandson. In view of the latter's deed to Baker, she could not reasonably expect anything but corroborative information from Erlandson. The plaintiff is therefore an innocent purchaser for value, without notice of the invalidity of Baker's title.

There is a conflict of authority on the question as to whether an unauthorized delivery of a deed held in escrow conveys any title even in favor of an innocent purchaser. We express no opinion on that question, as we are satisfied that upon the evidence in this case it must be held that the defendant is estopped by his own negligence to deny Baker's right to convey to plaintiff. The deed from defendant to Baker was taken from the custody of the depository and recorded September 28, 1892. The defendant was fully aware of that fact within a very short time after it occurred. He made occasional demands upon Baker for a reconveyance, but permitted himself to be lulled into inaction by Baker's promises to reconvey or settle in some other manner. The defendant's action after he discovered the abstraction and recording of the deed is such that it gives, at least, ground to claim that he ratified the unauthorized delivery and accepted Baker's promise of compensation for the land. He never paid any taxes on the land, or exercised any dominion over it, and knowingly permitted Baker to hold himself out to the world as the rightful grantee. This condition of affairs had existed for about two years before plaintiff purchased. Since that time defendant has never attempted to assert his right to the land until this action was commenced. Meanwhile Baker had died. Reasonable regard for the rights of third persons, as well as a prudent regard for his own, required of the defendant that

he should take prompt steps to make known that Baker's apparent title was not real. His deed, apparently valid, had vested Baker with all the indicia of ownership, and to third persons, ignorant of the undisclosed facts, the grantor's long continued silence operated as an assurance that the deed was invalid. Under such circumstance, it was the duty of the defendant to act promptly and make known the hidden vice in Baker's claim of title. If he had performed this duty, which ordinary fair dealing demanded, no loss could have resulted to himself or third persons from Baker's wrongdoing. Having failed in this duty, he must bear the consequences of his own negilgence. Mays v. Shields, 117 Ga. 814, 45 S. E. 68; Costello v. Meade, 55 How. Prac. (N. Y.) 356; Haven v. Cramer, 41 Iowa, 384; Quick v. Milligan, 108 Ind. 419, 9 N. E. 392, 58 Am. Rep. 71; Connell v. Connell, 32 W. Va. 319, 9 S. E. 252.

The judgment of the district court is reversed, and the court will render judgment in favor of plaintiff for the relief demanded in the complaint. All concur.

(105 N. W. 722.)

THE STATE OF NORTH DAKOTA v. ERNEST MALMBERG AND JOHN MALMBERG.

Opinion filed November 8, 1905.

Witness May Be Cross-Examined as to Specific Facts Showing Motive for Falsifying When He Denies Such Motive.

1. On cross-examination, the examining party has an absolute right, within reasonable limits, to interrogate the witness as to specific facts and circumstances which tend to show ill will or other motive for falsifying, although the witness has denied the existence of such motives.

Same — Contradiction of Witness on Collateral Matters.

2. Where the facts which it is sought to establish by cross-examination, for the purpose of discrediting the witness, are such as to detract from his credit or capacity to testify truly in the particular case on trial, as distinguished from facts discrediting him generally, the rule forbidding contradiction of a witness on collateral matters does not apply.

Ill Will of Witness — Cross-Examination as to Cause, Nature and Extent Whereof.

3. Where a party is seeking to show that an adverse witness' testimony should be discredited by reason of ill will or an existing

temptation to falsify in the case on trial, he has the right to show so much of the facts and circumstances as may be necessary to fairly inform the jury of the cause, nature and extent of the alleged improper influence.

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

Ernest Malmberg and John Malmberg were convicted of maintaining a liquor nuisance, and appeal.

Reversed.

Young, Wright & Jones, for appellants.

A witness may be cross-examined so as to test his bias, prejudice or hostility towards a party to the suit, and asked whether he has a controversy with him against whom he is testifying. Atwood v. Welton, 7 Conn. 66; Selph v. State, 22 Fla. 637; State v. McFarlan, 6 So. 728; Blessing v. Hapr, 8 Md. 31; People v. Christie, 2 Abb. Prac. 256; State v. Mase, 24 S. E. 798; Daffin v. State, 21 Tex. App. 76; Kellogg et al. v. Nelson et al., 5 Wis. 125; Fincher v. State, 58 Ala. 215.

Cases holding that it is improper on cross-examination to go into the cause of a witness' hostile feelings are confined to those where he admits them. People v. Macard, 40 N. W. 784; State v. Berrier et al., 12 S. E. 251; Conveyer v. Field, 61 Ga. 258; Patman v. State, Id. 379.

C. N. Frich, Attorney General, and *Alfred Zuger*, for respondents.

The conduct and extent of the cross-examination of a witness, affecting his credibility, is largely in the discretion of the trial court. Storm v. United States et al., 94 U. S. 76, 24 L. Ed. 42.

Questions irrelevant to the matter in issue cannot be asked of a witness to impeach him. U. S. v. Dickinson, Fed. Cases No. 14958; Rosenbaum v. State, 33 Ala. 35b; 2 Elliott on Ev. section 977; Odiorne v. Winkley, Fed. Cases No. 10432, 15 So. Rep. 914.

ENGERUD, J. Defendants appeal from a judgment rendered pursuant to a verdict convicting them of the crime of maintaining a nuisance, as defined in section 7605, Rev. Codes 1899.

On cross-examination of the complaining witness the defendants' counsel sought to show by appropriate questions that the defendant and the witness were members of opposing factions in the

village of Litchville, that the factional differences had engendered personal hostility between the witness and defendants, and that such ill feeling had been further embittered by the fact that the witness had been informed that one of the defendants was a rival of the witness for the appointment to the position of postmaster of the village. The trial court sustained objections made to these questions, and we think the ruling was erroneous. If the ill feeling and rivalry existed, as indicated by the questions asked, they were clearly important facts for the consideration of the jury in determining the weight to be given to the witness' testimony. Before the questions objected to were asked, the witness had testified, but in a somewhat evasive manner, in response to questions on cross-examination, that he entertained no unfriendly feelings towards the defendant and that he did not know at the time the prosecution was commenced, or since, that the defendant was a rival candidate for the post office. Some of the questions objected to called the witness' attention to his testimony at the preliminary examination, where the examiner claimed the witness had sworn in substance that he knew that one of the defendants was a rival candidate, and the questions sought to elicit from the witness an admission or denial of such testimony. The other questions objected to were designed to obtain from the witness an admission or denial of the facts, as indicated by the questions, that the witness and defendants were prominent adherents of opposite factions, and that the factional differences had engendered a feeling of bitter personal hostility on the part of the members of one faction against those of the other. The manifest purpose of this line of cross-examination was to overcome the effect of the witness' preceding statement denying the ill feeling and rivalry, and to test the credibility of the witness. If he gave an affirmative answer to the questions, his admissions would tend to discredit him. If he answered in the negative, the defendant might show, if he could, by other witnesses that the answers were false.

Respondent contends that the line of cross-examination objected to was wholly irrelevant, or was at least on a subject collateral to the issues, and hence that the extent of the cross-examination along that line was a matter resting in the sound discretion of the trial court. He further claims that the cross-examiner was concluded by the witness' denial of the ill feeling and rivalry, because that subject of inquiry being collateral to the issues could not be used as a basis for impeachment. As already indicated, the testimony

sought to be elicited by the questions was relevant and material to the controversy, because it bore directly upon the credibility of the witness; and the questions were therefore proper cross-examination. Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003; State v. Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518; State v. Rozum, 8 N. D. 548, 80 N. W. 477; State v. Ekanger, 8 N. D. 559, 80 N. W. 482. In a limited sense the subject of inquiry was collateral to the issues in the case, but it was not collateral in the sense that term is often used when applying the familiar rules which respondent invokes. There is a wide distinction between evidence which affects the general credibility of a witness and evidence which affects the credibility of a witness' testimony in a specific case. Both are proper subjects for cross-examination. Evidence of facts which are material only because they affect the general credibility of the witness, such as previous conviction of crime, evil associations, and the like, can in general be shown only by cross-examination of the witness, and the examination is concluded by the answers, however false they may be. The rule itself and the reasons for it are so familiar to the profession that a statement of them is unnecessary. With respect to evidence of facts which do not detract from his general credit, but which tend to diminish his credit and capacity to testify correctly in the particular case, a different rule applies. That rule is well stated in Finchier v. State, 58 Ala. 215, 219, as follows: "Of the several modes of assailing the credibility of a witness, the one most usually resorted to is a cross-examination as to his relationship to the parties, his interest in the pending suit, his hostility to the prisoner, if it be a prosecution for a criminal offense, his motives, and whatever may fairly be presumed to bias him in favor of the party at whose instance he is testifying and against the adverse party. These are matters collateral to the main issue of facts which is to be determined; and, while the general rule is that the answer of a witness to collateral questions cannot be contradicted by the party cross-examining, an exception obtains in reference to questions of this character, which are directed, not against his general credit, but against his credit and capacity to testify accurately in the particular case. 1 Whart. Law of Ev. section 545; McHugh v. State, 31 Ala. 317; Bullard v. Lambert, 40 Ala. 204; 1 Green. Ev. section 450; Blakey v. Blakey, 33 Ala. 611. The circumstances which affect the particular credit of the witness are generally incapable of proof save by his acts or declarations, and it is but just that the witness should have his attention directed

to them, and whatever explanation can be given of them without entering into particulars, should be received. 4 Phill. Ev. (2 C. & H. Notes) 717. If the witness should deny the relationship or bias, it may be proved by other evidence. Declarations in the presence of third persons, indicative of hostility, may be called to the attention of the witness, and he may be required to admit or deny them; if he deny them, the persons hearing them, to whom the attention of the witness is directed, may be called to contradict him. How far the bias of the witness, from whatever cause it arises, affects his credibility, is a question for the consideration of the jury, and depends upon his manner of testifying before them, the consistency of his evidence with other evidence in the cause, and the probability of its truth or falsity when considered in connection with all the facts and circumstances surrounding the parties, and which are parts of the transaction. The law does not discredit the witness because of the bias—it is simply a fact for the consideration of the jury in determining how far they can safely rely on his testimony. A remote relation would not usually lie under the same imputation on his credit as a nearer relation whose sympathies and affections were more deeply involved. A hostile feeling, generated by a sudden quarrel, would not reflect the same discredit as that which is shown to be malignant. The extent of the hostility of the witness is the subject of just inquiry. It is not enough, and the door to further cross-examination is not closed, so that it does not descend to the particulars of the controversy between the witness and the party, by the mere statement of the witness that he is hostile to the party against whom he is testifying. The party has the right to go further and show that the hostility is malignant and that the witness has the inclination, and would not scruple at the means or manner, of doing him the most grievous injury." We think the language above quoted correctly states the rule recognized almost universally throughout this country. This entire subject is very ably and clearly discussed and explained by Prof. Wigmore in his late work on Evidence, under the general head "Testimonial Impeachment." Wigmore on Evidence, vol. 2, c. 20 et seq. See particularly section 879, 943, 949-952, 1001-1005.

The defendant had the absolute right to show by cross-examination that the witness entertained hostile feelings against the defendant, or was in such a position with respect to him as to be under temptation to give false or biased testimony. The bare fact that ill feeling existed or that there was a temptation to falsify would be of little aid in determining what effect, if any, those facts

should have on the weight of the witness' testimony. The unfriendliness or temptation might be so slight as to render it altogether unlikely that the witness would be influenced by it; and, on the other hand, the ill will might be so bitter or the temptation to falsify so great as to justify the gravest doubts as to the witness' truthfulness in the particular case on trial. It is plain, therefore, that, in order to intelligently determine how much credit a witness subject to such influence is entitled to, it is necessary to be informed of the cause, nature and extent of the unfriendliness or temptation. It is therefore the absolute right of the party attacking the credibility of such a witness to elicit by cross-examination the facts and circumstances which tend to prove the existence and extent of the supposed improper motives. The extent of which examination into these collateral facts and circumstances shall be permitted rests in the sound discretion of the trial court, and no rule governing the exercise of such discretion can be laid down more definitely than to say that only so much and no more of the facts and circumstances should be admitted as are necessary to give a fairly intelligent understanding of the cause, nature and extent of the supposed improper influence. Kellogg v. Nelson, 5 Wis. 125, 131; Blessing v. Hape, 8 Md. 31; Atwood v. Welton, 7 Conn. 66; Daffin v. State, 11 Tex. App. 76; State v. McFarlain (La.) 6 South. 728; People v. Christie, 2 Abb. Prac. 256; Durham v. State, 45 Ga. 516; Wigmore on Evidence, section 948-953. The same erroneous rulings were repeated in the cross-examination of two others of the five witnesses for the state.

It is urged by respondent that the evidence for the state clearly established the guilt of the defendants, and their testimony was not contradicted either by the defendants themselves or by any witnesses in their behalf, and therefore no prejudice could have resulted to the accused from the errors assigned. There are, perhaps, cases where it might be made to appear from the record that an error like that we have been discussing was without prejudice. This is not such a case, however. What evidence the defendant might have seen fit to produce, had he been permitted to show that the truthfulness of the state's witnesses was questionable, or what effect the excluded evidence might have had on the minds of the jurors, if it had been admitted, we have no means of knowing.

The error above discussed requires a reversal, and we do not deem it necessary to discuss the remaining errors assigned.

Judgment reversed, and new trial ordered. All concur.

(105 N. W. 614.)

THE STATE OF NORTH DAKOTA v. JOHN BROWN.

Opinion filed November 9, 1905.

Information — Sufficiency — Continuing Offense.

1. An information for a continuing offense, which alleges that the offense was committed "on the 1st day of January, 1904, and on divers and sundry days and times between that day and the 24th day of April, 1905, and on the 24th day of April, 1905," is sufficiently certain as to time, and does not allege more than one offense.

Intoxicating Liquors — Nuisance — Information.

2. An information which alleges that the defendant, during a stated time, kept and maintained a nuisance defined and prohibited by section 7605, Rev. Codes 1899, in two adjacent buildings within the same curtilage, particularly describing the place, is neither uncertain or double.

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

John Brown was convicted of maintaining a liquor nuisance, and appeals.

Affirmed.

Lee Combs, for appellant.

The place where a crime is committed must be so set forth as to show that the court has jurisdiction; and when it is matter of essential description it must be particularly and truly stated, and proved as stated. State v. Redington, 64 N. W. 170; State v. Burchard, 57 N. W. 491; State v. Butcher, 47 N. W. 406; State v. Cotton, 24 N. H. (4 Frost.) 143.

Charging that the offense was committed in the "Little Kindred," and also in the building adjoining it, or the frame shanty adjacent thereto, is duplicitous. State v. Chapman, 62 N. W. 659.

The information is in the alternative and conjunctive, and charges in terms, not synonymous, several distinct and separate offenses, and is duplicitous. State v. Fairgreeves, 29 Mo. App. 641; State v. Messenger, 58 N. H. 348; Riggs v. State, 26 Miss. 51; Bishop v. Commonwealth, 13 Grat. 785.

Alfred Zuger, State's Attorney, and *C. N. Frich*, Attorney General, for respondent.

A continuing offense may be alleged with a continuando. 10 Enc. Pl. & Pr. 517; State v. Dellair, 4 N. D. 312, 60 N. W. 988.

A continuing offense being charged, the additions of the words "and on the 24th day of April, 1905," referring to the last day in the continuando, add nothing to the previous charge. Com. v. Sheehan, 9 N. E. 839; Com. v. Dunn, 111 Mass. 426.

The information is not double. A nuisance may consist of several buildings used together for one unlawful purpose. Com. v. Patterson, 26 N. E. 136; Com. v. Rumford Chem. Wks., 16 Gray, 231; State v. Clark, 44 Vt. 636; Stout v. State, 93 Ind. 150, 11 Enc. Pl. & Pr. 523, and note; Com. v. Crowell, 60 S. W. 179; State v. Arnold, 67 N. W. 252; State v. Caffrey, 62 N. W. 664; 10 Enc. Forms, Form No. 11611; State v. Brady, 12 Atl. 238.

The information is not bad in that it charges that the defendant kept a place, (1) where intoxicating liquors were sold, bartered and given away as a beverage; (2) where persons were permitted to resort and did resort for the purpose of drinking intoxicating liquors as a beverage; (3) where intoxicating liquors were kept for barter, sale and gift as a beverage. State v. Dellaire, 4 N. D. 312, 60 N. W. 988; State v. Thoemke, 11 N. D. 386, 92 N. W. 480; State v. Beckroge, 27 S. E. 658; Hale v. State, 51 N. E. 154; State v. Chapman, 10 L. R. A. 432; Schirmacher v. State, 45 S. W. 802; Smith v. State, 23 So. 854.

ENGERUD, J. The defendant was tried and convicted of the crime of maintaining a liquor nuisance, and has appealed from the judgment. The information alleges that the offense was committed on the 1st day of January, 1904, "and on divers and sundry days and times between that day and the 24th day of April A. D. 1905, and on the 24th day of April, A. D. 1905." The place maintained as a nuisance was described to be in that certain tenement consisting of a one-story wooden buidling known as the "Little Kindred," and frame shanty or building adjacent to and within the curtilage of said "Little Kindred," situated, etc., describing particularly the location of the structures referred to. It is claimed that the foregoing allegations quoted from the information render it uncertain as to time and place and cause it to charge more than one offense. The sufficiency of the accusation in other respects is not questioned. The sufficiency of the information was first attacked by demurrer, which was overruled. The same points presented by the demurrer were again urged and overruled on motions in arrest of judgment and for a new trial, and are the only points presented for review on this appeal.

The allegation as to time is proper and sufficient in a case like this which charges a continuing offense. The allegation is equivalent to a statement that the nuisance was maintained on the first and last days named and throughout the intervening period. The language is neither uncertain nor open to the objection that it implies that more than one continuous offense was committed. Commonwealth v. Sheehan, 143 Mass. 468, 9 N. E. 839; 10 Enc. Pl. & Pr. pp. 517, 518, and cases cited in notes. The objection to the allegation descriptive of the place which was kept as a nuisance is equally untenable. It is perfectly clear from the language of the accusation that it charges but a single nuisance maintained by the defendant, and that he used two structures for the unlawful purpose at the same time and place set forth in the indictment. We infer from the language of the information that the unlawful traffic to which the place was devoted had attained such proportions that it required two structures for its accommodation. Both structures, however, formed parts of the same place. The statute denounces the keeping of a "place" for the unlawful purpose. "Place" is a comprehensive term, and may consist of one or more rooms in a building; or it may be an entire building; or, as in this case, more than one building within the same place used together for the convenient conduct of the prohibited purpose. It is in substance plainly charged that the frame shanty or building was adjacent to the "Little Kindred," and within the curtilage of the latter, thereby implying that the shanty was in the same inclosure and was part of the same place or tenement. And it is expressly alleged, in effect, that both structures were used together and constituted a single nuisance. The term "shanty or building" plainly refers to a single structure to which either descriptive word is applicable. We think the information describes a single nuisance with ample certainty. Commonwealth v. Patterson, 153 Mass. 5, 26 N. E. 136.

Judgment affirmed. All concur.

(104 N. W. 1112.)

THE STATE OF NORTH DAKOTA, EX REL. GEORGE RUSK, v. WILLIAM BUDGE, D. J. LAXDAL AND ANDREW SANDAGER, AS MEMBERS OF THE BOARD OF STATE CAPITOL COMMISSIONERS.

Opinion filed November 1, 1905.

Grant of Public Lands to the State — Purposes — Governor's Residence.

1. The erection of a residence for the governor at the capital is within the purposes of the grant of land made by congress to the state for public buildings at the capital, under section 17 of the enabling act (25 Stat. 681, c. 180).

Same — Disposition by Legislature Within Constitutional Limits Final.

2. The disposition of such lands is exclusively with the legislature, and its action in such matters is final, unless violative of some constitutional provision and clearly contrary to the terms of the grant.

Same.

3. It is the province of the legislature alone to determine the manner in which said lands may be disposed of in furtherance of the purposes of said grant.

Constitutional Law — Delegation of Legislative Power.

4. All legislative power in this state is vested in the senate and house of representatives, and the legislature cannot delegate such power in relation to purely legislative matters.

Same.

5. The power to determine the manner of the use of the land granted by section 17 of the enabling act (25 Stat. 681, c. 180) is purely legislative, and cannot be delegated to a commission.

Same.

6. The power to limit the sum that shall be used for each public building authorized by section 17 of the enabling act (25 Stat. 681, c. 180) is purely legislative, and cannot be delegated to a commission.

Same — Capitol Commission — Unwarranted Delegation of Legislative Power.

7. Chapter 166, page 297, Laws 1905, provided for the appointment of a capitol commission by the governor. Said commission was thereby given authority to remodel and reconstruct the capitol building of the state, and to erect a governor's residence at the capital out of the proceeds of the lands donated to the state by congress. The law did not specify what sum should be used for the capitol building, nor what sum should be used for the governor's residence, nor specify when the buildings shall be completed. *Held,* that the law is invalid, as an unwarranted delegation of purely legislative powers.

Application by the State, on the relation of George Rusk, for a writ of injunction against William Budge and others, as members of the board of state capitol commissioners.

Writ granted.

George A. Bangs, John A. Sorley and *Spaulding & Stambaugh*, for relator.

Certificates of indebtedness, whether in shape of bonds or otherwise, issued by any unincorporated board of officials is indebtedness of the state. State ex rel. vs. McMillan, 12 N. D. 280, 96 N. W. 310; Sackett v. City of New Albany, 45 Am. Rep. 467; Beard v. City of Hopkinsville, 23 L. R. A. 402; Grant v. Davenport, 36 Iowa, 396; Council Bluffs v. Stewart ,51 Iowa, 395; Litchfield v. Ballou, 114 U. S. 190, 29 L. Ed. 132; Baltimore v. Gill, 31 Md. 375; State v. Fayette Co., Com'rs, 27 Ohio St. 526; Grant v Co. Com'rs, 21 Fed. 45; Scott v. Davenport, 34 Iowa, 208; Prince v. City of Quincy, 105 Ill. 138; Re Appropriations, 13 Col. 323; City of Joliet v. Alexander, 62 N. E. 861.

The law is an insufficient appropriation bill, in that it specifies no amount for the information of legislators voting for it, or of the people whose property is disposed of, or of the auditor to enable him to comply with section 98, Rev. Codes, but the act itself indicates the necessity for further appropriation. People v. Spruance, 9 Pac. 628; Institute for Education of Mute, etc., v. Henderson, 31 Pac. 714; Ingram v. Colgan, 38 Pac. 315, 366, 39 Pac. 437, 106 Cal. 113, 46 Am. St. Rep, 22, 28 L. R. A. 187; Kingsberry v. Anderson, 51 Pac. 744; Shattuck v. Kincaid, 49 Pac. 758; Goodkuntz v. Acker, 35 Pac. 911; Baggett v. Dunn, 10 Pac. 125; Clayton v. Berry, 27 Ark. 129, State v. Grave, 41 Pac. 1075, 62 Am. St. Rep. 764; Stratton v. Green, 45 Cal. 149; Martin v. Francis, 13 Kan. 220; State v. Wallichs, 11 N. W. 860; State v. Wallichs, 21 N. W. 397.

If the bill is an appropriation bill, it embraces more than one subject, viz.: An appropriation for the construction of the capitol, the governor's mansion, and payment of interest on the indebtedness authorized, and it violates sections 187, 62 and 80, Const. North Dakota. People v. Board, 52 N. Y. 556; People v. Denahy, 20 Mich. 349; Grand Rapids v. Burlingame, 53 N. W. 620; Murray v. Colgan, 29 Pac. 871; Sullivan v. Gage, 79 Pac. 537; H. B. 168, 39 Pac. 1096.

Chapter 166, Laws of 1905, is void as a delegation of legislative power. It commits to the capitol commission to assign the amounts to the three different objects, viz: Construction of the capitol, governor's mansion and payment of interest on the indebtedness authorized, a duty belonging to the legislature under the constitution. The bill should be complete when it leaves the legislature, with items so distinct as to enable the governor to approve or disapprove each, with nothing left to the judgment of the appointee or delegate of the law making body. Dowling et al. v. Lancashire Ins. Co., 65 N. W. 738, 31 L. R. A. 112; State v. Burdge, 70 N. W. 347; O'Neil v. American Fire Ins. Co., 166 Pa. 72, 30 Atl. 943, 26 L. R. A. 715; Anderson v. Manchester Fire Ass. Co., 60 N. W. 1095, 63 N. W. 241, 28 L. R. A. 609; Slinger v. Henneman, 28 Wis. 504; In re Village of No. Milwaukee, 67 N. W. 1033, 33 L. R. A. 638; Ex parte Cox, 63 Cal. 21; Cooley Const. Lim. 137; Galesburg v. Hawkinson, 75 Ill. 152; People v. Bennett, 29 Mich. 451; State v. Simons, 21 N. W. 750.

C. N. Frich, Attorney General, and *Tracy R. Bangs,* for respondent.

Payment of interest upon the certificates provided for in chapter 166, Laws of 1905, does not involve a diversion of funds. Board v. McMillan, 12 N. D. 309, 96 N. W. 310; sections 186-187 Rev. Codes 1899; In re Canal Certificates, 34 Pac. 274 (275); Strieb v. Cox, 12 N. E. 481 (485).

Such certificates do not create a debt of the state. Subdivision 6 of section 11, chapter 166, Laws 1905; Kelly v. Minneapolis, 65 N. W. 115; Winston v. Spokane, 41 Pac. 888; Hockaday v. Commissioners, 29 Pac. 290; Baker v. Seattle, 27 Pac. 464; Allen v. Grimes, 37 Pac. 662; State v. McGraw, 43 Pac. 176; State v. Cook, 43 Pac. 928; Johnson v. Harrison, 50 N. W. 923; Attorney General v. Weimar, 26 N. W. 773; Ritchie v. People, 40 N. E. 460; Ala. G. S. Ry. Co. v. Reed, 27 So. 20; State v. Sloan, 74 Am. St. Rep 106; Board Co. Com'rs et al. v. State, 13 Pac. 558.

The law contains within itself a complete and effective appropriation, and does not contravene the provisions of the constitution as to manner of appropriation or unity of subject. Ristine v. State, 20 Ind. 328 (329); Henderson v. Co. Com'rs. 28 N. E. 129; Carr v. State, 22 Am. St. Rep. 628; Campbell v. Com'rs, 18 N. E. 33; State v. LaGrave, 23 Nev. 25, 62 Am. St. Rep. 764; State ex rel. Brainerd v. Grimes, 34 Pac. 833; Ritchie v. People, 40 N. E. 460;

Richman et al. v. Muscatine Co., 4 L. R. A. 452; People v. Dunn, 3 Am. St. Rep. 121; McCauley v. Brooks, 16 Cal. 29; State v. McGraw, supra; State v. Cook, supra.

Chapter 166, Laws of 1905, complies with the enabling act, the constitution of the state, and properly provides for carrying out the provisions of the grant. Allen v. Grimes, supra, State v. McGraw, supra; State v. Cook, supra; Kingman et al. v. Met. Sewerage Com'rs, 27 N. E. 778; Territory v. Scott et al., 3 N. D. 357, 20 N. W. 401; Comonwealth v. Kitching, 5 Gray, 486; In re De Vancene, 31 How. Prac. 343; People v. Hazelwood, 6 N. E. 480; Mills v. Sargent, 36 Cal. 379; Martin v. Tyler, 4 N. D. 278, 60 N. W. 392.

MORGAN, C. J. The relator seeks a permanent injunction restraining the defendants from further proceeding towards the remodeling and reconstruction of the capitol building of the state of North Dakota, and from all other proceedings by said board provided for by chapter 166, p. 297, Laws 1905. Said chapter provides for the appointment by the governor of a board of capitol commissioners, consisting of three persons. It provides that such board shall have power to make a contract for the remodeling and reconstruction of the capitol of the state of North Dakota, and for the erection of a governor's residence on lots owned by the state in Bismarck. The details as to how funds shall be procured by issuing and selling certificates of indebtedness to be drawn solely against the funds derived from the sale of public lands granted by congress to the state under section 12 and 17 of the enabling act (25 Stat. 680, 681, c. 180), are provided for by the act. The members of the board were duly appointed by the governor and confirmed by the senate. The members thereof duly qualified under their appointment by taking the oath and giving the bonds required by the act, and duly organized as a board by the election of a president and the appointment of a secretary. Afterwards the board advertised for plans and specifications for remodeling and reconstructing the capitol building, and for bids for doing the work and furnishing the materials under the plans and specifications furnished. While such advertisement was proceeding, a preliminary injunction was issued by this court upon a complaint verified by the relator. An order to show cause was incorporated in said preliminary injunction why the same should not be continued in force permanently. The defendants appeared, and, issues having been

joined on the allegations of the complaint, the same were argued before the court on October 23d; the hearing of the order to show cause having been set on that day.

The plaintiff alleges in the complaint that chapter 166, p. 297, Laws 1905, under which the defendants are proceeding, is unconstitutional and void, and that the defendant board is proceeding in direct violation of said chapter, which specifies what their duties shall be and how they shall proceed. In general, the complaint alleges that the board is proceeding to carry out the provisions of said act before it is practicable, and is therefore contrary to the terms of the act, and that the board has violated section 6 (page 299) of said act, which prescribes their duties as to selecting plans and specifications and receiving bids. The claim is made in support of this objection that competitive bids are not asked for, either as to plans or as to doing the work. It is also claimed that the board is contracting a debt against the state which is in excess of the limitation on debts fixed by the constitution. It is also contended and alleged in the complaint that the board is proceeding to dispose of the lands donated by congress by the enabling act in a manner contrary to the provisions thereof, and that the board is diverting the fund derived from the sale of said lands by providing for the payment of interest on certificates of indebtedness out of said funds. It is also alleged that the said act is unconstitutional because (1) it contains more than one subject, viz., the reconstruction of a capitol building and the erection of a governor's residence. (2) That it delegates to the board the power of determining what sum shall be expended in a governor's residence, and what sum shall be expended in reconstructing the capitol building. (3) That the law contravenes the provisions of the enabling act by making provisions for the erection of a governor's residence. No objection is urged that this court is without jurisdiction to entertain the action as an original one.

Whether a residence for the governor of the state at the capital is a public building, within the terms of the enabling act, or not, is a matter of argument between opposing counsel in the case. Section 12 of the enabling act grants fifty sections of land to the state "for the purpose of erecting public buildings at the capital * * * for legislative, executive and judicial purposes." Section 17 of said act grants to the state 50,000 acres of land "for public buildings at the capital of said state." There is no other provision in the enabling act relating to or prescribing what build-

ings are to be deemed public buildings within the purpose of this act. The legislature is vested with the power to dispose of said land, and the duty of using the proceeds subject to the terms of said act. The legislature has enacted that an executive mansion shall be erected out of the proceeds of said land, and thereby declared an executive mansion to be a public building, within the meaning of said act. We deem that a correct and reasonable construction of the enabling act. The custom is general to provide the governor with a home at the capital. Generally this is owned by the state. The possession is in the state. It is used by the state through its executive. The governor is present at the capital of the state to discharge public functions. The occupancy of the executive mansion may be correctly said to be for public purposes, and to be a public building, within the meaning of the enabling act. Section 17 does not grant this land solely for capitol building purposes. Other buildings may be erected out of the proceeds. Fleckten v. Lamberton, 69 Minn. 187, 72 N. W. 65. The grant under section 17 and the grant under section 12 of these public lands may be appropriated and disposed of for a capitol building. Whether the grant under section 12 may be used for a governor's residence we need not determine, as section 17 clearly permits the erection of such a residence out of the lands thereby granted. To what extent the land granted by the two sections of the enabling act may be used for the same purpose or building we need not determine. The legislature having enacted that a governor's residence shall be one of the public buildings contemplated by said section 17, its action is final on that question, if within the purposes and terms of said section.

It is next contended by the relator that said chapter 166 is void, as an unwarranted delegation of legislative powers to said board. The basis of such contention is that matters of legislative discretion are to be determined by the board, which should have been specifically determined by the legislature. It is claimed that the sums to be expended on a residence for the governor involves a matter of legislative discretion, which cannot properly be delegated to the board, but must be limited by the legislature to an amount certain. Under the constitution all legislative power is vested in a senate and house of representatives (section 25), and all constitutional provisions are mandatory, unless expressly declared to be otherwise (section 21). Whether the power to determine the relative amounts of the fund derived from the sale of the lands granted by

congress that shall be spent for a capitol building and for a governor's residence is a matter of legislative discretion or pertains to administrative questions is the question to be determined. It is not disputed by any one that purely legislative functions cannot, generally, be delegated. This is founded on the familiar principle that a delegated power cannot be redelegated unless expressly provided in granting the power. The people having delegated the power to legislate to the legislature, it is incumbent upon it to enforce the will of the people, and not delegate it to others. See Sutherland on Statutory Construction (2d Ed.) vol. 1, section 87, and cases cited. "One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust." Cooley's Constitutional Limitations (5th Ed.) p. 139. See, also, Dowling et al. v. Insurance Co., 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112; O'Neil v. Insurance Co., 166 Pa. 72, 30 Atl. 945; State v. Simons, 32 Minn. 540, 21 N. W. 750; State v. Ashbrook, 154 Mo. 375, 55 S. W. 627, 48 L. R. A. 265, 77 Am. St. Rep. 765.

The exceptions to this general rule are not material to be here considered. If this power be purely legislative, defendants concede that no delegation of the duties is permissible. If purely administrative, the plaintiff concedes that they may be delegated. The line dividing these two powers is not always readily seen, and to determine when the line is crossed is an extremely delicate duty in many instances. Unless the delegation of the power is clearly a violation of the constitutional provision that the legislative power is vested in the legislature, the plaintiff's contention on this point should be upheld. The will of the legislature should not be thwarted, except in a clear case of violating the mandate of the constitution. Cooley's Constitutional Limitations (5th Ed.) c. 7, pp. 192-200; Cincinnati, etc., Ry. Co. v. Clinton County Com'rs, 1 Ohio St. 88. It will not be doubted by any one that the

legislature alone can legally determine when the proceeds of the congressional grant can be expended in public buildings at the capital. The language of section 17 of the enabling act is conclusive upon the question. When that act provides, "and the lands granted by this section shall be held, appropriated and disposed of exclusively for the purposes herein mentioned in such manner as the legislatures of the respective states may severally provide," no room is left for debate on the question that the legislature shall determine when these funds shall be used for public buildings, and what these public buildings shall be. The power to control these lands and the funds derived therefrom was delegated by congress to the legislature, and that delegation was accepted and confirmed in the constitution by its adoption by the people. Hence it is clear that the general disposition of these funds for use in public buildings must be done by the legislature.

It is claimed that the legislature has fully performed this general duty by the provisions of section 1 of chapter 166, wherein it is enacted what the duties of the board of capitol commissioners shall be in the following words: "And whose duty it shall be to remodel and reconstruct upon its present site the capitol building of the state of North Dakota, at Bismarck, and erect a suitable residence for the governor on the lots now owned by the state according to the provisions of this act." The law contains no directions as to how much shall be expended for each of said buildings. That is left entirely to the commissioners. Nor does the law definitely specify when these buildings shall be completed, nor when the duties of the commissioners shall end. It cannot be reasonably disputed that the legislature has power to delegate to a board the work of superintending the erection of public buildings. The legislature cannot act upon every detail arising in the course of the erection of public buildings, or in preparation therefor. This power must necessarily be delegated to some person or body. These duties are deemed executive, although they often involve discretion, and some of these could properly have been specifically provided for by legislative enactment. Duties that relate to acceptance of plans and specifications, making contracts, selecting materials, and other similar ones relate to the execution of the law enacted by the legislature, and are deemed administrative. State v. McGraw, 13 Wash. 311, 43 Pac. 176; Fleckten v. Lamberton, 69 Minn. 187, 72 N. W. 65; Territory v. Scott, 3 Dak. 357, 20 N. W. 401.

These cases sustain the right to delegate to a board or committee the power to erect a capitol building, and such duties are there denominated administrative. In none of these cases was the precise point herein involved presented or decided. The law under which these decisions were made fixed the maximum cost of the building, and one building only was to be erected. Hence the discretion of the board of commissioners was not unlimited, so far as the cost of the building was concerned. In this case the commission has unlimited discretion as to what the residence shall cost, and what the capitol shall cost, within the aggregate cost of both, which may, perhaps, be said to be limited to $600,000, because the aggregate sum of the certificates of indebtedness against the funds with which the buildings are to be paid for is limited to that sum. The commission has absolute power under this law to fix the limits of the cost of each of said buildings. They finally determine what sums shall be used for each building. We think that such discretion should have been exercised by the legislature. It is not properly an administrative discretion. What the several buildings shall cost should have been limited by the act, as it is a substantive matter of legislative discretion that the legislature cannot delegate. Section 17 of the enabling act prescribes that the lands donated by the United States to the state for public buildings shall be disposed of as provided by the enabling act, and shall be disposed of in the manner provided by the legislature. The legislature does not comply with these provisions of the enabling act, when it leaves it, without restriction or direction, to the capitol commission board to dispose of these funds in such manner as it deems wise, subject to one limitation only, that a capitol building shall be remodeled and reconstructed and a governor's residence erected. How much of these funds should be used for each of these buildings pertains to the manner of the disposition thereof. The discretion and judgment to be used in these matters of relative amount are committed to the legislature by congress. They are purely and clearly legislative powers, and cannot properly be delegated to persons or boards.

The principle that purely legislative functions and discretion cannot be delegated is illustrated in many cases in construing the powers and acts of city councils. The legislature may delegate to such bodies the power to make provisions for local government within constitutional limitations. In carrying out these functions city councils are held not to have the power to delegate to others

those matters pertaining to legislation, and requiring for their execution legislative discretion or judgment. Hitchcock v. Galveston, 96 U. S. 341, 24 L. Ed. 659; Harrisonburg v. Roller, 97 Va. 582, 34 S. E. 523; Minneapolis Gas Light Co. v. City of Minneapolis, 36 Minn. 159, 30 N. W. 450; Thompson v. Schermerhorn, 6 N. Y. 92, 55 Am. Dec. 385; Birdsall v. Clark, 73 N. Y. 73, 29 Am. Rep. 105. In the last case cited the court said: "It is a well-settled principle that public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others. Dillon on Municipal Corp. section 60. If discretion and judgment are to be exercised either as to time or manner, the body or officer intrusted with the duty must exercise it, and cannot delegate it to any other officer or person. * * * The council directed, not in a specific case, but in all cases, that the superintendent of streets should 'cause the work to be done,' thus delegating the precise authority conferred upon it. The charter conferred the power upon the council to cause it to be done by contract or otherwise. This requires the exercise of discretion and judgment as to the manner in which the work should be done. Whose judgment is to be exercised? The legislature has said that it is the judgment of the council, but the latter has attempted to invest the superintendent of streets with its exercise. This they had no power to do. The charter clearly contemplates the action of the council in each case." These cases, as well as those cited as bearing upon the powers of the legislature, unite in the general principle that agents or officers cannot be intrusted with powers of purely governmental or legislative character. They announce a salutary principle of constitutional law, which should not be departed from. The decision on this point is conclusive, and determines the action in favor of plaintiff's contention.

Other objections are urged against the validity of the law, and against the proceedings of the board, but to determine them would serve no purpose at present.

An order will be entered permanently enjoining further proceedings of the defendant board. All concur.

(105 N. W. 724.)

JOHN S. MURPHY v. THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT, AND E. B. GOSS, JUDGE.

Opinion filed November 20, 1905.

Criminal Law — Change of Venue — Judge Not Limited to Adjoining Counties and Districts in Ordering Change.

1. Under the statutes of the state regulating changes of place of trial in criminal cases upon defendant's application, because of prejudice which precludes a fair and impartial trial in the county where the indictment or information is laid, the presiding judge is not limited, in selecting a place for trial, to adjoining counties or judicial districts. The single statutory requirement is that he shall send the case "where the cause complained of does not exist."

Same — Discretion of Trial Judge.

2. When a change of place of trial is obtained by a defendant because of local prejudice, the duty of selecting the place for trial rests exclusively upon the presiding judge, in the exercise of sound judicial discretion.

Same — Abuse of Discretion.

3. When a change has been granted, and another county selected, it will be presumed that the discretion of the presiding judge was exercised properly, and the burden is upon one attacking his order to show affirmatively a manifest case of abuse; and this court will not, under its superintending power over inferior courts, revise his order, in the absence of such a showing, and in no case will it substitute and enforce its discretion as against the discretion of the presiding judge.

Same.

4. The defendant, who stands charged with the crime of forgery in the third degree in the district court of Ward county, applied for a change of place of trial and of judges, because of local prejudice and prejudice of the presiding judge, and requested a speedy trial. A change was granted to Cass county, and the judge of that district was designated as the judge to preside at the trial. After the order was made the defendant objected upon two grounds: (1) Because the case was not sent to an adjoining or neighboring county; and (2) because of the added expense of taking witnesses to Cass county. It is shown that a speedier trial could be had in Cass county than elsewhere, and it is conceded in this court that the court's action was proper in not selecting an adjoining county, and it is also conceded that a fair and impartial trial is assured in Cass county and before an unprejudiced judge, and it is not claimed or shown that the defendant will be prejudiced in making his defense. It is *held*, upon defendant's application for a writ of certiorari to review said

order, that these facts and those set out in the opinion do not show an abuse of discretion by the presiding judge such as will warrant the exercise of the superintending jurisdiction of this court; and the writ is therefore denied.

Engerud, J., dissenting in part.

Application by John S. Murphy for writ of certiorari to the district court of the Eighth Judicial district, and E. B. Goss, Judge.

Writ denied.

W. S. Lauder and *Palda & Burke,* for plaintiff.

Green & McGee, for defendants.

YOUNG, J. This is an application for a writ of certiorari on behalf of one J. S. Murphy, the defendant in State v. Murphy. On July 28, 1905, an information was filed in the district court of Ward county, charging the defendant with the crime of forgery in the third degree. On August 7, 1905, the defendant moved for a change of place of trial, and for a change of judges to sit at the trial of the action. The motion was based upon the defendant's affidavit, which alleged in substance that he could not have a fair and impartial trial in Ward county because of the prejudice which made it impossible to obtain jurors who had not formed an opinion of the guilt or innocence of the defendant, and that the presiding judge was prejudiced and biased against the defendant. The motion was granted, and the place of trial was changed from Ward county, in the Eighth judicial district, to Cass county, in the Third judicial district, and the judge of that district was designated as the judge to preside at the trial. The record shows that the defendant "objected and excepted to that portion of the order in which the place of trial is changed to Cass county, * * * it being 283 miles from the county seat of Ward county to the county seat of Cass county by the usual route of travel, and that there is no reason shown why a fair and impartial trial of said action cannot be had at any of the counties adjoining or near to the said county of Ward, and that no reason is shown why the defendant should be put to the great and extraordinary expense of traveling, with his witnesses, 283 miles from his home to defend the action." Thereafter, and on August 30, 1905, the defendant, upon his affidavit setting forth the facts and proceedings above stated, procured an order from a judge of this court, directing the presiding judge of the Eighth judicial district, commanding him to show cause before

this court on September 20, 1905, "why an appropriate writ should not be issued from this court, requiring and commanding him to transmit to this court all the pleadings and records, and all the records of the proceedings had in said criminal action that right and justice may be done therein." On the return day a verified answer to the order to show cause was filed on behalf of the judge of the Eighth judicial district, which states the reasons for his action, and, among other things, contains a copy of the defendant's affidavit upon which the order complained of was made. The hearing in this court upon the application for the writ prayed for was upon the defendant's moving affidavit and the verified answer. The question involved is whether the facts presented show that the presiding judge exceeded his jurisdiction in sending the case to Cass county. If they do, the writ should be granted; otherwise, it must be denied. The consideration of this question will require a reference to the sections of the statute authorizing and regulating changes of place of trial and judges in criminal cases. So far as material, they are as follows (Rev. Codes 1899):

Section 8110: "The defendant in a criminal action * * * may be awarded a change of the place of trial, upon his petition upon oath * * * that he has reason to believe, and does believe, and the facts upon which such belief is based, that he cannot receive a fair and impartial trial in the county or judicial subdivision where said action is pending, upon any of the following grounds"—which are four in number: (1) Undue influence of the state's attorney or person promoting the prosecution over the minds of the people of the county; (2) prejudice of the people against the defendant or the offense; (3) impossibility to obtain an impartial jury; (4) any other cause which would probably deprive the defendant of a fair trial.

Section 8112: "The court being satisfied that cause exists therefor, as defined in section 8110, must order a change of the place of trial to some county or judicial subdivision where the cause complained of does not exist. * * *"

Section 8120: "Whenever the defendant * * * shall file his affidavit stating that he has good reason to believe and does believe that he cannot have a fair and impartial trial of such action on account of the prejudice of the judge of the district court in which said action is pending, the court shall thereafter proceed in said action as follows: (1) If the defendant * * * asks for a change of the place of trial of said action on any of the

grounds specified in section 8110 of this Code [local prejudice], and also for the cause mentioned in this section [prejudice of the judge], it shall be the duty of the court to order said action moved for trial to some other county or judicial subdivision in this state, as provided in this article, and to request, arrange for and procure some other judge than the one objected to, to preside at the trial of said action; or (2) if a change is asked for only on account of the cause mentioned in this section [prejudice of the judge] the court in which said order is pending may order said action removed to a county or judicial subdivision in an adjoining judicial district in which it can be conveniently and expeditiously tried before another judge, or may request, arrange for and procure the judge of another judicial subdivision to preside at the trial in the county or judicial subdivision in which the action is pending * * *"

It will be observed that when a change of place of trial is made because of local prejudice, under section 8110, supra, or because of local prejudice and the prejudice of the presiding judge combined, as in this case, under subdivision 1 of section 8120, the presiding judge is not restricted as to the county or judicial district to which he may send it. Subdivision 1 of section 8120 states that "it shall be the duty of the court to order said action removed for trial to some other county or judicial subdivision in this state, as provided in this article, and to arrange for and procure some other judge than the one objected to, to preside at the trial of said action;" and section 8112 provides that, when the court is satisfied that the cause authorizing the change under section 8110 (local prejudice) exists, it "must order a change of the place of trial to some county or judicial subdivision where the cause complained of does not exist." Subdivision 2 of section 8120, supra, relates solely to the court's duty when the affidavit of prejudice is directed to the presiding judge alone. The court may, in such cases, call in another judge, or send the case to some county in "an adjoining district," where it can be "conveniently and expeditiously tried before another judge." Where a case is sent to another county under this subdivision (prejudice of the judge), it is purely for convenience, and this fact amply justifies the provisions limiting the change to a county in an adjoining district. Where, however, the change is for local prejudice, the statute places no limitation upon the court's action further than the requirement to select a county "where the cause complained of does not exist."

The statutes of most of the states require that in ordering a change the case must be sent to an adjoining county or judicial district, or to the nearest or most convenient county free from objection. See 4 Enc. Pl. & Pr. 458. It is needless to say that, when such restrictions are imposed, they must be observed. Our statute, however, contains no such restrictions. The matter of fixing the place of trial, when the change is for local prejudice, is left to the presiding judge. The only requirement imposed by the statute is that it must be sent to a county or judicial subdivision "where the cause complained of does not exist." The selection of the county is left to the discretion of the presiding judge. He may select one county in preference to another county, and may prefer one judicial district to another, so long as he does not exceed his legal discretion. This, we understand, is conceded by counsel for defendant. Their contention is—and this presents the only question in the case—that the presiding judge abused or exceeded his discretion in sending the case to Cass county, and that the record should therefore be sent up to the end that he may be required to select some county nearer to Ward county. In our opinion, the facts presented afford no warrant for such interference on the part of this court. The duty of selecting a county free from prejudice is cast upon the presiding judge, and this means, of course, a county where the trial will be fair, both to the state and to the defendant. Ex parte Hodgson, 59 Ala. 305. The defendant is given the right to secure a change on account of local prejudice, but the power to select the county to which the action shall be sent is not given to him. Neither is it given to this court. It is given to the presiding judge, and is peculiarly within his discretion.

The question, therefore, is, not what county would the defendant select, nor what choice would our discretion dictate, but is whether or not the presiding judge exceeded the discretion committed to him in sending the case to Cass county. The superintending control over inferior courts—that is, the power to keep them "within bounds"—which is vested in this court by the state constitution, does not authorize us to substitute our discretion for that of the tribunals whose acts we superintend. This was well expressed by the Supreme Court of Michigan in T. & W. Co. v. Circuit Judge, 75 Mich. 360, 371, 42 N. W. 968, in which that court said: "It is true that the constitution has given this court a general superintending control over all inferior courts, but in the exercise of this jurisdiction it has never been claimed that this court can substi-

tute its discretion for that of the inferior tribunal, and compel it to exercise and enforce our discretion and not theirs." It is true the discretion of the presiding judge is a judicial and not a personal one, "yet, it being a discretion created and confided by the law, it will not be revised by this court, in the absence of any showing that it has been abused to the prejudice of the defendant" Bohannon v. State, 14 Tex. App. 271, 302, and cases cited. The presumption is that the discretion of the trial judge was properly exercised, and, "no matter from what source the court gets information to aid its discretion, when exercised, it must be regarded as properly done in the interest of justice." Coal Co. v. Coal Co., 64 Md. 302, 305, 1 Atl. 878; State v. Coleman, 8 S. C. 237; Grooms v. State, 40 Tex. Cr. R. 327, 50 S. W. 370; Cox v. State, 8 Tex. App. 254, 283, 34 Am. Rep. 746; Simmons v. St. Paul & C. Ry. Co., 18 Minn. 184 (Gil. 168). And the court's action will not be revised, unless it is clearly apparent that it has exceeded its legal discretion and authority (Bohannon v. State, supra; Cox v. State, supra), and unless it is shown that the defendant has been prejudiced thereby (Frizzell v. State, 30 Tex. App. 42-54, 16 S. W. 751). In addition to the foregoing, for cases in point, see State v. Elkins, 63 Mo. 159; Preston v. State, 4 Tex. App. 186, 192; also, Bradley v. Cramer, 61 Wis. 572, 21 N. W. 519; Miller v. T. W. & W. Ry. Co., 33 Ind. 535; Cromie v. Hoover, 40 Ind. 49; Greer v. Whitfield, 4 Lea (Tenn.) 85.

Tested by the foregoing rules, which are well settled, the majority of this court are of opinion that the defendant has not shown adequate cause for the exercise of our superintending jurisdiction. It is admitted that Cass county is free from the prejudice from which the defendant wished to escape when he applied for a change of venue, and it is not claimed nor suggested that the judge of the Third judicial district is in any respect prejudiced. The purpose for which the change was taken concededly has been accomplished by the selection of a county "where the cause complained of does not exist." The only objections urged against the court's action are (1) that it has not been shown "why a fair and impartial trial cannot be had at any of the counties adjoining or near to Ward county;" and (2) the additional expense which the defendant will incur traveling with his witnesses to Cass county.

The first objection is perhaps sufficiently answered by the mere statement that the presiding judge, who was charged with the duty of selecting a place of trial, selected Cass county, and the

further fact that the court was not limited by the constitution or by statute—and this is not disputed—to the selection of a county near to or adjoining the county where the action is pending. The presumption, as we have seen, is in favor of his action, and it has not been shown by the defendant who assails the order that a fair, impartial, and speedy trial could have been had in any of the intervening counties or judicial districts. Then, too, it appears from the defendant's affidavit in support of his application for a change, as well as the answer of the presiding judge, that he did not exceed his legal discretion in selecting a remote county. The prejudice against the defendant is alleged by him to be exceedingly bitter, and to be both personal and political, and to exist both within and without Ward county. His affidavit states, among other things, that for twelve years last past he has taken a prominent part in political affairs, and that during this time the feeling in Ward county has been very bitter, and that he was, because of his prominence in such affairs, and because of his leadership in the campaign of 1904 of one of the political factions into which that county is divided, been subjected to much personal abuse and vilification; that this prosecution is primarily to subserve political purposes and nothing else, and is being pushed vigorously by the political enemies of this defendant, both within and without Ward county; that the state's attorney is a bitter political enemy of the defendant; that this is true of the sheriff of the county and his chief deputy; that a majority of the county commissioners are bitter personal and political enemies of the defendant; that many of the township supervisors belong to the opposing faction, and they, with the county commissioners, have, in selecting names to fill the jury list, sent in only those who are his personal and political enemies—and to this general arraignment is added the allegation that the presiding judge of the district is prejudiced against him.

It will be seen that this affidavit presents a case of more than mere local prejudice. The prejudice of which the defendant complains is both personal and political, one growing entirely out of his political leadership, existing within and without Ward county, and of a more violent character; and he charges that this prosecution is purely for political purposes. That a bitter factional difference exists in Ward county, which involves the personal character and reputation of this defendant, is admitted by the answer; and it is also admitted that practically the same condition exists in

all of the counties of the Eighth judicial district, in which Ward county is situated. It is apparent that the conditions which produce the prejudice of which the defendant complains are not confined by county lines, and their extent cannot be measured by miles. The presiding judge owed a duty to the defendant, and, indeed, was required to send the case to a county where the cause complained of does not exist. Instead of selecting a county near to or adjoining Ward county, he selected a remote county, and that it would have been an improper exercise of discretion to have selected any county in the Eighth judicial district is frankly conceded by defendant's counsel, and it is not claimed in this court that any of the adjoining counties could have been properly selected. The adjoining counties in the Eighth judicial district are confessedly objectionable for the same reason that Ward is, and the adjoining counties on the south, apparently otherwise unobjectionable, are eliminated solely on the ground of inconvenience. It may be that some county might have been selected nearer to Ward, or some county between Ward and Cass county, which would be free from prejudice, but this does not show that in selecting Cass county the presiding judge exceeded his legal discretion. It shows, rather, that he exercised his discretion on the side of safety and in favor of the defendant in securing a fair trial by avoiding with certainty the bitter personal and political prejudice of which he complained.

Of the several reasons stated in the answer for the selection of Cass county in preference to other counties or judicial districts, we shall refer only to the following: It is alleged that: "Upon the motion for a change of place of trial being made by the defendant in said information, it was urged by counsel for said defendant that they were anxious for a speedy trial and disposition of said cause, and that the district court of said Ward county and the judge thereof regarded it as proper to change the place of trial to such county as would insure an expeditious trial upon said information; that at the time of making said order, changing the place of trial of said cause to Cass county in the Third judicial district, a term of the district court of said Cass county was then just opening, at which term it appeared to said district court of Ward county the issue upon said information could be tried, thus insuring a fair and expeditious trial of said cause; that at the time of making said motion for change of place of trial no presentation of facts was made by the defendant or his counsel with reference

to the number of his witnesses or the probable additional expense which might be imposed upon the defendant by any change of the place of trial, and that no showing has yet been made upon that point, the only intimation of any objections to the change as made being made in the oral comments of counsel after the order of the district court of said Ward county had been made, and in the course of stating exceptions to such order; that the order changing the place of trial upon said information was made * * * solely with the view of securing to said defendant a perfectly fair and impartial trial of the issues in said action, and the place of trial was so changed to said Cass county in the honest belief on the part of the court making said order that thereby all fear of local prejudice, or the interference by local officials or other persons, would be avoided and prevented; that in making the order changing the place of trial as aforesaid, the district court of Ward county aimed at the exercise of fair and honest discretion, believing that in making such change it was the duty of said court to protect the interests of the state as well as of the defendant, and by its order to insure that the trial be had in such county as would be removed from undue influence either for or against said defendant."

It was important that the court, in selecting the place of trial, should take into consideration the defendant's request for a speedy trial as well as a fair and impartial trial. It was important to the state as well as to the defendant. The defendant urged his desire for a speedy trial, and in doing so he was asserting a constitutional right. Section 13, state constitution. In deciding where such a trial could be had it must, we think, be admitted that one county could be preferable to another in the same judicial district, or one judicial district to another, for the purpose of securing it. The presiding judge was in a position to know of the conditions in the other counties and judicial district. A speedy trial was assured in Cass county, and it is not shown or claimed that as speedy a trial could have been had elsewhere. This reason alone, in the opinion of the majority, shows that the presiding judge did not abuse his discretion.

The objection based upon the expense added by the change to Cass county, whatever it may be, does not merit serious consideration. The defendant deliberately elected to forego a trial by a jury of the vicinage because of the alleged prejudice against him, and thus cast upon the presiding judge the duty of selecting some

other county free from complaint. He voluntarily chose to bear the additional inconvenience and expense which would result from a trial away from his home. That the actual expense of making his defense in Cass county may be greater than if the trial was had in a nearer county is probably true. The defendant did not advise the trial court, nor has he advised this court, of the probable extent of the additional expense. This was a matter which, among other things, it was proper for the presiding judge to take into consideration, but, as compared with the necessity of securing a fair, impartial and speedy trial, it is of minor importance. It is not claimed that the defendant is unable to bear the additional expense, or that he is financially unable to make his defense in Cass county, because of the expense of securing witnesses; and, if that were urged, it could not be sustained, for the legislature has made provisions for the payment of fees of witnesses by the county in such cases. Section 8408, Rev. Codes. It is apparent, and indeed it is not claimed otherwise, that the defendant will not be deprived of any legitimate means of defense because of the additional expense, or because of the change to Cass county, and the objection cannot therefore prevail against the change which secures a fair and speedy trial. That mere additional expense will not prevail against a change to a county not adjoining see People v. Baker, 3 Parker, Cr. R. (N. Y.) 181, 197. It is conceded in this case that by the order of which complaint is made the defendant was assured of a fair and impartial trial, and by an unprejudiced judge. This is what the defendant prayed for in filing his application for a change. He also demanded a speedy trial. That, too, was granted, and it is not claimed that a speedier trial could have been had elsewhere. Whatever additional expense or inconvenience may be added because of the change are merely incidents voluntarily assumed by the defendant in applying for the change, and can be given but little weight as against the court's action in selecting a county where it is admitted a fair and speedy trial will be had. As previously stated, the selection of the county was a matter for judicial discretion. The objection that an adjoining county was not selected is confessedly without merit, and this is shown to be true as to the objection based upon additional expense. No other objections were urged to the selection of Cass county. In the opinion of the majority of the court it is not shown that the presiding judge exceeded his discretion in making the order complained of.

It follows, therefore, that the application for the writ must be denied, and the temporary restraining order dissolved; and it is so ordered.

MORGAN, C. J., concurs.

ENGERUD, J., (dissenting). I am unable to concur in the conclusions reached by my associates in the foregoing opinion. I shall state my reasons for dissent as briefly as possible. I agree with my associates that when the defendant, in a criminal case, demands and proves his right to a change of venue by reason of the bias and prejudice of the judge and inhabitants of the county where the case arose, neither the defendant nor the prosecution has any constitutional or statutory right to name the county to which the action shall be sent, but that the selection of the county wherein to try the case is committed to the discretion of the district judge. I concede that in selecting the county to which to send the case the judge may act upon facts within his personal knowledge, as well as upon proof offered by the parties. In the absence of any showing to the contrary, it must be presumed that the discretion was properly exercised. This presumption in favor of the action of the trial court may be overcome, however. To hold otherwise is to vest the district judge with unlimited arbitrary power (which is synonymous with caprice) to send a case to any county in the state, however remote from the county where the crime is alleged to have been committed. The presumption in this instance in favor of the propriety and regularity of the rulings of the district judge is in no respect different in kind or degree from the presumption which prevails with respect to the decision of that court in any other discretionary matter. The decision is presumed to be right until the contrary is made to appear. If it is made to appear in an appropriate proceeding before the Supreme Court that the discretion of the district judge has been erroneously exercised or abused, the erroneous decision or order should be set aside or corrected, whether it occurs on a motion to change the venue or in any other proceeding before the lower court. This must be so because the discretion of the lower court with respect to the selection of a county to which to send the case is a judicial, not an arbitrary discretion, and, being judicial, must be reasonably exercised with due regard to the rights of the parties, and must be justified by the facts upon which the decision was based. This is a proceeding which directly challenges the propriety of the order for a change

of venue on the ground that the district judge arbitrarily, and without any reasonable cause, sent the case to Cass county. Of all the county seats in this state, east of the Missouri river, with which Minot has direct railway communication, Fargo, the county seat of Cass county, is the most remote, with the possible exception of Wahpeton in Richland county. The petitioner alleges that there is no reason in existence to justify the selection of so distant a place for trial, and the place selected was objected to in proper season. When it said that there is a presumption that judicial discretion was properly exercised, it is meant thereby merely that there is a presumption, in the absence of any proof on the subject, that there were sufficient facts to warrant the decision in question. When, however, as in this case, in response to a proceeding which directly challenges the propriety of the decision on the ground that there were no facts justifying it, the lower court is called upon to disclose and certify to this court the facts upon which it based its decision, and all those facts are before the reviewing tribunal, there is no presumption in favor of the propriety of the decision under review.

The inquiry then is: Do the facts disclosed justify the decision? So, in this case, the district court was required by the order to show cause to disclose to this court all the facts which were before it, and upon which it relied, as a reason for selecting so remote a place for trial as Cass county, instead of some one of the several nearer counties. In obedience to the order the lower court has set forth in the return all the facts which it asserts warranted its decision. The question before this court is: Do the facts set forth in the return warrant the selection of Cass county in preference to some nearer county. I am very clearly of the opinion that the facts stated in the return were utterly insufficient to justify the selection of Cass county, and disclose a clear case of abuse of discretion. It seems to me too plain for argument that, when a change of venue becomes necessary by reason of local prejudice, the district court cannot rightfully send the case for trial to a place more remote than is necessary to secure a fair and impartial trial. The disadvantages of a trial far remote from the scene of the alleged crime are obvious. It is not merely a matter of expense, although that is an important item. Every lawyer of experience knows how often during the progress of a trial some unforeseen emergency may arise which renders it imperative to get additional testimony to refute or corroborate some other testimony which

has been unexpectedly disclosed at the trial, or to obtain information to enable counsel to effectively examine or cross-examine witnesses whose presence or whose testimony is a surprise. These reasons, and others which might be suggested, render it highly important that the trial should take place no further from the scene of the alleged crime than is absolutely necessary. The legislature has wisely left it to the discretion of the court to determine on the facts of each case how far from the county where the case arose the trial shall be had in order to avoid local prejudice, and I think it is clear that the distance it may be removed is impliedly limited to that required in order to obtain a fair and impartial trial. Such is the holding in New York under a similar statute. See People v. Baker, 3 Parker, Cr. R. 181, 198; s. c., 3 Abb. Prac. 42, 56, cited in the majority opinion. In that case it is said: "Ordinarily, where the place of trial is changed, an adjoining county should be selected, and so the authorities declare. However, there is no express limitation, and, if the necessity which may require any change should call for a more remote county, that should be selected."

I maintain that the presumption is that a fair and impartial trial can be had in any county in the state until the contrary appears. That being so, it was the duty of the court to select the nearest and most accessible county to Ward county, unless some valid objection to the selection of that county existed. The presumption being that a fair and impartial trial could be had in any other county than Ward, it is clear that the burden was on him who asserts the contrary to overcome the presumption. Hence the question in this case is: Do the facts disclosed in the return furnish a valid reason for passing by the several counties near to Ward and selecting a place of trial 284 miles away? In my opinion, if the facts disclosed by the return do not show a sufficient reason for passing over near-by counties, then it was an abuse of discretion to select a remote county in preference to a near one. The nature of the showing of local prejudice was such that it gave good grounds to claim that the prejudice extended to all the counties in the Eighth judicial district, and the district judge states in his return facts within his own knowledge which it may be assumed show that a fair and impartial trial could not be had in the Second judicial district, which, until quite recently, included the counties now constituting the Eighth judicial district. The only reason assigned for not selecting some county in the Fifth district, where the county seat is on the main line of the Minneapolis, Saint Paul &

Sault Ste. Marie Railway, and thus easily accessible to Minot, is that the judge of that district is a brother of one of the attorneys for the defendant. It is needless to say that that reason is insufficient. It cannot be supposed that a district judge will be influenced in his conduct as a judge in the trial of a criminal case by his relationship to one of the attorneys. If, however, it was undesirable to send the case to Fessenden, the county seat of Wells county, in the Fifth judicial district, which county seat is only eighty-nine miles from Minot, I am unable to discover why one of the two counties in the First district should not have been selected. No reason whatever is assigned why the case should not be tried in the First district. Lakota, the county seat of Nelson county, is only 142 miles from Minot, on the main line of the Great Northern railway, and Grand Forks is 206 miles from Minot, on the same line.

It seems unreasonable to me to assume that the political strife which created the prejudice against defendant in his county and judicial district had become so widespread and general as to taint with prejudice any appreciable portion of the inhabitants of other districts not affected by the questions which created the strife in Ward county. But, even if such a condition of affairs were possible or reasonably probable, it is not claimed that such is the condition in this case. It is not pretended that a fair jury could not be had in either the Fifth or First districts. As stated before, I assert that the propriety of the court's decision must be tested by those facts, and those alone, which are shown in the return as grounds for his action. The facts stated in the return are not disputed by the petitioner, and hence we are called upon to determine only the legal sufficiency of the facts alleged by the district judge to warrant his decision. In this case, as in any other case before an appellate court, we cannot go outside the record and assume the possible existence of other facts than those disclosed by the record, in order to sustain or reverse the decision under review. The fact that perhaps a speedier trial could be had in Cass county than in any other is in my opinion no sufficient reason for the selection of that county. It is doubtless true that the speedy disposition of the case is a desirable thing, and under some circumstances would be a good reason for preferring a more distant county than a nearer one. I maintain, however, that, where the trial is not likely to be delayed for any great length of time by selecting the nearer county, then the mere fact that the case may be

tried in the distant county a few days or weeks sooner than in the nearer is no reason whatever for selecting so distant a county.

Finally, I cannot agree with my associates in the holding that the defendant, when he was informed that the district judge had selected Cass county, should have offered proof that the nearer counties were unobjectionable. As already stated, the presumption was that a fair trial could be had in any county other than those of the Eighth judicial district. It was not necessary for the defendant to reinforce the presumed fact with corroborative proof. If the reasoning of the majority were true, then a defendant who obtains a change of venue for local prejudice must come prepared to show by proof in what counties a fair trial can or cannot be had; and this, even though no one questions the presumed fact that a fair trial can be had in any county. Neither can I agree with the opinion of the majority that the petitioner is not in a position to obtain a review of the decision of the district court because he did not first make a formal motion for reconsideration of the selection in that court. The district judge assumed to select the proper county without the aid of any suggestion from counsel, or any proof that the near-by counties were objectionable. He acted upon his assumed knowledge of the facts. What those facts were he did not disclose to the parties below. How, then, could the defendant below offer proof in support of a motion for reconsideration, when he was ignorant of what undisclosed reasons for the selection were in the mind of the judge?

The petitioner asserts that there could not have been sufficient reasons in the mind of the court. He takes the position that he is willing to concede the truth of all the facts which the district judge alleges in this court as reasons for the decision, but contends that those facts, instead of supporting the decision, show an abuse of discretion. In other words, his only contention is that the undisputed facts show an abuse of discretion. In my opinion his contention is clearly sound, and the relief ought to be granted.

(105 N. W. 728.)

JOHN S. MURPHY v. THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT, AND E. B. GOSS, JUDGE.

Opinion filed November 20, 1905.

Application by John S. Murphy for writ of certiorari to the district court of the Eighth Judicial District, and E. B. Goss, judge.

Writ denied.

W. S. Lauder and *Palda & Burke,* for plaintiff.

Green & McGee, for defendant.

PER CURIAM. This case is identical with and governed by the facts and conclusions announced in the case of Murphy v. District Court, 105 N. W. 728, the opinion in which has just been handed down. Following that case, the application for the writ must be denied, and the temporary restraining order dissolved; and it is so ordered.

(105 N. W. 734.)

THE STATE OF NORTH DAKOTA v. JOHN POULL.

Opinion filed November 20, 1905.

Intoxicating Liquors — Illegal Sale — Maintaining Nuisance — Evidence — Relevancy.

1. On a trial for the offense of maintaining a nuisance in violation of section 7605, Rev. Codes 1899, under an information charging the maintenance of a certain frame building on certain described lots, evidence that a nuisance was also maintained in another building on the same lots is not relevant to the issue.

Criminal Law — Reception of Evidence — Independent Offenses — Election Between Acts.

2. Where the evidence tends to show that two independent offenses were committed under such circumstances, it is prejudicial error to refuse to compel the state to elect which transaction it will rely on for conviction before the defendant offers any evidence in his defense.

Same — Time for Election.

3. It is discretionary with the trial court at what stage of the trial it will compel such election up to the time when the state rests its case in the first instance.

Intoxicating Liquors — Information — Sufficiency.

4. In informations charging the keeping and maintaining of nuisances in violation of section 7605, Rev. Codes 1899, the information should particularly describe the place where the nuisance is maintained before abatement proceedings can be based on a conviction thereon.

Same — Construction of Statute.

5. The word "place," as used in Rev. Codes 1899, section 7605, means the particular building or apartment where the unlawful sale is made or the intoxicating beverages are kept for sale.

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

John Poull was convicted of maintaining a nuisance, and appeals.

Reversed.

L. N. Torson and *A. M. Christianson,* for appellant.
C. N. Frich, Attorney General, for the respondent.

MORGAN, C. J. The defendant was convicted of the offense of keeping and maintaining a nuisance in violation of the provisions of section 7605, Rev. Codes 1899. The information alleges the maintenance of such nuisance between January 1, 1904, and December 10, 1904, and that defendant "did * * * keep a place, to wit, a certain frame building situated on lots 16 and 17 * * * of Rugby, Pierce county, N. D., * * * in which pace intoxicating liquors were * * * kept for sale, and in which place persons were * * * permitted to resort * * * for the purpose of drinking intoxicating liquors, * * * and in which place intoxicating liquors were * * * sold as a beverage," etc.

It appears from the evidence that there are two buildings on the lots in question. On the front part thereof is the building in which the defendant lived, and on the rear portion is a barn. The two buildings are not connected together in any way. The evidence tends to show that the defendant sold liquors in each of said buildings, and permitted persons to resort to each of these buildings for the purpose of drinking intoxicating liquors during the time covered by the information and this evidence would sustain a conviction for maintaining a nuisance at each of said places during the time charged. The evidence concerning sales or keeping for sale at the barn was objected to at the trial as irrelevant, and

not within the allegations of the information. At the close of the testimony for the state defendant moved that the state be compelled to elect whether it would rely for conviction on the evidence concerning sales at the barn or at the residence. This motion was denied and duly excepted to, and is now assigned as error. We think that the motion should have been granted. The information charged the maintenance of the nuisance at one building, and that cannot be held to be two buildings not connected together, but, on the contrary, wholly disconnected and independent. A nuisance is maintained by keeping a place for the purposes named in section 7605, Rev. Codes 1899; that is, by selling liquors at a place or keeping it there for purpose of sale, or permitting persons to resort to such place for the purpose of drinking intoxicating liquors. Under this section, the word "place" is restricted in its meaning, and cannot be construed to mean all buildings on a particular lot, when not shown to be united in some way. Two buildings on one lot are not necessarily one place, and in this instance constituted two places, within the rule of State v. Nelson (N. D.) 99 N. W. 1077, where the word "place" was defined as follows: "The word 'place,' as used in section 7605, Rev. Codes 1899, means the particular room, tenement or apartment wherein the unlawful business is done or the liquor is kept for sale or sold." Evidence as to sales and keeping for sale in the two buildings was therefore in reference to two separate and independent offenses. Had the information charged the maintenance of nuisances in these two buildings, it would have been objectionable and subject to demurrer, as charging two offenses in violation of section 8042, Rev. Codes 1899. It is elementary that evidence of other offenses than the one charged is not admissible, except in certain cases, and then for restricted purposes only. In this case the information charged the commission of the offense in a certain frame building on certain lots. On those lots were two buildings. Evidence as to violation of the law in either of these two buildings would have been relevant under the information. The information contained nothing showing what building was intended to be specified as the one in which the nuisance was maintained. The facts in this case are not like those in State v. Brown, 104 N. W. 1112, recently decided by this court. In that case both structures formed a part of the same place, and were described as within one curtilage.

At what stage of the trial the state shall be compelled to elect is undoubtedly somewhat in the discretion of the trial court.

The duty to do so at some time before or at the time the state rests on its direct case devolves upon the court, where two distinct offenses are testified to by the witnesses, and their evidence does not fall within some of the exceptions to the general rule heretofore mentioned. The reason for this rule is as obvious as its fairness. The defendant is charged with but one offense by the information, and cannot be expected to be prepared to defend except as to the offense charged. If evidence of more than one offense is permitted finally to be presented to the jury, it cannot determine from a verdict what offense the defendant was convicted of, nor whether the jurors agreed on one offense as having been committed. To require an election before the defendant shall be compelled to present his defense is a reasonable requirement, and is consistent with our criminal procedure that contemplates that the defendant shall be advised of the offense with which he is charged, and that he shall not be twice tried for the same offense. The following authorities hold that it is prejudicial error to refuse to compel an election by the state under facts similar to those in the case at bar. Wharton on Criminal Evidence, section 104; Bishop on Criminal Procedure, section 460; Maxwell on Criminal Procedure, 551; State v. Crimmins, 31 Kan. 376, 2 Pac. 574; Boldt v. State, 72 Wis. 7, 38 N. W. 177; State v. Valentine, 7 S. D. 98, 63, N. W. 541; State v. Boughner, 7 S. D. 103, 63 N. W. 542; Lebkovitz v. State, 113 Ind. 26, 14 N. E. 363, 597; State v. Farmer, 104 N. C. 887, 10 S. E. 563; State v. Smith, 22 Vt. 74; Stockwell v. State, 27 Ohio St. 563; People v. Jenness, 5 Mich. 305.

The information did not give a particular description of the place where the nuisance was maintained. The number of the lots was given, but the block in which they were situated was not given; and it appears from the evidence that the village of Rugby is platted into lots and blocks. The omission of the block in the description of the place would not be sufficiently definite on which to base abatement proceedings after conviction. Section 7614, Rev. Codes 1899; State v. Thoemke, 11 N. D. 386, 9 N. W. 480; State v. Nelson, supra. As the information can be amended before another trial, no further questions will probably arise on the incomplete description.

The judgment is reversed, and the cause remanded for further proceedings. All concur.

(105 N. W. 717.)

STATE OF NORTH DAKOTA v. C. H. FOSTER.

Opinion filed November 24, 1905.

Criminal Law — Adjournment of a Preliminary Examination for More Than Three Days Not Invalid Where There Is No Injury.

1. The adjournment of a preliminary examination by a justice of the peace for more than three days, in violation of section 7954, Rev. Codes 1899, is not invalid, so as to render the subsequent examination a nullity, unless it has actually prejudiced the defendant, or has tended to his prejudice in respect to a substantial right.

Statutory Grounds for Setting Aside Information Excludes All Others.

2. The grounds for setting aside an information enumerated by section 8082, Rev. Codes 1899, are exclusive of all others, and do not include the failure to file an information at the term of court succeeding the defendant's commitment.

Criminal Law — Delay in Filing Information.

3. A regular term of court, within the meaning of section 8497, Rev. Codes 1899, which in the absence of good cause shown, requires the dismissal of a prosecution when an information is not filed at the next regular term after the defendant's commitment, means a jury term, as distinguished from a statutory term without a jury.

Cross Examination Is a Matter of Right, But Extent and Latitude Discretionary.

4. An opportunity to cross-examine is a matter of right, but the latitude and extent of the cross-examination rests largely in the discretion of the trial judge. The limitation imposed in this case does not show an abuse of discretion.

Same — Instructions — Circumstantial Evidence.

5. It is not error to fail to refuse to charge the law as to circumstantial evidence, when the state's case rests in part upon direct evidence.

Same — Direct and Circumstantial Evidence.

6. There is no legal distinction, so far as the weight and effect to be given to it is concerned, between circumstantial and direct evidence, and it is not error to refuse a request which disparages it as a species of evidence.

New Trial — Sufficiency of Evidence.

7. The verdict in this case rests upon evidence of a substantial nature, and it was not error to refuse a new trial because of its alleged insufficiency.

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

C. H. Foster was convicted of larceny, and appeals.

Affirmed.

Geo. A. Bangs, for appellant.

By a continuance for more than three days the magistrate lost jurisdiction and the commitment was void, there being no preliminary examination to support it. State v. Barnes, 3 N. D. 131, 54 N. W. 541; State v. Weltner, 7 N. D. 522, 75 N. W. 779.

An information should charge the same offense as that of the complaint on preliminary examination. People v. Cohen, 50 Pac. 20; People v. Crespi, 46 Pac. 863; State v. Wright, 91 N. W. 311; People v. Christian, 35 Pac. 1043; Brown v. State, 64 N. W. 749; Yaner v. People, 34 Mich. 286; Davis v. State, 22 S. W. 979; State v. Farris, 51 Pac. 772; Com. v. Linton, 2 Va. 205; section 7954, Rev. Codes 1899.

When an act is to be performed in fulfillment of a statutory requirement, Sunday will not be excluded and the act must be done on Saturday. Harrison v. Sager, 27 Mich. 476; Dale v. Lavigne, 31 Mich. 149; Vailes v. Brown, 27 Pac. 945; Peacock v. Reg., 93 E. C. L. 264; Ex parte Simkin, 105 E. C. L. 392; Rollin v. Overseers, 52 E. C. L. 71; Sheffer v. McGone, 47 Fed. 872; Herman v. U. S., 66 Fed. 721; Burr v. Lewis, 7 Tex. 76; Company v. Schroeder, 59 A. S. R. 25; Ex parte Dodge, 7 Cow. 147; Brown v. Wellington, 1 Sandf. 664; Weaver v. Lammon, 28 N. W. 905.

When an information is not filed at the next term at which it is triable, it should be dismissed. Section 403, Rev. Codes 1899; Bishop on Cr. Proc., sections 89, 92, 93.

The statute is mandatory and prosecution should have been dismissed. Ex parte Bull et al., 42 Cal. 196; People v. Staples, 27 Pac. 523 to 525; People v. Wickham, 48 Pac. 123; In re Esselborn, 8 Fed. 904; Cummins v. People, 34 Pac. 734; Jones v. Com., 19 Grat. 478; Bennett v. Sette, 27 Tex. 701; Wentzels v. People, 28 Atl. 694; Ex parte Two Calf et al., 9 N. W. 44; State v. Miller, 62 N. W. 238.

Unless defendant is brought to trial at next term at which information is triable after it is filed, prosecution should be dismissed, and this provision is mandatory, and state must establish good cause for the failure. People v. Morino, 24 Pac. 892; People v. Douglass,

34 Pac. 490; In re Begero, 65 Pac. 828; State v. Brodie et al., 35 Pac. 137; State v. Kuhn, 57 N. E. 106; Walker v. State, 15 S. E. 553; In re Garvey, 4 Pac. 758; In re McMicken, 18 Pac. 473; Ochs et al. v. People, 16 N. E. 662.

The court erred in restricting and limiting the cross-examination. Wigmore on Evidence, section 1368 and 1390; Greenlf. on Evidence, section 446; State v. Kent (Pancoast) 5 N. D. 516, 67 N. W. 1052; People v. Gallagher, 35 Pac. 80; Territory v. OHare, 1 N. D. 30, 44 N. W. 1003; People v. Tice, 30 N. E. 494, 15 L. R. A. 669; People v. Casey, 72 N. Y. 394; People v. Irving, 95 N. Y. 541; State v. Rozum, 8 N. D. 548, 80 N. W. 477; O'Donnell v. Segar, 25 Mich. 371; Bennett v. Eddy et al., 79 N. W. 481; Thompson v. Richards, 14 Mich. 172; Chandler v. Allison, 10 Mich. 460; 3 Enc. of Evidence, 809 to 812; People v. Cole, 43 N. Y. 508; Lichtenberg et al. v. Mair, 5 N. W. 455; Beers v. Payment, 54 N. W. 886; Jones on Evidence, section 437; Zacher et al. v. Carpeles et al., 50 N. W. 373; People v. Westlake, 57 Pac. 465.

The state relied wholly upon circumstantial evidence and the court should instruct the jury thereon. People v. Scott, 37 Pac. 335; Hanks v. State, 56 S. W. 922; Polanke v. State, 28 S. W. 541; Williard v. State, 9 S. W. 358; Hart v. State, 23 S. E. 831; Crowell v. State, 6 S. W. 318; Jones v. State, 31 S. E. 574; Lopez v. State, 40 S. W. 594; Hamilton v. State, 22 S. E. 528; State v. Brady, 91 N. W. 801, 97 N. W. 62; 1 Blashfield Inst. Juries, section 213, 12 Cyc. 633; 12 Am. & Eng. Enc. Law (1st Ed.) 879; Underhill on Cr. Ev. 10; Rapalje on Larceny, section 258; State v. Maxley, 14 S. W. 969; Territory v. Lermo, 46 Pac. 16; McCamant v. State, 37 S. W. 437.

J. B. Wineman, State's Attorney, and *B. G. Skulason,* Assistant State's Attorney, for respondent.

Jurisdiction of a justice in a criminal case is not lost by adjourning the cause for more than three days without the consent of the parties. People v. Van Horn et al., 51 Pac. 538; State v. Valure, 64 N. W. 280.

"A term of the district court," as used in section 7982, Rev. Codes 1899, means an actual session, having a place, time, judge and jury at which the defendant can be tried. Jones v. Commonwealth, 19 Gratt. 478; Clark v. Commonwealth, 29 Pa. St. (5 Casey, 129);

State v. Boucher, 8 N. D. 277, 78 N. W. 988; Com. v. Brown, 11 Phila. 370; State v. Tough, 12 N. D. 425, 96 N. W. 1025; State ex. rel. Adams v. Larson, 12 N. D. 474, 97 N. W. 537.

It is within the discretion of the trial judge to limit the cross-examination, and he is not bound to wait for objection or request from the state. Gilliland v. State, 42 N. E. 238; Payne v. Goldbach, 42 N. E. 642; Bailey v. Bailey, 63 N. W. 341; Hamilton et al. v. Miller, 26 Pac. 1030; Commonwealth v. Leyden, 113 Mass. 452; Wallace v. Tauton, 119 Mass. 91; Gardner v. Kellogg, 23 Minn. 463; Ellis v. Pervis, 10 N. Y. St. Rep. 628; Thompson on Trials, section 352, and cases cited; Abbott's Criminal Trial Brief, page 319, and cases cited; Plew v. State, 35 S. W. 366; Buck v. Maddock, 167 Ill. 219; Pigg v. State, 145 Ind. 560; State v. Brown, 100 Iowa, 50; People v. Harrison, 93 Mich. 594; State v. Miller, 93 Mo. 263; State v. Southern, 19 So. 668.

Restriction or enlargement of the scope of cross-examination as to credibility will not be reviewed except for abuse. Birmingham Fire Ins. Co. v. Pulver, 18 N. E. 804; People v. Kindra, 60 N. W. 458; State v. Ward, 73 Iowa, 534, 35 N. W. 617; Lumehan v. State, 115 Ala. 471; State v. Ross, 21 Iowa, 467; State v. Refefferle, 36 Kan. 90; State v. May, 11 S. E. 440; Commonwealth v. Hales, 10 Cush. 530; People v. McEran, 121 Mich. 79; Jones on Evidence, 827; Wigmore on Evidence, 944, 983; Rice on Criminal Evidence, 330, 334; Greenleaf on Evidence, 431.

If there is direct evidence that defendant admitted his guilt, the court may refuse instruction based upon the theory that the evidence is purely circumstantial. Blashfield on Instructions to Juries, 323, and cases cited; Tatum v. State, 85 N. W. 40; Barrow v. State, 80 Ga. 191; Cotton v. State, 87 Ala. 75; Rains v. State, 88 Ala. 91; Upchurch v. State, 39 S. W. 371; State v. Donnelly, 130 Mo. 642; Weatherby v. State, 29 Tex. App. 278; Wilson v. State, 29 So. 569; People v. Lem Deo, 132 Cal. 199; Thomas v. State, 62 S. W. 919.

Only where the inculpatory evidence is wholly circumstantial is an instruction as to its weight required. Smith v. State, 28 Tex. App. 309; Self v. State, Id. 98; Jones v. State, 31 Tex. App. 177.

Where there is direct evidence sufficient to convict, an instruction on circumstantial evidence is not required. Welch v. State, 27 So. 307; Purvis v. State, 14 So. 268; Vaughan v. State, 20 S. W. 588; People v. Burns, 53 Pac. 1096; State v. Gartrell, 71 S. W. 1045;

State v. Calder, 59 Pac. 903; People v. Kaatz, 3 Park Cr. 129; Barnards v. State, 12 S. D. 431; Jackson v. State, 62 S. W. 914; 12 Cyc. Law & Pro. 634.

Proof of confession by defendant renders a charge on circumstantial evidence unnecessary. Green v. State, 12 So. 416, 15 So. 242; Perry v. State, 36 S. E. 781; Langdon v. People, 24 N. E. 874; State v, Robinson, 23 S. W. 1066; Robert v. State, 70 S. W. 423.

YOUNG, J. The defendant was convicted of the crime of larceny upon an information filed by the state's attorney of Grand Forks county. A motion for new trial was overruled, and he has appealed from the order and judgment.

The first error assigned is the refusal of the trial judge to grant a motion to set aside the information, which was upon two grounds: (1) That he had no preliminary examination before the information was filed; and (2) that the information was not filed at the next term of the district court after his commitment. The motion was properly denied. The claim that there was no preliminary examination is based upon an alleged loss of jurisdiction by the examining magistrate. It is shown that on September 22, 1904, the state's attorney applied for a continuance because of the absence of a material witness, and the justice granted the request over defendant's objection, and adjourned the examination until September 26th, a period of four days. The 25th was Sunday. The examination was continued on the 26th, over defendant's objection to the jurisdiction, and resulted in the defendant's being committed for trial. Counsel for defendant claims that the justice lost jurisdiction by the adjournment, and that the subsequent examination was therefore a nullity. He relies upon section 7954, Rev. Codes 1899, which reads as follows: "The examination must be completed at one session unless the magistrate, for good cause, adjourns it. The adjournment cannot be for more than three days at each time, nor more than fifteen days in all, unless by consent, or on the motion of the defendant." The adjournment was for four days, if Sunday, the 25th, be included, and in that event was beyond the limit fixed by the statute. It is not necessary to determine whether Sunday should be excluded; for, assuming that the adjournment was beyond the statutory limit, still it does not follow that the justice lost jurisdiction to proceed upon the adjourned day. No prejudice is shown to have resulted to the defendant because of the adjournment, neither did he lose any substantial right. It was, in

that event, a mere mistake or error in the proceedings, which, under the terms of section 8423, Rev. Codes 1899, did not render it void. That section provides that "neither a departure from the form or mode prescribed in this code in respect to any pleadings or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." It is apparent that the defendant's claim that he has not had a preliminary examination is without merit. The supreme court of California, under a statute similar to section 7954, and upon a like state of facts, reached the same conclusion, and without reference to the statutory rule of interpretation contained in section 8423 by which we are governed A defendant who is aggrieved by the unwarranted adjournment of his hearing by a committing magistrate is not remediless. He may, upon habeas corpus, either secure his discharge or a speedy examination. See section 8662, subd. 2, and section 8664, Rev. Codes 1899.

The second ground of the motion, the alleged failure to file an information at the next regular term of court succeeding his commitment, is not one of those enumerated by section 8082, Rev. Codes 1899, as grounds upon which an information may be set aside. In State v. Tough, 12 N. D. 425, 96 N. W. 1025, we held that the grounds enumerated by this section are exclusive of all others, and so the courts generally hold under similar statutes. See cases cited in opinion, page 429 of 12 N. D., page 1026 of 96 N. W. The several grounds named in the statute go to the validity of the information. The defendant's objection goes, not to its validity, but to an alleged failure on the part of the state to proceed with the prosecution within the time required by statute. The remedy of one so aggrieved is not by an attack upon the information.

Following the denial of the above motion, counsel for defendant moved to dismiss the prosecution and discharge the defendant upon the second ground urged in his attack upon the information, to wit, that no information was filed against him at the next regular term of court succeeding his commitment. This motion was also denied, and the ruling is assigned as error. In our opinion no error was committed. The motion is based upon section 8497, Rev. Codes 1899, which provides that "the court, unless good cause to the contrary is shown, must order the prosecution to be dismissed: * * * (1) When a person has been held to answer for

a public offense, if an information is not filed or an indictment found against him at the next regular term of the district court. * * *" The record shows that the defendant was committed on September 26, 1904, and the information was filed on December 12, 1904, at the first jury term of court held after his commitment. It is true section 403, Rev. Codes 1899, provides for a term of court in Grand Forks county for each month in the year except the months of August and September, commencing on the first Tuesday of each month. But these terms are not made regular jury terms by the statute. The same section requires the calling of a jury for at least two terms each year, and with this exception provides that a jury shall not be called for any term unless, in the opinion of the judge, there is sufficient business to demand a jury. No jury was called for the October or November terms, and the term at which the information was filed was the first jury term held after the defendant was committed. We are of opinion that a regular term of court, within the meaning of section 8497, means a court which is equipped with a jury for the trial and cases, and not a mere statutory term without a jury. This section was in force long before the so-called statutory terms were provided for, and that was its meaning then, and must be held to be its meaning now. This section requires two jury terms at least to be held each year in Grand Forks county. If they are held, it cannot be said that a defendant is denied his constitutional right to a speedy trial. If without good cause the presiding judge should fail or neglect to call a jury for these two terms, a different question would arise, and one which we need not discuss, for there has been no such neglect of duty, and the defendant predicates no rights upon the fact that a jury was not called at the October and November terms. His position is that each statutory terms is "a regular term," a position which, in our opinion, is not tenable.

Counsel for appellant also assigns error upon the court's action in limiting his cross-examination of the prosecuting witness Perry. We have examined the record upon this point and find no abuse of discretion. An opportunity to cross-examine is a matter of right, but the latitude and extent of the cross-examination rests largely in the discretion of the presiding judge, and he may place "a reasonable limit upon the time which shall be allowed for the examination or cross-examination of a witness." 1 Thompson on Trials, section 352, 8 Enc. Pl. & Pr. 110, and cases cited; Hamilton v. Miller (Kan.) 26 Pac. 1030; State v. Brown, 100 Iowa, 50, 69

N. W. 277; Hamilton v. Hulett, 51 Minn. 208, 53 N. W. 364; Jones v. Stevens, 36 Neb. 849, 55 N. W. 251; Railway Co. v. Bailey, 43 Ill. App. 293. The record shows that the presiding judge permitted a cross-examination of this witness for more than an hour, and covering the widest latitude, before he interrupted, and then allowed ten minutes' additional time. It cannot be said that the defendant did not have an opportunity to cross-examine, and we find no ground for holding that the defendant suffered any prejudice, or that the trial judge abused his discretion in imposing the limitation.

Error is assigned upon the failure to instruct as to circumstantial evidence. In this no error was committed. The state's case did not rest entirely upon circumstantial evidence. The main facts were attested by eye witnesses. It is only when a conviction is sought upon circumstantial evidence alone that the trial court is required to charge the law relating thereto. Barnards v. State, 88 Tenn. 183, 235, 12 S. W. 431; State v. Donnelly, 130 Mo. 642, 649, 32 S. W. 1124; State v. Robinson, 117 Mo. 663, 23 S. W. 1066; Cotton v. State, 87 Ala. 75, 6 South. 396; Weathersby v. State, 29 Tex. App. 279, 309, 15 S. W. 823; Hays v. State, 30 Tex. App. 404, 17 S. W. 940; Baldwin v. State, 31 Tex. Cr. R. 589, 21 S. W. 679; Adams v. State, 34 Tex. Cr. R. 470, 31 S. W. 372; Crews v. State, 34 Tex. Cr. R. 533, 543, 31 S. W. 373.

Defendant also complains of the refusal to give the following instruction: "In this case the state relies on what is known as circumstantial evidence to establish that the defendant was concerned in, or aided and abetted, the commission of the crime of larceny, if you find beyond a reasonable doubt that such crime was committed; and while circumstantial evidence is in its nature liable to produce the highest degree of moral certainty, yet experience and authority both admonish us that it is a species of evidence in the application of which the utmost caution and vigilance should be used." The request was properly refused, and for two reasons: First, it erroneously assumed that the case was one purely of circumstantial evidence; and, second, it discredited such evidence as matter of law. It is well settled that there is no legal distinction, so far as the weight and effect to be given it is concerned, between direct and circumstantial evidence. State v. Rome, 64 Conn. 329, 30 Atl. 57; Hickory v. United States, 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170; Brown v. State, 23 Tex. 195; People v. Morrow,

60 Cal. 142; People v. Urquidas, 96 Cal. 239, 31 Pac. 52; People v. O'Brien, 130 Cal. 1, 62 Pac. 297; Wharton on Criminal Evidence (9th Ed.) section 30.

There are five further assignments relating to the instructions, which require only a passing reference. As to three of them it is sufficient to say that we find that the charge given, when read as a whole, as it must be, is not open to the objections urged against it. The other two assignments relate to the court's refusal to instruct that the evidence was insufficient to sustain certain allegations of the information. Just what these allegations were the record does not disclose. The information is not set out in the abstract. These questions are not, therefore, properly reviewable. But, assuming that the facts are as stated in appellant's brief, we are agreed that the assignments are without merit.

The defendant also urged as ground for new trial that the verdict is "clearly against the evidence." Rev. Codes 1899, section 8271. In our opinion the trial judge did not abuse his discretion in denying the motion. It appears from recitals in the abstract that the information charged the defendant jointly with Bradford and Hicks with the crime of larceny from the person, in the nighttime, of $25, the property of J. E. Perry." This defendant demanded and was accorded a separate trial. The theory of the state was and is that the three defendants were confederates. The evidence shows that the larceny was committed on a west-bound Great Northern passenger train between Larimore and Niagara, in Grand Forks county. The train was crowded when it left Grand Forks, many persons being unable to find seats, and among them was the prosecuting witness, Perry, who was on his way from Michigan to Montana. Hicks secured a seat in the smoking car and asked Perry to occupy it with him. A few minutes later Bradford joined them and Hicks and Bradford engaged in conversation; later in matching pennies, half-dollars and dollars. Hicks stated that he was a banker at Grand Rapids, Mich., and Bradford represented himself as the proprietor of a large stock farm in Kentucky. Finally Hicks asked Perry if he could change a $20 bill, and the latter, after some hesitation, produced a roll of bills, consisting of two $10 bills and a $5 bill, and while the money was resting in his open hand both Hicks and Bradford grabbed for it. Bradford got it and started out of the car. Hicks at once grabbed Perry and detained him, and during the time offered to give him a check on a Great Falls bank in lieu of the money which had been taken. Perry finally

got away from Hicks and went after Bradford, calling out as he went down the car aisle that he had been robbed. When he reached the end of the car he was grabbed by the defendant Foster and thrown against the side of the car, and was again set upon by the defendant in the vestibule, and their "tussle" was continued upon the ground while the train stopped for water at Niagara, and apparently was finally stopped by the interference of a passenger by the name of Smith. Perry finally found the dining car conductor and the sleeping car conductor, and narrated the facts to them. At the latter's request he went through the train and identified the defendants. Hicks was found in the vestibule disguised in appearance by a change of hat and overcoat and by the addition of spectacles. Bradford was found in a seat apparently asleep with his hat pulled down over his face. Dearborn, the sleeping car conductor, testified that the defendant Foster said to him, "We got the money, and if you will steer the old man back here we will give it back to him." This was said in the vestibule in the presence of Hicks and Bradford, and later, when Perry was called back, the money was returned to him by Bradford, in the presence of the defendant and Hicks and several of the trainmen. The record contains other incriminating facts which need not be stated. The defendant did not take the stand, and no witnesses were sworn on his behalf. The case went to the jury upon the uncontradicted testimony of the state, and the only question is whether it was sufficient to warrant the verdict. The trial court held upon the motion for new trial that it was, and we fully agree with his conclusion. The verdict rests upon evidence of a substantial nature, and it was for the jury to determine its weight.

Finding no error in the record, the judgment and order appealed from must be affirmed, and it is so ordered. All concur.

(105 N. W. 1108.)

GEORGE W. HART v. O. G. HANSON, T. A. ULBERG, GILBERT NELSON, A. G. CLAYTON, SIDNEY C. LOUGH AND P. S. EVANSON, DEFENDANTS, P. S. EVANSON, APPELLANT.

Opinion filed November 24, 1905.

Banks and Banking — Directors' Duty to Creditors.

1. A director of a banking corporation owes no duty in a legal sense, by reason of his office, to the creditors of the bank or to the public.

Same — Directors' Liability to Corporation.

2. The directors of a bank are liable only to the corporation whose agents or trustees they are for violation or neglect of their official duty.

Same — In the Absence of Actionable Deceit Directors Are Not Liable to Creditors.

3. In the absence of actionable deceit, directors are not directly liable in damages to a creditor of the corporation for loss suffered by the creditor through the insolvency of the corporation caused by the directors' neglect of their official duties.

Same — Liability for Deceit — Duties of Directors in Case of Insolvency.

4. The mere fact that a director, who knows that the bank is insolvent, takes no action to close the bank, or announce its insolvency, does not make him liable for deceit to persons who have extended credit after the bank became insolvent on the assumption that it was solvent.

Appeal — Where Complaint and Evidence Show No Cause of Action Appellate Court Will Dismiss.

5. Where the complaint does not state a cause of action, and the evidence affirmatively shows that no cause of action exists, the appellate court will direct the action to be dismissed.

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

Action by George W. Hart against P. S. Evanson and others. Judgment for plaintiff, and defendant Evanson appeals.

Reversed.

Tracy R. Bangs, for appellant.

Solvency or insolvency is an ultimate fact to be submitted to a jury, and it was incompetent for a witness to give an opinion upon the subject. Minton v. Stahlman, 34 S. W. 222; State v. Stevens, 92 N. W. 420; Babcock v. Middlesex S. B. & B. Assn., 28 Conn. 302; State v. Myers, 38 Pac. 296; Brice v. Lide, 30 Ala. 647; Brundred v. Machine Co., 4 N. J. Eq. 295; Nuckolls v. Pinkston, 38 Ala. 615; Persee & Brooks Paper Wks. v. Willett, 24 N. Y. Sup. Ct. 131; Hall v. Ballou, 12 N. W. 475.

A director or stockholder of a bank is not chargeable with actual knowledge of the business transactions of the corporation. Briggs v. Spaulding, 35 L. Ed. (U. S.) 662; Rudd v. Robinson, 26 N. E. 1046; Dickey v. Leonard, 77 Ga. 151; Wakeman v. Dalley, 51 N. Y. 27.

When bank directors have in entire good faith selected a manager in whose competency and honesty they have reason to believe, being themselves without banking experience, they have acted prudently and with proper caution. Clews v. Bardon, 36 Fed. 617; Warner v. Pennoyer, 82 Fed. 181; Same v. Same, 91 Fed. 587.

Keeping a bank open for business does not constitute a representation of its solvency. 14 Am. & Eng. Enc. Law, 80; Cochrane et al. v. Hasley, 25 Minn. 52; Bell v. Ellis, 33 Cal. 620; Hotchkin v. Third National Bank, 27 N. E. 1050; 14 Am. & Eng. Enc. Law, 81.

The special verdict fails to support the judgment, in that there is no finding that appellant made any misrepresentation to plaintiffs or either of them with intent to deceive, or to induce them to sign the bond. Sections 3847, 3848, 3850, Rev. Codes 1899; 14 Am. & Eng. Enc. Law (2d Ed.) 21, 85, 102, 207; Feeny v. Howard, 12 Am. St. Rep. 162; Haven et al. v. Neal et al., 45 N. W. 612.

Where a jury is to find a special verdict, they must find the ultimate facts. Russell v. Myers, 7 N. D. 335, 75 N. W. 262; Louisville, N. A. & C. Ry. Co. v. Miller, 37 N. E. 343; Bartholomew v. Pierson, 14 N. E. 249; Humpener v. D. M. Osborne & Co., 50 N. W. 88; McKenna v. Whittaker, 69 N. W. 587; Bartow v. Nor. Assur. Co., 72 N. W. 86.

Fraud under our statute is a question of law. Nat. State Bank v. Sanford Fork & Tool Co. et al., 60 N. E. 699; Cicero Township v. Picken et al., 23 N. E. 763; Phelps et al. v. Smith et al., 17 N. E. 602; Farmers Loan & T. Co. v. Canada & St. L. Ry. Co. et al., 26 N. E. 784; Rose v. Colter, 76 Ind. 590; Owens v. Gascho, 56 N. E. 224; Wilson v. Campbell et al., 21 N. E. 893; Phillips v. Kennedy et ux., 39 N. E. 147; Monticell Bank v. Bostwich, 77 Fed. 123; Parks v. Satterthwaite, 32 N. E. 82; Elston v. Castor, 101 Ind. 426; State Bank v. Bachus et al., 66 N. E. 475; Fletcher et al. v. Martin et al., 25 N. E. 886; Hawkins et al. v. Fourth Nat. Bank et al., 49 N. E. 957; Maxwell v. Wright et al., 67 N. E. 267; McKibben et al. v. Ellingson, 59 N. W. 1003.

In the absence of a finding of intent to deceive, no such intent is presumed to exist. Cincinnati, O., St. L. & C. Ry. Co. v. Gaines, 5 N. E. 746; Meeker et al. v. Shanks et al., 13 N. E. 712; Bank v. Dovetail B. & G. Co., 40 N. E. 810; Vinton v. Baldwin, 95 Ind. 433; Hildman v. City of Phillips, 82 N. W. 566.

Frank B. Feetham and *B. G. Skulason,* for respondent.

An expert, after showing the facts, figures, computations, values and other tangible matters which can be explained to the jury, should then be permitted, as an expert, to give his opinion as to the result, as to the solvency or insolvency of a party. State v. Cadwell et al., 44 N. W. 700; Waterson v. Fuelhart, 32 Atl. 597; Crawford v. Andrews, 6 Ga. 244; Breckenridge v. State, 5 Dana. 114; Reggins v. Brown, 12 Ga. 273.

If the admission of opinion evidence was error, it was without prejudice; the point was fairly established by competent testimony. United States v. Adams, 9 N. W. 718; Comms. of Highways of Homer Township v. Riker, 44 N. W. 955; Taylor v. Neys et al., 79 N. W. 998; Parsons v. New York Central & Hudson River R. Co., 3 L. R. A. 683; Campbell v. Carnahan, 13 S. W. 1098; Jacksonville, Tampa & Key West R. Co. v. Peninsular Land, Transportation & Manufacturing Co., 17 L. R. A. 33; New Mexican R. Co. v. Hendricks et al., 30 Pac. 901, 2 Enc. Pl. & Pr. 556.

An officer of a corporation is chargeable with notice of all matters relating to its affairs which he actually knows, or which it is his duty to know, and which by diligence he might have known, whether known or not. 21 Am. & Eng. Enc. Law, 896; Finn v. Brown, 12 S. C. R. 140; German Bank v. Wulfheimer, 19 Kan. 60; Martin v. Webb, 3 S. C. R. 428; United States v. Underwood, 15 Am. Rep. 735; State v. Myers, 38 Pac. 299.

Good faith, exact justice and public policy unite in requiring of one voluntarily taking the position of trustee or director of a corporation, ordinary care and prudence, and it is a gross breach of duty not to bestow them. Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546; Ackerman v. Halsey, 37 N. J. E. 356; same case, 38 N. J. E. 501; Society v. Underwood, 15 Am. Rep. 735; U. S. v. Means, 42 Fed. 599; Warren v. Penoyer, 91 Fed. 287; Warren et al. v. Robison et al., 57 Pac. 287; Rev. Codes 1899, sections 7529, 7532, 7524.

When a bank is insolvent, it should not only decline deposits but close its doors, and it is a fraud upon its depositors not to do so. 3 Am. & Eng. Enc. Law, 847; Higgins v. Hayden, 73 N. W. 280; Craigie et al. v. Hadley, Receiver, etc., 1 N. E. 537; American Trust & Savings Bank v. Gueder & Paeschke Manufacturing Co., 37 N. E. 227; Peck v. Bank, 43 Fed. 357; Wasson v. Hawkins, 59 Fed. 233.

Ultimate facts found by a jury in a special verdict, if sufficient to state a cause of action, will support a judgment. 9 Enc. Pl. & Pr. 696; Ginson v. Fristoe, 1 Am. Dec. 502.

If the directors have been guilty of neglect of duty amounting to a tort, they are liable to account. United Society v. Underwood, 15 Atl. 735; Gibbons v. Anderson, 80 Fed. 345; Hun v. Cary, 82 N. Y. 65; Solomon v. Bates, 181 N. C. 311; Cassidy v. Uhlmannet et al., 63 N. E. 554; Carr v. State, 16 So. 150; San Pedro Lumber Co. et al. v. Reynolds, 53 Pac. 410; Marshall v. Farmers' & Mechanics' Savings Bank, 8 S. E. 586; Craigie et al. v. Hadley, Receiver, etc., 1 N. E. 537; Cummins v. Winn. 14 S. W. 512.

ENGERUD, J. Defendant P. S. Evanson appeals from a judgment for plaintiff and from an order denying a motion for a new trial. The complaint states, in substance, the following facts: The defendants were directors of the State Bank of Northwood. On or about February 20, 1901, the bank's application to the county commissioners of Grand Forks county to be designated a depositary of the funds of that county under article 8, c. 26, Pol. Code, had been accepted and the directors authorized Mr. Lough, the president of the bank, to cause to be executed and delivered to the county, in behalf of the bank, a bond, with sureties, as required by the county depositary law, to indemnify the county against loss of the funds received by the depositary. At the solicitation of Mr. Lough, this plaintiff and his assignors became sureties on such depositary bond, and the same was delivered to and accepted by the county. County funds were thereupon deposited in the bank, and on July 23, 1901, the bank was closed by the state authorities by reason of its insolvency. The plaintiff and his assignors paid to the county the sum of $1,990.20 in satisfaction of their liability on the bond. It is alleged that the bank had been insolvent more than two years before the bond was procured, and had been insolvent ever since, and that the defendant knew of its insolvency during all of said time; but that notwithstanding such knowledge, the defendants, contrary to law, kept the bank open and paid dividends, "and did carry 10 per cent of the face of the stock of said bank to a fund which they designated a surplus, did make and publish false statements of the condition of such bank, did accept upon deposit funds of said county and did in all things so conduct the affairs of said bank in the same manner as if it were a solvent institution, and did deceive the public, and especially the sureties, who at the solicitation of the said Sidney C. Lough, signed the said bond to the county of Grand Forks as to the true condition of the said bank, and that by reason of such false and fraudulent and

unlawful representations made at the direction of the defendants herein and by them, and in reliance thereon this plaintiff did sign said bond to the said county of Grand Forks aforesaid." It is alleged that the condition of the bank is such that nothing will be realized for the creditors from the assets. The plaintiff's two cosureties assigned their claims to him, and he demands judgment for $1,990.20, the aggregate amount paid by the three sureties; each claim being set forth in a separate cause of action.

The appellant's answer, aside from certain admissions unnecessary to particularly mention, was in effect a general denial. The evidence was submitted to the jury for a special verdict. In response to the interrogatories the jury in effect found that the allegations of the complaint with respect to this appellant were true, except in certain particulars which will be hereafter mentioned Judgment was ordered and entered for plaintiff and against the defendant for the sum demanded in the complaint. A motion for a new trial, upon a statement of the case, was made and denied. We are agreed that neither the complaint, the proof nor the findings of the jury warranted the judgment appealed from. The fallacy which underlies each of the several theories upon which respondent seeks to sustain his right to recover in this action, is the assumption that the directors of a banking corporation owe some duty individually to each creditor of the corporation. That assumption is erroneous. The creditor deals with the corporation and contracts with it, not with the individual directors. The directors are agents or representatives of the entire body of stockholders, and the relationship between the corporation and the directors is that of principal and agent. The agency of course implies a trust, but the obligations imposed by the trust are solely to the corporation whose agents and trustees they are, and like all other agents they are accountable for their stewardship to their principal alone. Creditors of the corporation are utter strangers to the obligations of the directors to the corporation. Howe v. Barney (C. C.) 45 Fed. 668; Bank v. Peters (C. C.) 44 Fed. 13; Bailey v. Mosher, 63 Fed. 488, 11 C. C. A. 304; Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662; Fusz v. Spaunhorst, 67 Mo. 256; Bank v. Hill ,148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep. 615; Deaderick v. Bank, 100 Tenn. 457, 45 S. W. 86; Zinn v. Mendel, 9 W. Va. 580; Andrews v. Foster, 76 Iowa, 535, 41 N. W. 212. The fact that plaintiff has suffered loss as a result of the defendant's action or

omission to act does not necessarily give the plaintiff a cause of action against the defendants to recover damages. There must not only be a loss, but the loss must be proximately traceable to the defendant's breach of a legal obligation which he owed to the plaintiff. Carroll v. Rye Township, 13 N. D. 458, 101 N. W. 894.

It follows from these propositions, which we deem to be axiomatic, that the plaintiff has not shown any cause of action against this appellant, for the reason that the appellant has not violated any obligation due from him to the respondent. The complaint does not allege nor does the evidence show any affirmative willful misrepresentation of fact by this appellant with intent to deceive. The allegations and proof merely show gross neglect by the defendant of his duties as a director, and no attempt on his part to have the bank discontinue business by reason of insolvency. The jury found that the bank had been insolvent for at least a year before the execution of the bond, and so remained until closed by the authorities, and that this appellant at all times knew its insolvent condition. In response to the twelfth interrogatory the jury found that the plaintiff and his assignors were induced to sign said bond by misrepresentations as to the solvency of the bank made by this appellant and Mr. Lough. This finding was made pursuant to the following instruction: "I charge you that there is no evidence that the plaintiff, or the said Mandt or Rierson, were induced to sign said bond by any misrepresentation as to the solvency of said bank, made directly by any of the defendants, and if any such misrepresentations were made, they were made by implication; that is, by the conduct of the defendants in the management of said bank. If you find from the evidence that the defendants, or any of them, by their conduct in the management of said bank, led the public generally to believe, and the plaintiff and his assignors especially to believe that said bank was in a solvent condition by keeping the same open when they knew the same was insolvent, if you find it was insolvent; then I charge you that you should answer this interrogatory accordingly, and you should find whether the plaintiff and his assignors were misled and deceived thereby, or any of them, and also find by whom such misrepresentations were made." It is apparent, then, that the finding as to misrepresentations was merely a finding that the defendant passively suffered the bank to continue in business when he knew it was insolvent.

The respondent suggests four different theories to sustain the judgment: First, upon the theory of fraud; second, upon the

ground of the violation of the criminal statute; third, upon the ground of negligence; fourth, upon implied contract. Damages may be recovered for fraud when it constitutes actionable deceit. The Civil Code tersely states the low on that subject as follows: Section 3941: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damage which he thereby suffers." Section 3942: "A deceit within the meaning of the last section is either: (1) The suggestion as a fact of that which is not true by one who does not believe it to be true. (2) The assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true. (3) The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or (4) A promise made without any intention of performing." Section 3943: "One who practices a deceit with intent to defraud the public or a particular class of persons is deemed to have intended to defraud every individual in that class who is actually misled by the deceit."

Two of the essential elements of actionable deceit are a willful misrepresentation, and an intent thereby to induce another person to alter his position. Such is the language of the Civil Code, and it states the rule generally recognized by the authorities ever since Pasley v. Freeman, 3 Term Rep. 51. See cases cited in Smith's Leading Cases in notes on Pasley v. Freeman. In this case both elements are absent. The defendant cannot be held liable on the theory that the continuation of the bank in business after insolvency was a false representation that it was solvent. Whatever may have been the appellant's duty as a director under such circumstances, it was a duty which, in a legal sense, he owed only to the corporation. For his acts or omissions as a director he is answerable only as an agent or trustee to his principal, not to third persons. As an individual he owed no legal duty to the public or to the bank's creditors, different from that which every person owes to all others—to refrain from infringing on their rights. This appellant, as an individual director, had no control over the bank. He could only act in conjunction with his fellow directors. The acts of the directorate body of which he was part were not his individual acts. The president and cashier were not his agents, because, they were the agents, not of each individual director, but of the board of directors. The act of keeping the bank open was not therefore the act of this appellant. He had no dealings with the

plaintiff or his assignors; and he owed them or the public no legal duty to personally denounce the bank, however plain his moral duty to do so may have been. He was not therefore, guilty of false representations nor of suppression of facts which it was his duty to disclose. It is urged that the appellant's conduct as a director was so grossly negligent that the law will infer willful fraud and intentional injury. That argument involves an absurdity. Negligence, whether slight, ordinary or gross, consists of want of care (Rev. Codes 1899, sections 5110, 5111); and implies the absence of intentional wrong doing. Morrison v. Lee, 13 N. D. 591, 102 N. W. 223.

It follows from what has been said that no recovery can be had on the theory either of negligence or implied contract, for the reason that the appellant owed no duty or obligation to the plaintiff. If he violated his obligation to the bank, or neglected his duty to it, redress must be sought by the corporation itself or its representative for the common benefit of all creditors and stockholders. There are several cases in which a creditor has been permitted to recover damages from the directors under circumstance similar to those in the case at bar. Foster v. Bank (C. C.) 88 Fed. 604; Solomon v. Bates (N. C.) 24 S. E. 478, 59 Am. St. Rep. 725; Delano v. Case, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81; Seale v. Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592; Cassidy v. Uhlmann, 170 N. Y. 505, 63 N. E. 554; Baxter v. Coughlin, 70 Minn. 1, 72 N. W. 797. These cases proceed upon the theory that the directors are trustees for creditors, and individually owe a legal duty to them. For reasons hereinbefore stated we think that theory is untenable. Many of these cases are reviewed and ably criticized in Zinn v. Mendel, 9 W. Va. 580. See, also, Bank v. Hill, 148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep. 615. The fallacy of the line of cases above referred to is briefly and clearly stated in Killen v. State Bank (Wis.) 82 N. W. 536, 542, a case cited and relied upon by respondent. In that case Judge Marshall says: "There are numerous cases where the distinction has not been clearly recognized, if at all, between a wrong to a depositor of a bank committed by its officers, for which they are personally liable directly to such depositor on the ground of deceit, and a wrong by such officers to the corporation for which they are liable to such corporation and through it to the creditors. Delano v. Case, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81, is a good specimen of such cases. It would take too much space to review such cases and to

try to bring harmony out of the confusion that would be disclosed, though we venture to say that in most cases that proceed on the ground of negligence, the purpose will be found to have been to enforce a liability in the right of the corporation. Such is Hodges v. Screw Co., 1 R. I. 312, 53 Am. Dec. 624, often found cited in the books. The confusion on this subject is quite well illustrated by the fact that the Hodges case, a plain action to enforce a right of the corporation, because its proper officers failed to do their duty in that regard, is cited in Davenport v. Underwood, 9 Bush. 609, and other authorities upon which the Delano case is grounded, to support the decisions there made, that officers of a bank may be held liable directly to depositors for losses of the bank to the damage of depositors, on the ground of negligence and fraud in performance of their duties to the corporation. Other cases to support the direct action of a creditor against an officer for damages to the former, because of the fraud or negligence or other actionable wrong, are based on statutes, as, for instance, Stephens v. Overstolz (C. C.) 43 Fed. 465.

The real principle upon which the cases are probably grounded, which hold that the creditors may sue directors to enforce a personal right against them, is that they are quasi trustees for such creditors under the trust-fund doctrine, so-called, which, as will be hereafter shown, has no place in our system. The directors of a corporation are trustees for it, and bear no other relation to its creditors than the agent of an individual to his creditors." The argument that the proof shows the appellant to be amenable to criminal punishment, if true in fact, is of no avail to the plaintiff. The fact that a given act or omission is criminal does not relieve it from the operation of that fundamental rule of law that no cause of action for damages can exist unless the defendant has violated some obligation which he owes to the plaintiff. We think the decision in Baxter v. Coughlin (Minn.) 72 N. W. 797, is unsound because it erroneously assumes that the officer of the bank, who received the deposit was the agent of each individual director, and that each director individually owed a duty directly to the bank's creditors.

As the complaint does not state a cause of action, and the evidence affirmatively discloses that the facts necessary to constitute a cause of action do not exist, a new trial would be improper. The judgment is therefore reversed, and the district court is directed to enter

final judgment in favor of the appellant, and against the respondent dismissing the action with costs. All concur.

(105 N. W. 942.)

JOHN VALLELY v. FIRST NATIONAL BANK OF GRAFTON, A CORPORATION, CHARLES A. HARRIS, JOHN L. CASHEL, J. E. GRAY, HENRY BLASE AND JOHN CONNOLLY.

Opinion filed November 25, 1905. Rehearing denied January 27, 1906.

General Creditors — Recording Laws.

1. General creditors are not within the protection of the recording laws of this state relating to real estate.

Same — Deed as Mortgage — Failure to Record Defeasance — Effect as to General Creditors.

2. Section 4730, Rev. Codes 1899, which declares that a grant absolute in form but intended to be defeasible is not affected "as against any person other than the grantee," etc., unless a defeasance is recorded, construed and *held,* that the term "any other person" means any person otherwise entitled to the protection of the recording laws, namely, subsequent purchasers and incumbrancers, and does not include general creditors.

Same — Bona Fide Purchaser — Effect of Actual Notice — Deed by Trustee in Bankruptcy — Title Acquired.

3. One Savard, the owner of certain real estate, executed a conveyance to Deschenes, in form a warranty deed to secure a debt which he afterwards paid. No defeasance was recorded. Thereafter Deschens' trustee in bankruptcy gave a deed to plaintiff, who had actual notice that the conveyance to Deschenes was for security. *Held,* (1) That the trustee's deed to plaintiff did not convey title; and (2) that the trial court did not err in sustaining a mortgage subsequently executed by Savard, the true owner.

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

Action by John Vallely against the First National Bank of Grafton and others. Judgment for defendant, and plaintiff appeals.

Affirmed.

Charles F. Templeton, for appellant.

Where a deed is given as a mortgage, parol agreement as to defeasance is inoperative as to creditors of the grantee. Tomlinson v. Monmouth Mut. Fire Ins. Co., 47 Me. 232; Foote v. Hart-

ford Ins. Co., 119 Mass. 259; Red River Valley Land & Inv. Co. v. Smith, 7 N. D. 236, 74 N. W. 194.

Filing of a petition in bankruptcy is equivalent to a seizure of the property by execution or attachment. In re Perkins Plow Co., 112 Fed. 308; In re Garcewich, 115 Fed. 87; Mueller v. Nugent, 46 L. Ed. 405; In re Rodgers, 125 Fed. 169, 180.

Whatever estate the bankrupt had or his trustee as representing his creditors acquired, passed under the trustee's deed. Wood v. Chapin, 13 N. Y. 509; Lacustrine Fertilizer Co. v. L. G. & Fer. Co., 82 N. Y. 476; Cole v. Gourlay, 79 N. Y. 527; East v. Pugh et al., 32 N. W. 309; Hayes v. Nourse, 114 N. Y. 595, 22 N. E. 40; Pierce v. France, 47 Me. 507; Bell v. Twilight, 45 Am. Dec. 367; Pringle v. Dunn, 37 Wis. 449; Craig v. Zimmerman, 56 Am. Rep. 466; Doyle v. Waile, 11 Am. St. Rep. 334; Red River Valley Land & Inv. Co. v. Smith, supra; Gunnison Co. Commissioners v. Rollins & Sons, 137 U. S. 255, 43 L. Ed. 689.

The bank cannot claim the rights of bona fide purchasers, as its cashier had actual notice, and the mortgage was given to secure a pre-existing debt. Rev. Codes 1899, section 5130; Porter et al. v. Andrus et al., 10 N. D. 558, 88 N. W. 567; De Lancy v. Stearns et al., 66 N. Y. 157; Howells v. Hettrich, 54 N. E. 677; Commercial Nat. Bank v. Pirie, 82 Fed. 799; Schloss et al. v. Feltus, 61 N. W. 797; Lillibridge v. Allen et al., 69 N. W. 1031; Pride v. Whitfield, 51 S. W. 1100; March v. Ramsey, 35 S. E. 433; Morse v. Godfrey, 3 Story, 389.

Gray & Casey, for respondents.

At the time of the transaction in question, the recording acts protected only bona fide purchasers and incumbrancers in good faith without notice, but not creditors. Rev. Codes 1899, sections 3594, 4703, 4713; 2 Dembitz on Land Titles, 134; footnote, Stephens v. Keating, 17 S. W. 37; 1894 Minn. Stat. 4180; 24 Am. & Eng. Enc. Law, 125 (2d Ed.); Murphy v. Plankinton Bank, 83 N. W. 575; Columbia Bank v. Jacobs, 10 Mich. 349; Wolf v. Theresa Village Mut. Fire. Ins. Co., 91 N. W. 1014; Bryan v. Traders Ins. Co., 145 Mass. 389, 14 N. E. 454.

Under the bankruptcy act of 1867 the assignee took the bankrupt's property subject to all equities, liens or incumbrances which existed against the property in the bankrupt's hands, except such attachments and transfers as the law avoids. Yeatman et al. v.

New Orleans Sav. Institution, 95 U. S. 764, 24 L. Ed. 589; Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816; Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993; Bush on Bankruptcy, 398 and 392.

The rule is the same under the present bankrupt act. Collier on Bankruptcy, 408; Loveland on Bankruptcy, 285; 5 Enc. 352; Bush on Bankruptcy, supra.

At the time of the adjudication of bankruptcy a judgment becomes a lien upon the interest which the judgment debtor has in land, and nothing more, even though land appears of record to stand in his name. Dalrymple v. Security Loan & Trust Co., 11 N. D. 65, 88 N. W. 1033; Fitzgerald v. Miller, 63 N. W. 221; Bank v. Petaluma Sav. Bank et al., 35 Pac. 170; 17 Am. & Eng. Enc. Law, 778; 1 Black on Judgments, 421; Moore v. Thomas, 36 N. E. 712.

A mortgagee whose mortgage debt is fully paid, not only has no interest in the land mortgaged, but is liable to a penalty if he does not release it on demand. Sections 3792, 3797 and 4724, Rev. Codes 1899; Kronebusch v. Raumin, 6 Dak. 243; Decker v. Decker, 89 N. W. 795; McMillan v. Richards et al., 9 Cal. 365; 1 Jones on Mortgages, 889.

YOUNG, J. The plaintiff brought this action to determine adverse claims to 160 acres of land situated in Walsh county. The complaint, which is in the statutory form, alleges that the plaintiff is the owner of the premises, and that the defendants claim certain estates or interests in or liens or incumbrances upon the same adverse to the plaintiff, and prays that they be required to set them forth and that their validity and priority be determined. The defendants answered, setting out their several claims to the premises. The issues presented by the answers were fully covered by the findings. The trial court found that the plaintiff is the owner of the premises free from all liens and incumbrances claimed by the defendants, except a mortgage for $1,210 in favor of the defendant Harris, the validity of which was confirmed. In all other respects the findings were adverse to the defendants. The plaintiff has appealed from the judgment, and assigns error upon the judgment roll.

It is contended that the trial court erred in sustaining the Harris mortgage. The facts essential to a review of this question are as follows: On December 20, 1889, the land in question was owned by one Honore Savard. On that date Savard and wife executed and delivered a conveyance of the same to one Joseph Deschenes,

which conveyance, although in form a warranty deed, was given for security, and was, as between the parties, a mortgage. No written defeasance was executed, acknowledged and recorded. On December 12, 1900, Deschenes was adjudged a bankrupt, and one R. B. Griffith was made trustee. Savard had paid to Deschenes his entire indebtedness prior to the latter's failure. On March 25, 1901, Griffith, as trustee, executed and delivered a deed of the premises to the plaintiff. On December 10, 1901, Savard gave his promissory note to the defendant, C. A. Harris, for $1,210, and gave a mortgage upon the premises in question to secure it. The note was given for a pre-existing indebtedness which Savard owed to the defendant bank, and both the note and the mortgage were for the bank's benefit. Subsequently and on April 15, 1903, Savard executed a quitclaim deed of the premises to the plaintiff. All of the instruments referred to were recorded at or about the date of their execution. The plaintiff had actual notice when he purchased from the trustee that the conveyance to Deschenes was for security. Both Harris and the bank had actual notice of the trustee's deed to the plaintiff when the mortgage to Harris was executed by Savard. It does not appear that Deschenes' creditors had actual notice that the conveyance which he had received from Savard was other than what it purported to be, i. e., an absolute conveyance.

From these facts the trial court found that the Harris mortgage is a valid lien. There is no question as to the correctness of the finding that the plaintiff has the legal title of the premises, and this is true, whether Savard's conveyance to Deschenes be given effect either as an absolute conveyance of title or a mortgage merely creating a lien; for, as already stated, the plaintiff holds under two deeds, one from Savard, who concededly was the owner prior to his conveyance to Deschenes, and the other from Deschenes' trustee in bankruptcy, who had succeeded to whatever right or title the bankrupt had in the premises. The plaintiff owns the legal title in any event. The only question is whether it is subject to the Harris mortgage, and this, it will be seen, depends entirely upon the effect to be given to Savard's conveyance to Deschenes. If it be held valid and effective as a conveyance of title, it follows that the mortgage subsequently executed by Savard to Harris does not constitute a lien. But if, on the other hand, it be given effect for what it really was, as between the parties, a mere mortgage,

and not a conveyance of title, in that event, the legal title remained in Savard, his mortgage to Harris creating a valid lien, and was properly sustained by the trial court. It is conceded that the trustee did not in fact acquire title to the premises through Deschenes; and this must be true, for Deschenes had no title to which he could succeed. He merely had a lien, and this had been discharged prior to the trustee's appointment. But the appellant's position is that the trustee succeeded, not only to the rights of the bankrupt, but also to the rights of the creditors of the bankrupt, and that as to them, and therefore as to him as their representative, the true nature of Savard's conveyance to the bankrupt cannot be shown, but must be held to be what it purports to be, i. e., an absolute conveyance of title. If this view be sustained, it is apparent that the trustee's deed was effective as a conveyance of title, and the Harris mortgage is a nullity. In our opinion this contention cannot be sustained. It is based upon section 4730, Rev. Codes 1899, which reads as follows: "When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, such grant is not defeated or affected as against any person other than the grantee or his heirs or devisees or persons having actual notice, unless an instrument of defeasance duly executed and acknowledged shall have been recorded in the office of the register of deeds of the county where the property is situated."

It is contended that under the terms of this section a general creditor has a right to stand upon the form of a conveyance executed to his debtor regardless of its true nature, when a defeasance has not been executed, acknowledged and recorded as required by the above section, and that as to him it cannot be defeated or affected. The crucial question is whether creditors are within the protection extended by this section. It is clear to us that they are not. The purpose of the section is to declare the consequences which will follow the failure to execute and record a defeasance in connection with a conveyance which is absolute in form, but is intended to be defeasible. The result is that the conveyance shall not be defeated or affected "as against any other person than the grantee or his heirs or devisees or persons having actual notice." Grantees, heirs, devisees and persons having "actual notice" are in express terms excluded from the protection of this section, and it is declared that as to "any person other than" those excepted the

conveyance "is not defeated or affected," unless a defeasance is "executed, acknowledged and recorded." Counsel for appellant contend that in construing this section "we must give the language used its ordinary meaning, except where words and phrases have been interpreted by the legislature," and that, observing this statutory rule, "an absolute grant, though intended merely as security, can no more be defeated as against creditors of the grantee than it can be defeated as against purchasers for value from the grantee. * * * The words in this section, to wit, 'Any other person than * * * ,' etc., embrace, include and comprehend creditors of the grantee just as certainly and plainly as they embrace, include and comprehend purchasers for value from the grantee." There can be no doubt that the language of this section, standing and considered alone, without reference to other sections relating to the same subject, would include creditors within its protection, and, indeed, all persons save those expressly excluded, whether creditors or not. It is, however, a cardinal rule of statutory construction that a statute must be construed in connection with all other statutory provisions relating to the same subject matter. 2 Sutherland on Statutory Construction (2d Ed.) section 368; Wishek v. Becker, 10 N. D. 63, 84 N. W. 590. Applying the foregoing rule, it is apparent that creditors are not included. The section in question is part of the recording laws relating to real estate. It declares the effect of a failure to record a defeasance. Other sections declare the effect of recording and the failure to record conveyances. Section 3597 makes the recording "constructive notice * * * to all purchasers or incumbrancers subsequent to the recording." Section 3594 declares that every conveyance "is void as against any subsequent purchaser or incumbrancer * * * in good faith and for a valuable consideration whose conveyance is first duly recorded." Section 4703 provides that a transfer may be shown to be a mortgage "except as against a subsequent purchaser or incumbrancer for value and without notice, though the fact does not appear by the terms of the instrument." And section 4713 declares that "a mortgage is a lien upon the property mortgaged in the hands of every one claiming under the mortgage, subsequently to its execution, except purchasers and incumbrancers in good faith without notice and for value. * * *" It is thus seen that subsequent purchasers and incumbrancers are elsewhere expressly named as the persons to whom notice is imparted by a recorded

conveyance, and who are protected by a failure to record, and we have no hesitation in holding that it was the legislative intent in enacting section 4730 to extend protection to the same class of persons—that is, subsequent purchasers or incumbrancers—and that, in declaring that a conveyance should not be defeated or affected "as against any person" other than those expressly excluded, "any person" must be understood as meaning any person entitled to the protection of the recording laws, namely, subsequent purchasers or incumbrancers. This in substance was the conclusion reached by the supreme court of South Dakota under the same statutory provisions, and we think the conclusion is sound. Murphy v. Plankinton Bank, 13 S. D. 501, 511, 83 N. W. 575. Other courts, under statutes substantially the same, have reached a like result. Banks v. Jacobs, 10 Mich. 349, 81 Am. Dec. 792; Wolf v. Insurance Co., 115 Wis. 402, 91 N. W. 1014. Some courts have held that the creditors are protected against an unrecorded defeasance. Such decisions will be found to rest either upon statutes expressly protecting creditors, or under a settled policy of interpretation which includes creditors. See Ives v. Stone, 51 Conn. 446; Stephens v. Keating (Tex.) 17 S. W. 37. These decisions have no application in this state, or under the statutes of this state as they existed when this transaction occurred. Section 4730, supra, which is the governing section, and the section preceding it, are the only ones relating to the effect of a failure to record a defeasance, and their provisions, in our opinion, do not conflict with the provisions of any other Code chapter or article. Section 81, Rev. Codes 1899, which establishes a rule for the adjustment of conflicting provisions, has, therefore, no application.

As to Deschenes, the deed in question was a mortgage, and this is true as to Griffith, his trustee in bankruptcy, who is plaintiff's grantor. Plaintiff had full notice and knowledge of its true character, and is not, therefore, for the reasons above stated, within the protection of section 4730 supra. The plaintiff's title was acquired through the quitclaim deed from Savard, which was given after the latter had executed the mortgage to Harris. It follows that the mortgage is a valid lien, and was properly sustained by the trial court.

Judgment affirmed. All concur.

(106 N. W. 127.)

JOHN L. SCHMIDT v. ARTHUR N. BEISEKER.

Opinion filed November 29, 1905.

Principal and Agent — Contract of Agency — Statute of Frauds — Action for Breach.

1. Plaintiff employed the defendant to appear at a public sale of a tract of land provided for by the federal laws, and to bid in and purchase the land in plaintiff's name, and pay for the same with defendant's money. Plaintiff was to repay to defendant the funds paid out for the land immediately upon ascertaining the amount, and was to pay defendant a fixed sum for his compensation. Defendant bid in the land in his own name and refused to convey to plaintiff. *Held*, that the contract is a contract of agency, and not within the statute of frauds, and that an action at law for damages for a breach of such contract is properly brought by the principal.

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

Action by John L. Schmidt against Arthur N. Beiseker. Judgment for defendant and plaintiff appeals.

Reversed.

Hanchett & Wartner, for appellant.

Where a contract relating to real estate and required by the statute of frauds to be in writing is pleaded with no averment as to whether it is in writing or not, a demurrer on that ground will be overruled, as it is presumed to be in writing. Lewin v. Stewart, 10 How. Pr. 509; Cranston v. Smith, 6 R. I. 231; Sanborn v. Rodgers, 33 Fed. 851; Brennan v. Ford et al., 46 Cal. 8; Tucker v. Edwards,, 3 Pac. 233; Hayt v. Hunt, 15 Pac. 410; Mayger v. Cruse et al., 6 Pac. 333; Groce v. Jenkins et al., 5 S. E. 352; Day v. Dalziel, 32 S. W. 377; Strouss v. Elting, 110 Ala. 132; New York & T. Land Co. v. Dooley, 77 S. W. 1030; Taliefero v. Smiley, 37 S. E. 800; Bradford Inv. Co. v. Joost et al., 48 Pac. 1083; Stearns v. Lake Shore & M. S. Ry. Co., 71 N. W. 148; Gale v. Harp, 43 S. W. 144; Lupean v. Brainerd, 46 N. Y. Sup. 1044.

An agent should follow faithfully his principal's directions, keep him informed of his transactions, act in the utmost good faith, and not speculate himself in the subject matter of the agency to the detriment of his principal, or he is liable in damages for any loss sustained by his principal. 1 Am. & Eng. Enc. Law (2d Ed.) 1058, 1069, 1071; Commercial Bank v. Red River Valley Nat'l Bank, 8 N. D. 383, 79 N. W. 859.

Where defendant pleads over and goes to trial, the rule of fair and reasonable intendment applied, and all objections as to form and slight omissions are waived. Andrews' Stephens' Pleading, sections 141-142; Bauman v. Bean, 23 N. W. 451; Garrett v. Tratter, 65 N. C. 430; Marvin v. Weider, 48 N. W. 825.

A defect in the complaint curable by amendment is waived by going to trial without objection. Becknell v. Spier, 27 N. Y. Sup. 386; Strait v. City of Eureka, 96 N. W. 695.

The practice of answering and then objecting to evidence on the ground that the complaint does not state a cause of action is disapproved in this state. Pine Tree Lumber Co. v. City of Fargo, 12 N. D. 360, 96 N. W. 357; Schweinber v. Gt. Western Elevator Co., 9 N. D. 113, 81 N. W. 35; Chilson v. Bank of Fairmont, 9 N. D. 96, 81 N. W. 33.

Besessen & Berry and *Burke & Middaugh,* for respondent.

No action will lie for damages for violation of a parol agreement to convey. Warvell on Vendors, 984.

If a party asserting a resulting trust made no payment he cannot show by parol proof that the purchase was made for him or on his account. Botsford v. Burr, 2 Johns Ch. 405; Steere v. Steere et al., 5 Johns Ch. 1; Pinnock v. Clough, 16 Vern. 500; Howland v. Blake, 97 U. S. 624, 24 L. Ed. 1027; Levy v. Brush, 45 N. Y. 589; Richardson v. Johnsen, 41 Wis. 100; Payne v. Patterson, 77 Pa. St. 134; Bander v. Sugden, 5 Barb. 63; Lathrop v. Hoyt, 7 Barb. 59; Story Eq. Jur,. section 501a; Parsons v. Phelan, 134 Mass. 105; Gettman v. Gettman, 1 Barb. Ch. 499; Davis v. Wetherall, 11 Allen 19.

MORGAN, C. J. This is an action for the recovery of damages for the breach of a contract of agency. Plaintiff employed the defendant to appear for him at the United States land office at Devils Lake and purchase for him a fractional tract of land advertised to be there sold to the highest bidder, under a provision of the United States statutes. The complaint alleges that plaintiff and defendant entered into a contract under which defendant was to appear at said office, bid in and purchase the described tract, pay for it with defendant's money, and that plaintiff was to repay defendant for the money paid for the land as soon as he should ascertain the sum that defendant had paid for said land, and plaintiff was also to pay defendant the sum of $75 as his compensation

for his services at the same time; that defendant appeared at said land office and bid in and purchased said land for himself in his own name, contrary to his instructions and contract; and procured the evidence of the title to said tract to be issued in his own name, and thereafter sold said land to another person, and thereafter refused to convey the said land to the plaintiff upon being requested so to do; that the value of said land is the sum of $1,000, for which sum plaintiff demands judgment, less $145, the sum paid by the defendant for said land. The defendant answered by a general denial. After a jury was impaneled to try the case, the defendant objected to the introduction of any evidence under the complaint, for the reason that the same does not state facts sufficient to constitute a cause of action; and for that reason defendant also moved for judgment on the pleadings at that time. The court sustained this objection and the motion, and judgment was entered dismissing the action. The point on which this ruling was based is that the contract set forth in the complaint is one that relates to a conveyance of an interest in real estate, and is therefore invalid under the provisions of the statute of frauds. Other alleged defects are urged against the complaint, to the effect that the contract pleaded is so indefinite that an action for damages cannot be predicated thereon. These alleged defects are not such as to render the cause of action defective in matters of substance. Plaintiff asked to have the complaint amended after the objection to any evidence being admitted was made, and these amendments should have been allowed. In ruling on such objections the complaint will be more liberally construed than when it is attacked by demurrer. Waldner v. Bank (N. D.) 102 N. W. 169.

The question which the defendant principally relies on, and devotes nearly the whole of his written argument to, is that the contract was not in writing, and therefore invalid. The gist of the contract relied on and pleaded is that defendant and plaintiff contracted that defendant was personally to appear at the land office or procure another to there appear for him and purchase the land for the plaintiff, and in plaintiff's name to receive the receiver's receipt from the local land office. Defendant agreed to pay the price at which the land was bought from the United States. Plaintiff agreed to repay said purchase price to the defendant immediately, and as soon as he ascertained the amount of the same, and further agreed to pay to the defendant the sum of $75 for his compensa-

tion. Does this contract relate to a sale of, or to an interest in, real estate, and render the contract invalid as being "an agreement for a sale of real property or of an interest therein," under section 3960, Rev. Codes 1899? We conclude that the contract was simply one of agency or employment and cannot be construed to mean that it in any way involved a purchase of the real estate or of any interest therein by the defendant. It does not contemplate that in the performance of the contract the defendant was to take title in himself and was thereafter to convey it to the plaintiff. The statute of frauds deals with contracts necessarily affecting the title and conveyance of real estate as between the parties to the contract. This contract is one of agency. Because the agency involved a bidding in of real estate in the name of the principal, it did not become a contract for the sale of real estate as between the plaintiff and defendant. It involved a purchase of the land by the plaintiff through his agent, the defendant, but no sale or conveyance by the agent to the principal was to follow under the contract. The title was not to be in him, and therefore no conveyance by him could have been intended. If the land was to be purchased by the defendant in his own name and then conveyed to the plaintiff, a different question would be presented. The cases cited by the respondent involve contracts that required the agent to convey the real estate to the principal. The distinction between such cases and this one is so obvious that further statement is unnecessary. Burden v. Sheridan, 36 Iowa, 124, 14 Am. Rep. 505, is cited as in point, but that case involved a contract requiring the agent to convey to the principal. The following cases hold contracts such as here involved not within the provisions of the statute of frauds. Watters v. McGuigan, 72 Wis. 155, 39 N. W. 382; Carr v. Leavitt, 54 Mich. 540, 20 N. W. 576; Wilson v. Morton, 85 Cal. 598, 24 Pac. 784; Baker v. Wainright, 36 Md. 336, 11 Am. Rep. 495; Snyder v. Wolford, 33 Minn. 175, 22 N. W. 254, 53 Am. Rep. 22; Gardner v. Randell (Tex. Sup.) 7 S. W. 781; Miller v. Kendig (Iowa) 7 N. W. 500; Rose v. Hayden, 35 Kan. 106, 10 Pac. 554, 57 Am. Rep. 145. These cases are in point as sustaining the proposition that actions for damages may be based on such contracts although made in parol.

Respondent also insists that defendant did not become a trustee of this land for the plaintiff. We do not think that the question is involved. The plaintiff does not seek to follow the land in an

equitable action. He brings an action at law for damages. No valid objection is made to the contract set forth, and, under the authorities cited, we hold it to be a valid and enforcible contract in an action at law by the principal for damages.

The judgment is reversed, and the cause remanded for further proceedings. All concur.

(105 N. W. 1102.)

THOMAS REGAN, MARCELLUS EDISON AND CHARLES L. GRABER, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF T. S. EDISON, DECEASED, v. A. H. JONES.

Opinion filed November 29, 1905.

Answer Setting Forth as a Defense Merely, Matter Available Either as Counterclaim or Defense, Requires no Reply.

1. Where facts which might be used either as a defense or counterclaim are pleaded in the answer as a defense merely, and the answer demands no affirmative relief indicating that a counterclaim was intended, no reply is necessary.

Action by Representatives of Deceased — Transaction With Decedent.

2. In an action on a note by the legal representatives of the deceased payee, the defendant sought by his own testimony to prove when and where the note was given and who was present when the transaction with the testator took place pursuant to which the note was afterwards given, in order to lay a foundation for the testimony of a third person, by whom he expected to prove what the bargain was. *Held,* that the testimony was properly excluded. under section 5653, Rev. Codes 1899.

Same.

3. Testimony by the defendant in such action to the effect that the note in suit was the only note he ever gave to the deceased, and that he never had any other transactions with the deceased, was likewise prohibited by section 5653.

Appeal and Error — Exclusion of Evidence — Offer of Proof.

4. Errors assigned on the rulings of the trial court sustaining objections to questions propounded to a witness cannot be reviewed, in the absence from the record of any offer of proof showing what facts the appellant expected to establish by the questions objected to, where the questions themselves do not disclose the materiality and competency of the expected answers.

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

Action by Thomas Regan and others as executors of the last will of T. S. Edison, deceased, against A. H. Jones. From a judgment for plaintiff, defendant appeals.

Affirmed.

A. E. Coger and *Burke & Middaugh,* for appellant.

The test of a counterclaim is, could defendant maintain an independent action on the demand set forth in it. McKinney v. Sundback, 52 N. W. 322; Heebner v. Shepard, 5 N. D. 56, 63 N. W. 892; National Bank of Commerce v. Feeney, 80 N. W. 186; Morris et al. v. Ewing, 8 N. D. 99, 76 N. W. 1047.

Section 5653, subdivision 2, does not exclude a party from testifying if he does not testify to any statement made by deceased or give facts relative to a transaction between the deceased and the said party. St. John v. Lofland, 5 N. D. 140, 64 N. W. 930.

Scott Rex, for respondent.

The vendee may treat a breach of warranty in reduction of damages in an action for the purchase price, or bring a cross action. Thoreson v. Minneapolis Harvester Co., 13 N. W. 156.

Where it is doubtful whether an answer is a counterclaim or a defense, it cannot be held a counterclaim and admitted for want of a reply unless plainly denominated a counterclaim. 2 Abbott's Trial Brief, section 100; Bates v. Rosenkrans, 37 N. Y. 409, 412; Equitable Life Ass. Co. v. Cuyler, 75 N. Y. 511; Ravicz v. Nickells, 9 N. D. 536, 84 N. W. 353; Seiberling v. Mortinson, 70 N. W. 835; Pomeroy's Code Remedies, section 748; Brannan v. Paty, 58 Cal. 330; Stowell v. Eldred, 39 Wis. 630.

The purpose of section 5653, subdivision 2, is to do away with the opportunity for perjury, where, the other party to the transaction being dead, it could be committed with impunity. Hutchinson v. Cleary, et al., 3 N. D. 270, 55 N. W. 729; Bunker v. Taylor, 83 N. W. 555; Redding v. Godwin, 46 N. W. 563; Madson v. Madson et al., 71 N. W. 824; Babcock v. Murray et al., 71 N. W. 913; Robins v. Legg et al., 83 N. W. 379; Ewing v. White, 30 Pac. 984; Jones on Evidence, section 790.

The word "transaction" is very broad. Jones on Evidence, section 793; Auchampauch v. Schmidt, 34 N. W. 460; Montague v. Thompson, 18 S. W. 264; 29 Am. & Eng. Enc. Law (1st Ed.) 701.

ENGERUD, J. Action by the executors of the last will of Thomas S. Edison, deceased, to recover on a promissory note given by the defendant to the plaintiff's testator. A verdict was directed in favor of plaintiffs for the full amount claimed. The defendant has appealed from the judgment entered on the verdict.

The defendant admitted the execution and delivery of the note, and "as a defense" alleged that the note was given in payment of the purchase price of some stallions, and that there had been a breach of the warranty under which the stallions were sold, and also a failure to comply with the seller's agreement to furnish the pedigrees of the horses sold. After the jury had been impaneled, the defendant moved for judgment, on the ground that the answer pleaded a counterclaim, and the plaintiff had failed to reply. The motion was overruled and we think the ruling was right. The sufficiency of the facts pleaded to constitute a counterclaim is open to grave doubt; but, even if we assume that the facts pleaded were sufficient to entitle defendant to recover damages for a breach of warranty, the motion was properly denied, because the answer did not purport to set forth a counterclaim. The answer pleaded the seller's breach of the agreement as a defense for failure of consideration. The answer in express terms declared that the facts were pleaded as a defense, and the prayer for judgment did not indicate that the defendant regarded the answer as pleading anything but a defense which entitled him to a dismissal of the action. Under such circumstances the answer will not be construed as pleading a counterclaim. Bates v. Rosekrans, 37 N. Y. 409; Society v. Cuyler, 75 N. Y. 511; Brannan v. Paty, 58 Cal. 330; Stowell v. Eldred, 39 Wis. 614, 630; Ravicz v. Nickells, 9 N. D. 536, 84 N. W. 353.

The contract of sale, in connection with which it was alleged the note was given, was a verbal one between the defendant and the deceased. The defendant was precluded from testifying in relation to that transaction by section 5653, Rev. Codes 1899, which reads as follows: "* * * In civil actions or proceedings by or against executors, administrators, heirs at law or next of kin, in which judgment may be rendered or order entered for or against them, neither party shall be allowed to testify against the other as to any transaction whatever with or statement by the testator or intestate, unless called to testify thereto by the opposite party." The defendant attempted to prove that the note was given for stal-

lions, and that the terms of sale were as alleged in the answer—by third persons who were present when the bargain was made. None of these persons, however, were able to testify that the transaction at which they were present, was the transaction which involved the note in suit. The testimony of these witnesses was therefore clearly irrelevant, unless it could be shown by competent testimony that the transaction in reference to which they had knowledge was the one in or pursuant to which the note was given.

For the purpose of supplying this necessary link in the chain of proof the defendant was sworn as a witness and numerous questions were propounded to him by his counsel. The trial court sustained the objections of plaintiffs thereto, on the ground that the questions called for testimony by the defendant in relation to a transaction with or statement by the deceased. The nature of the questions is fairly disclosed by the following: "You may state what the note was given for?" "How many notes did you ever give to Thomas S. Edison?" "Did you give more than one note to Thomas Edison at any time?" "I will ask you to state who was present when the note was signed by you, and without stating anything about the transaction, or what the note was given for?" "You may state whether or not the note was given as the purchase price of four stallions?" Although these questions did not require the witness to state what the testator said, or to detail the facts and circumstances which constituted the transaction with the deceased, they clearly called for testimony "as to the transaction." This is especially apparent in view of defendant's admissions on the cross-examination, which was permitted in support of plaintiff's objection to the competency of the witness to testify on the subject. In that cross-examination the defendant admitted that the note was executed when Edison was not present, and at a different time and place from the time and place at which the bargain was made. The bargain was clearly a transaction with the testator as to which section 5653 forbids the defendant to testify. To permit this witness, under such circumstances, to testify that this note was executed in pursuance of the bargain which had been previously made, was nothing more or less than to permit the witness to state his bare legal conclusion as to the nature and result of the bargain, and as to the fact of executing it by giving this note, without specifically disclosing the terms of the agreement itself. The attempted proof was therefore doubly objectionable, because it was not only

testimony "as to the transaction" forbidden by the statute, but was also a mere conclusion of the witness. Madson v. Madson, 69 Minn. 37, 71 N. W. 824. So, also, the attempt to prove by this witness that no other note was given to the deceased, or that no other bargain was made with him, was likewise within the prohibition of the statute; because it is manifest that such questions called for the witness' testimony as to a transaction with the deceased, whether the transaction in question was the only one ever had with the deceased, or one of a number of transactions of a similar nature. Van Vechten v. Van Vechten, 65 Hun. 215, 223, 20 N. Y. Supp. 140; Brewing Co. v. Grubb (Wash.) 71 Pac. 553.

The question as to who was present when the note was signed was immaterial, in view of the defendant's admission that Edison was not present when the note was signed, and that the bargain was made at another time and place. The execution of the note was admitted, and the fact that some third persons were present when it was signed in Edison's absence would in uo manner tend to show that such third persons heard the bargain made between Jones and Edison at a different time and place concerning this note. There was no attempt to show by this witness who was present when the note was delivered to Edison, and hence we express no opinion as to whether such testimony would have come within the terms of the statute if it had been sufficient to show that the note when delivered was the note involved in the bargain heard by the other witnesses.

There are several errors assigned on the rulings of the trial court in sustaining objections to questions addressed to other witnesses than the defendant. It is claimed by the appellant that the answers to these questions would have established the necessary connection between the note in suit and the bargain which was overheard and could be proved by these and other qualified witnesses. It is not clearly apparent from the questions themselves that the answers would have been competent and material; and the defendant neglected to make any offer of proof. While some of the questions, standing alone, might, at first glance, appear to be unobjectionable, and call for answers which might have been competent and material, yet an examination of the entire record tends strongly to show that the answers would have been incompetent and immaterial; and under such circumstances it was the duty of the examining party to show the competency and materiality of the expected answers

by an offer of proof. Halley v. Folsom, 1 N. D. 325, 48 N. W. 219. The presumption is in favor of the rulings of the trial court, and its rulings will not be held erroneous unless the record affirmatively shows error. 2 Enc. Pl. & Pr. 475, 476.

The foregoing disposes of all the assignments of error which merit discussion.

The judgment is affirmed. All concur.

(105 N. W. 613.)

HARRIET L. ALSTERBERG v. H. BENNETT.

Opinion filed December 6, 1905.

Parol Evidence to Vary Written Consideration — Statute of Frauds — Action for Breach of Contract.

1. While either party to a written contract may show that the true consideration therefor is different from that recited in the writing, yet it is not permissible, under the guise of proving the true consideration, to establish as a cause of action an oral agreement within the statute of frauds, or one which violates the rule embodied in section 3888, Rev. Codes 1899, that a written contract supersedes all prior or contemporaneous oral agreements or stipulations concerning its matter.

A Deed Is to Determine Grantor's Undertaking as Well as to Pass Title.

2. The function of a deed is not only to transfer to the grantee the grantor's rights, but is also a written contract evidencing the obligations, if any, assumed by the grantor with respect to the nature and condition of the estate or title which the deed purports to convey.

Quitclaim Deed — Effect — Warranties.

3. A deed delivered and accepted merely transferring the grantor's right, title, and interest in the land described, and containing no express or implied covenants as to title or incumbrances, is, in the absence of actionable deceit, conclusively presumed, in an action at law, to show that the grantor assumed no obligations as to the validity or extent of his title or interest, or as to incumbrances.

Evidence — Grantee in Quitclaim Deed Cannot Recover on Oral Warranties.

4. The grantee who has accepted a quitclaim deed cannot recover in an action at law, on the grantor's alleged oral promise, made before or at the time the deed was delivered and accepted, to pay certain taxes which were then an incumbrance on the land conveyed.

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

Action by Harriet L. Alsterberg against H. Bennett. Judgment for defendant, and plaintiff appeals.

Affirmed.

G. F. Wyvell, for appellant.

It is competent to prove a contemporaneous and independent matter founded on the consideration embraced in the price of the land, which would in no way vary or modify the deed itself. Jones on Evidence, 475-6, 444-6; Warvelle on Vendors, 169; 20 L. R. A. 104, note subdivisions 2a and 3; Fraley v. Bentley et al., 1 Dak. 25, 46 N .W. 506; Mapes v. Metcalf et al., 10 N. D. 601, 88 N. W. 713, p. 719; Langan et al. v. Iverson, 80 N. W. 1051; Anderman v. Meier, 98 N. W. 327; First Nat. Bank et al. v. Bower, 98 N. W. 834; Miller v. Kennedy et al., 81 N. W. 906; Ford v. Savage, 69 N. W. 240; Mowry v. Mowry et al., 100 N. W. 388; Brader v. Brader, 85 N. W. 681; Lathrop v. Humble, 97 N. W. 905; Headrick v. Wischart, 57 Ind. 129; Welz v. Rhodius, 87 Ind. 1, 44 Am. Rep. 747; Hays v. Peck, 107 Ind. 389; Richardson v. Traver, 112 U. S. 423, 28 L. Ed. 804; Carr v. Dooley, 119 Mass. 294; McCormick v. Cheevers, 124 Mass. 262.

Charles F. Templeton, for respondent.

A party cannot under the pretense of showing a consideration prove a prior or contemporaneous and oral agreement which will vary, cut down or add to the stipulation in the deed. Duncan v. Blair, 5 Denio, 196; Headrick v. Wisehart, 41 Ind. 87; Maupin on Marketable Title to Real Estate, section 121; Proctor v. Gibson, 49 N. H. 62; Cook v. Combs, 75 Am. Dec. 241; Howe v. Walker, 4 Gray, 318; Tucker v. White, 125 Mass. 344; Flynn v. Bourneuf, 143 Mass. 277, 58 Am. Dec. 135; Simanovitch v. Wood, 145 Mass. 180, 13 N. E. 391; Radigan v. Johnson, 174 Mass. 68, 54 N. E. 358; Stookey v. Hughes, 18 Ill. 55; Putnam v. Russell, 86 Mich. 389, 49 N. W. 147; Cabot v. Christie, 42 Vt. 121.

To deeds also with peculiar vigor is this applied, that to what is written no new ingredients can be added by parol. Wharton on Evidence (2d Ed.) section 1050; Seitz v. Brewers & Co., 141 U. S. 510, 35 L. Ed. 837; McCray Refrigerator & Cold Storage Co. v. Woods et al., 99 Mich. 269, 58 N. W. 320; Mast v. Pearce & Cowan,

8 N. W. 632, 12 N. W. 597; Johnson v. Powers, 65 Cal. 179, 3 Pac. 625; Thompson v. Libbey, 34 Minn. 374, 26 N. W. 1; Willard v. Ostrander, 26 Pac. 1017.

ENGERUD, J. The plaintiff sought to recover from the defendant $122.05 and interest, on a cause of action set forth in the complaint as follows: "That on or about the 7th day of May, 1904, the defendant sold to the plaintiff the N. E. ¼ of section 14, in township 150 N., of range 56 W., in Grand Forks county, North Dakota, for the sum of $2,000, free and clear of all incumbrance, except a certain mortgage of $800, then a lien against said property, which the plaintiff assumed, and has since paid, and at said time the defendant made and executed to this plaintiff a quitclaim deed of said premises; that at said time, and as a part of the consideration for the payment by the plaintiff to him of said sum of $2,000, defendant agreed to pay all taxes which were then a lien upon said land; that said agreement was by mistake omitted from said deed; that on said day taxes duly levied and assessed against said lands for the years 1899, 1900, 1901 and 1903 were unpaid and constituted a lien upon said land; that said land was, pursuant to the laws of this state, sold for the taxes of said years 1899, 1900 and 1901; that in order to clear the land of said liens and protect her interest therein, plaintiff was obliged to, and actually did, on the 19th day of November, 1904, pay to the treasurer of said Grand Forks county the sum of $99.64 to redeem the land from such tax sales, and on the 31st day of May, 1904, paid to said treasurer the sum of $22.41 in satisfaction of said tax of the year 1903; that such taxes constituted valid and subsisting liens against said premises for the amounts above stated on the dates referred to, and that no part of said sums has been paid by defendant, although demanded." The answer was a general denial. On the trial before a jury the plaintiff proved or offered to prove the facts substantially as set forth in the complaint; it being admitted that the alleged agreement on which recovery was sought was oral. The trial court excluded proof as to the alleged oral agreement of the defendant to pay the taxes, on the ground that such proof would conflict with and vary the defendant's agreement as evidenced by his deed, which was a mere quitclaim without any express or implied covenants as to title or incumbrances.

The appellant contends that the alleged oral promise was "a contemporaneous agreement with reference to a separate and in-

dependent matter and founded on the consideration embraced in the price of the land, which would in no way vary or modify the deed itself," and was therefore erroneously excluded. This is the only question presented by the assignments of error. Appellant's argument is primarily based upon the assumption that a quitclaim deed without covenant has no office to perform, except to transfer to the grantee the grantor's claim or right. In other words, unless a deed on its face limits or defines the obligations of the grantor with respect to incumbrances, then the deed does not purport to be the grantor's contract on that subject, so as to exclude evidence of a promise otherwise valid which was part of the consideration for the price paid for the land. If appellant's assumptions as to the functions of the deed is true, then his argument is doubtless sound, because it is a well-settled general rule that the true consideration for a deed may be shown to be something different from that which appears on the face of the deed. The right to show the true consideration, however, when it is claimed to be a promise or agreement not disclosed by the deed, is subject to the qualification which is clearly stated in Howe v. Walker, 4 Gray, 318, as follows: "It is true, as the plaintiff suggests, that the consideration of a contract, in other respects within the statute of frauds, may be proved by parol. You may prove what was the real consideration, and that it was not recited in the deed. But you cannot show that, as the consideration of a deed from A to B of Whiteacre, B agreed by parol to convey Blackacre to A, and rely upon such parol agreement as the ground of a suit in equity to enforce a specific performance. That is, under the power of proving by parol the consideration of a written contract, you cannot establish an independent agreement, otherwise within the statute of frauds. Nor can you, under the guise of proving by parol the consideration of a written contract, add to or take from the other provisions of the written instrument. This would practically dispense with the statute of frauds and with that sound rule of the common law which finds in the written contract the exclusive and conclusive evidence of the intent and agreement of the parties, and will not suffer such written contract to be varied or affected by any contemporaneous parol agreement." The correctness of the conclusion reached in that case that the agreement there involved was within the statute of frauds is questionable. On that point, we express no opinion. We think, however, that the language quoted

therefrom is a clear and correct statement of the law applicable to the case at bar.

It is conceded that the oral promise relied on in this case is not within the statute of frauds, and may, therefore, be shown, unless it is objectionable for the reasons stated in the last paragraph of the foregoing quotation from Howe v. Walker. That paragraph states the same common-law rule which is expressed in our Civil Code (section 3888, Rev. Codes 1899), as follows: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument." The decisive question in this case therefore, is whether or not the deed is a contract in writing concerning the matter which was the subject of the defendant's alleged promise to remove the incumbrances caused by the unpaid taxes. It is apparent, then, that the truth or falsity of appellant's assumption as to the scope and functions of the deed is the proposition in dispute. We do not think it is true that the only function of a deed is like the ancient livery of seisin, merely to transfer the grantor's rights. In this jurisdiction, at least, it is beyond question that a deed of land is intended by the parties, not only as a transfer of the land, but also as the written evidence of all obligations assumed by the grantor with respect to the nature and condition of the title conveyed. It would be a startling proposition, indeed, in this state, to contend that the grantee, who was content to accept a quitclaim deed, could, notwithstanding the deed, prove an oral warranty and recover for its breach in an action at law. That is the necessary result of appellant's argument. If an oral promise to pay incumbrances on the part of a grantor in a quitclaim deed can be shown in an action at law for a failure to perform it, then it must necessarily follow that any other prior promise on his part with respect to the estate to be conveyed by the deed is likewise enforcible by such an action. In either case the plaintiff could allege and prove that the promise was part of the consideration paid for the land. Such is not the law in this state. One who accepts a quitclaim deed is, in the absence of fraud, mistake or other ground for equitable relief, conclusively presumed to have agreed to take the title subject to all risks as to defects or incumbrances, relying on such protection only as the recording laws afford him. The absence of express or implied covenants in a deed is equivalent to an express declaration therein that the grantor as-

sumes to convey only his right or interest, whatever it may be, and that he declines to bind himself to do more. Headrick v. Wisehart, 41 Ind. 87; 3 Washburn on Real Property (6th Ed.) sections 2239, 2368; Thorp v. Coal Co., 48 N. Y. 253, 256; Wheeler v. County, 132 Ill. 599, 604, 24 N. E. 625; Peters v. Bowman, 98 U. S. 56, 25 L. Ed. 91; Cartier v. Douville (Mich.) 56 N. W. 1045. We think the views expressed by Pettit, C. J., in Headrick v. Wisehart, supra, as to the effect of a quitclaim deed are sound, notwithstanding the decision of the Indiana supreme court on a subsequent appeal in the same case. Headrick v. Wisehart, 58 Ind. 129.

It would be an interminable task to attempt to analyze and discuss the mass of cases bearing on the question as to what constitutes a valid, independent or collateral agreement not varying the terms of the written instrument. Such an analysis would disclose that the cases are in hopeless conflict, and we despair of bringing order out of such a chaos. The whole subject is discussed in Wigmore on Evidence, section 2427 et seq. We hold that it must be conclusively presumed that the deed in this case is the sole evidence of the obligations of the grantor with respect to the nature and condition of the title, and hence supersedes all prior or contemporaneous oral agreements or stipulations on his part concerning that matter. Johnson v. Kindred State Bank, 12 N. D. 336, 96 N. W. 588. If the deed does not, in fact, express the actual agreement in that respect, relief must be sought in equity, where the matter may be heard and determined under the safeguards peculiar to that jurisdiction. It is perhaps needless to say that the deed in this case would not bar evidence as to the oral negotiations if misrepresentations amounting to actionable deceit had been alleged as a cause of action.

We think the rulings of the trial court were right, and the judgment is accordingly affirmed. All concur.

(106 N. W. 49.)

ST. ANTHONY & DAKOTA ELEVATOR CO. v. THE COUNTY OF CASS, NORTH DAKOTA, AND CHARLES E. WILSON, SHERIFF OF CASS COUNTY.

Opinion filed December 8, 1905.

Taxation — Ownership — Passing of Title.

An oral sale of personal property without actual or constructive delivery or payment of any part of the price, and without any special

agreement as to immediate delivery or change of title, does not pass to the purchaser, but remains in the seller, and the property was properly assessed against the seller in whose possession it remained on April 1, 1897.

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

Action by the St. Anthony & Dakota Elevator Company against the County of Cass and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Guy C. H. Corliss, for appellant.

A sale from any motive is lawful except to defraud creditors, and such motive is not the subject of inquiry. Weimer v. Louisville Water Co., 130 Fed. 244; Robertson v. Carson, 19 Wall. 106; Draper v. Hatfield, 124 Mass. 53; Thayer v. Boston, 26 Am. Rep. 650.

Whether there was a sale, or an agreement for a sale, depends upon the intent of the parties. Tiedman on Sales, section 84; Tufts v. Griwn, 22 Am. Dec. 866; Warner v. Warner, 66 N. E. 760; Barber v. Thomas, 71 Pac. 845.

A warehouseman may retain possession of grain sold as bailed and the law does not require the burdensome ceremony of the delivery and immediate return of the grain to make a sale complete. Cambridge v. Hobart, 27 Mass. 232; Phelps v. Cutler, 4 Gray, 137; Green v. Rowland, 16 Gray, 58; Stinson v. Breed, 14 Allen, 376; Ingalls v. Herrick, 108 Mass. 351; Russell v. O'Brien, 127 Mass. 349; Goodheart v. Johnson, 88 Ill. 58.

Sufficient delivery in performance of a contract of sale may be a delivery of the key or warehouse receipt. Horr et al. v. Barker et al., 8 Cal. 603; Adams v. Foley, 4 Iowa, 44; Glasgow v. Nicholson,, 25 Mo. 29; Mitchell v. McLean, 7 Fla. 329; Whittiker v. Summer, 20 Pick. 405; Cushing v. Breed, 92 Am. Dec. 777; Farnem et al. v. Pitcher et al., 24 N. E. 590; Tiedman on Sales, section 105.

Sale may be made from a mass by giving a delivery order. 24 Am. & Eng. Enc. Law, 1057; Kimberly v. Patchin, 19 N. Y. 330; Russell et al. v. Carrington et al., 42 N. Y. 118; Hurff v. Hires, 29 Am. Rep. 282; Mackellar v. Pillsbury et al., 51 N. W. 222; Fed. Cas. No. 1936; Cushing v, Breed, 92 Am. Dec. 777; Rev. Codes, section 3552.

A sale does not date from the written memorandum of it required by the statute of frauds, but from the oral arrangement, which was

the contract of the parties. Bird v. Monroe, 66 Me. 337; Teidman on Sale, 72; Wood on Statute of Frauds, 345; Leadly v. McRoberts, 13 Ont. App. 378, 383.

The memorandum is merely the evidence of a previous parol agreement. Shirley v. Fulton et al., 57 N. W. 395; Reilly et al. v. Bancroft's Estate et al., 71 N. W. 745; Townsend v. Hargreaves, 118 Mass. 325; Remington v. Lintchicum, 14 Pet. 84, 10 L. Ed. 365, 8 Am. & Eng. Enc. Law (1st Ed.) 715.

Taxing authorities cannot invoke the statute of frauds, as that is purely personal to the parties to the transaction. Merchan v. O'Rourke, 82 N. W. 759; Brisham v. Lutrie, 24 So. 169; Kemp v. Nat. Bank. 109 Fed. 48; Auten v. Ry. Co., 104 Fed. 395; Collins v. Thayer, 74 Ill. 138; Kelly v. Kendall et al., 9 N. E. 261; Singer Nimick & Co. v. Carpenter, 17 N. E. 761; Abba v. Smyth, 59 Pac. 756; St. Louis, K. & N. W. R. Co. v. Clark et al., 26 L. R. A. 751; 8 Am. & Eng. Enc. Law (1st Ed.) 659; York v. Washburn, 118 Fed. 316; 8 Enc. (1st Ed.) 660.

W. H. Barnett, State's Attorney, and *Seth W. Richardson,* Assistant State's Attorney, for respondent.

Appellant must show delivery, part payment or memorandum. Rev. Codes 1899, section 3958.

A memorandum to satisfy the statute of frauds should contain every material part of the contract of sale, names of the parties, subject matter of the sale, its terms and conditions. Tiedman on Sales, section 76.

MORGAN, C. J. This action is brought to recover judgment for money paid under protest by the plaintiff to the defendant, for taxes alleged to have been unlawfully assessed against it by the defendant in the year 1897. During that year taxes were assessed upon 35,000 bushels of wheat as owned by the plaintiff and stored in its elevator at Page, in said county. The plaintiff refused to pay said taxes. Thereupon the county regularly proceeded to distrain its property in said county, and advertised the same for sale for said taxes, and it was offered for sale to pay said taxes. Plaintiff thereupon, and before the actual sale of said property, paid said taxes under protest. Plaintiff alleges in its complaint that it was not the owner of any of the wheat so assessed to it on April 1, 1897, and further alleges that the said wheat was owned by the Barnum Grain Company at that time. The sole issue raised

by the defendant's answer is the ownership of said wheat on April 1st, at which time property becomes taxable to the owner. The district court found for the defendant and dismissed the action; a trial by jury having been waived. If the plaintiff was the owner of the wheat on April 1, 1897, the judgment of dismissal must be affirmed. Appellant claims that it sold to said Barnum Grain Company 1,235,000 bushels of wheat on March 17, 1897, and that 35,000 bushels thereof were stored in its elevator at Page. The sale was an oral one. No money was paid on the sale on that day, nor before April 1st, and there was no manual delivery or change in the possession of the wheat on that day or before April 1st. The testimony as to the terms of the sale is meager. The secretary and manager of the plaintiff company both testified that the plaintiff "sold" 1,235,000 bushels of wheat to the Barnum Grain Company on that day. This wheat was stored in plaintiff's elevators throughout the state. The president of the Barnum Grain Company testified that his company "purchased" that number of bushels of wheat on that day from the plaintiff company. No writings were drawn up or delivered on that day as evidence of the sale. Later the plaintiff company issued five warehouse receipts in the following words, which, it is claimed ,covered some of the wheat included in the prior negotiations: "The St. Anthony & Dakota Elevator Co., Minneapolis, Minn., March 18, 1897. Received in store at Page City, N. D., ten thousand bushels, ——— lbs. of No. one Nor. ——— wheat subject to the order hereon of ourselves ———, on return of this receipt properly endorsed." These five receipts aggregated 35,000 bushels. They were duly signed by the plaintiff's general manager and by him indorsed in blank, and delivered to the Barnum Grain Company. It is not shown when they were delivered, except by a general statement of a witness that they were delivered between March 19th and July 1st. The district court found that they were delivered some time between those days. There was no actual delivery of any of the wheat until April 19th. There is one of plaintiff's account books in evidence. It is called a "journal" or "warehouse receipt book." The entries therein of March 29, 1897, relate to some grain transactions between plaintiff and the Barnum Grain Company. So far as the transaction concerns the 35,000 bushels alleged to have been stored in the elevator at Page, the entries in said warehouse receipt book show the numbers of the five receipts,

the total number of 35,000 bushels, and the sum of $21,682.50, said to represent the price paid. The wheat was sold as No. 1 Northern grain, but that does not mean that the wheat was of that grade. The evidence shows that that grade is used in sales of grain until it is actually graded. If the wheat does not grade No. 1 Northern, the custom is that it shall be paid for according to the actual grade at the terminal point where it is shipped to. Although the contract is made in reference to No. 1 Northern, it is paid for according to the actual grade when shipped, at a sum fixed by the course of business, at a certain fixed sum higher or lower than the price of No. 1 Northern. The evidence shows that this contract was made subject to this rule or custom of business.

Under these facts it remains to be determined whether the sale was a completed one when made or became such before April 1, 1897. The parties do not disagree upon the principles of law applicable to the facts. These are elementary, and relate solely to the principles applicable to the delivery of personal property and change of title under sales. The decisive point for determination is: Who owned the wheat in question on April 1, 1897, It is claimed that there was a delivery of the wheat when the sale was made, and that the sale thereby became consummated. That the wheat was delivered is claimed by virtue of the fact, asserted to be true, that the warehouse receipts was delivered before April 1st. There is no evidence of this fact. The court found that it was delivered between March 18th and July 1st; and that is as definite a finding as can be made under the evidence. Conceding, but without deciding, that the delivery of the warehouse receipt would be a delivery of the wheat in this case, because of its bulky character and large number of bushels making immediate and actual delivery impossible, still no delivery is shown, as the evidence fails to show the fact of the delivery of the warehouse receipt before April 1st. The mere issuing of the warehouse receipt without delivery will not constitute a completed sale, nor would that fact be sufficient to make the sale within the requirements of the statute of frauds. The entries in the journal or warehouse receipt book are not sufficient as a memorandum. These entries do not state the terms of the sale substantially. This is necessary in a memorandum. Tiedeman on Sales, section 76; Mechem on Sales, sections 425, 433. In fact, they do not show a sale at all, nor can a sale be proved thereby or therefrom without the aid

of additional extrinsic evidence. The vendor or party to be charged does not subscribe the memorandum. These entries are a record of warehouse receipts issued to the Barnum Grain Company on the 1,235,000 bushel deal and contain nothing more than the total sum charged and credited on the transaction and a record of the warehouse receipts given by number and the amount of bushels they represent. It is not a sufficient memorandum of sale. There could not be a completed sale under the terms of this contract until the wheat was delivered at Duluth, the terminal point, and there graded. The price to be paid could not be ascertained until the wheat was graded there. It is true that the parties could have agreed that title should pass immediately, or delivery could have been immediately made under an agreement for final settlement of price after grading at Duluth, but there is nothing to show that such was the understanding. Such an understanding will not be presumed. It must be shown to have existed.

It is claimed that the title may pass before delivery in certain cases, and we do not dispute the proposition. But the facts must show that such was the intention of the parties. That is the test as to whether the title has passed or not. In this case there is nothing to show that the parties intended that title should pass before delivery of the wheat and payment of the price. There was nothing said nor done when the sale was made showing that title was intended to pass immediately, nor that delivery was then to be made. If anything is shown in regard to delivery, it is that delivery was to be made later. The plaintiff's secretary testifies that plaintiff sold all this wheat to said Barnum Grain Company "to be delivered between April 1st and July 1st at 72¾ cts., delivered at Duluth." This negatives the idea of a present delivery at the time of sale. Summing up the evidence of the sale, it appears to be beyond dispute that it does not show a delivery of the warehouse receipts to the purchaser before April 1st. It is also beyond dispute that there was nothing said or done when the sale was agreed on to show that an immediate delivery was then and there to be made, nor was anything said that title should then and there pass to the buyer, although delivery was to be made later. Nor was payment or part payment made before April 1st; nor was there any act done, or word said, showing that there was a delivery by symbol. The necessary conclusion from a careful consideration of all the evidence is that the transaction consisted solely of the

one naked fact that plaintiff "sold" 1,235,000 bushels of wheat to the Barnum Grain Company without any written memorandum of the sale at the time and without any act indicating an intention to immediately pass the title or to surrender the possession. We are unable to give to these facts a construction or effect that will constitute the transaction a completed sale. We give no effect to the fact that there were more than 35,000 bushels of wheat in the Page elevator on March 19th, when the alleged sale was made, and that the 35,000 bushels were not separated from the balance of the wheat in the elevator. That fact was of no consequence if there had been a completed sale with intention to pass title. O'Keefe v. Leistikow (N. D.) 104 N. W. 515, is conclusive on that point if the wheat was of one grade.

It is contended that it is immaterial whether there was a memorandum of the agreement or not, inasmuch as the parties had the right to waive the provisions of the statute of frauds and make a valid and completed sale, regardless of the statute. That the right to claim the benefit of the statute is a personal privilege and may be waived seems to be generally held, although we need not pass on that question now. If we were to hold that the evidence shows that the parties intended an immediate change of title without actual delivery of possession, the point would be applicable. However, we hold that the evidence fails to show delivery or the passing of the legal title. Hence the ownership was in the plaintiff on April 1st, and the property was subject to assessment as the plaintiff's property on that day. We have considered the evidence solely to ascertain therefrom whether it shows a completed sale between the parties or not. We conclude that the evidence fails to show that the parties intended an immediate change of title or an immediate delivery. The plaintiff could not have recovered for the price of the wheat if an action therefor had been brought against the Barnum Grain Company on or before April 1, 1897. This is a satisfactory test as to whether the title had passed. Inasmuch as the contract involved the sale of personal property valued at more than $50, an oral contract would not be valid, unless in writing or accompanied by a memorandum subscribed by the vendor in the case, or there was a delivery or part delivery, or payment or part payment, under section 3958, Revised Codes. Before delivery is sufficient to do away with the requirement that the contract shall be in writing or evidenced by a memorandum, both parties must be parties to the delivery. That

is, the seller must deliver and the buyer must accept and receive the property or some of it. Mechem on Sales, section 357. The evidence entirely fails to show that there was any acceptance of the property by the buyer before April 1st. Waite v. McKelvy, 71. Minn. 167, 73 N. W. 727; Dinnie v. Johnson, 8 N. D. 153, 77 N. W. 612; Reeves & Co. v. Bruening (N. D.) 100 N. W. 241.

Plaintiff's contention that it became a bailee of the wheat after the contract was entered into is also untenable. It is true that such an arrangement might legally have been entered into, but such a contract or bailment will not be presumed. The question is, not what the parties might legally have done, but what contract did they then enter into, and what was done thereunder. It is immaterial that there may have been a delivery of all this wheat to the Barnum Grain Company later. How much of the wheat was delivered to it under this contract we have not determined, as the crucial question to be determined is: Which party owned the wheat on April 1st? On that question, the answer must be against the claims of the plaintiff. The most that the evidence shows is that there was an agreement for a sale to be consummated later. Before it was consummated the right to assess the property in Cass county arose, and it was there taxed.

Judgment affirmed. All concur.

ENGERUD, J., having been of counsel in the court below, took no part in the foregoing opinion; HON. C. J. FISK, Judge of the First Judicial District, sitting in his place by request.

(106 N. W. 41.)

GEORGE WALKER v. C. J. REIN.

Opinion filed December 12, 1905.

Where the Evidence Shows No Cause of Action Upon the Grounds the Complaint Seeks to Base One, It Is Unnecessary to Pass Upon the Technical Sufficiency of Such Complaint.

1. Where the evidence offered by the plaintiff shows affirmatively and conclusively that the plaintiff has in fact no cause of action upon the claim which the complaint attempts to allege as a ground of recovery, it is unnecessary to pass upon the technical sufficiency of the complaint.

Foreign Insurance Company Cannot Recover Upon a Contract Forbidden to a Domestic Corporation.

2. A foreign insurance corporation, although licensed to do business in this state, will not be permitted to recover on a contract of insurance

made with a resident of this state upon property located here, if the contract is one which domestic corporations are forbidden to make.

Same.

3. The same rule applies, even though the contract was actually made in another state, where such contract is not forbidden.

Same — Rule of Comity — Rights of an Assignee of a Forbidden Cause of Action.

4. The rule of comity expressed by section 5756, Rev. Codes 1899, bars not only the assertion by the foreign corporation itself of a cause of action or defense which a domestic corporation is forbidden to assert without express authority, but also bars the assignee of the foreign corporation.

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

Action by George Walker against C. J. Rein. Judgment for defendant, and plaintiff appeals.

Affirmed.

Pierce & Tenneson, for appellant.

A contract for insurance consummated in Minnesota is a Minnesota contract, although the assured and risk are in North Dakota. Seamans v. Knapp, Scott & Co., 89 Wis. 171, 61 N. W. 757; Whiston v. Stodder, 13 Am. Dec. 281; Hyde v. Goodnow, 3 N. Y. 266; Scudder v. Union Nat. Bank, 91 U. S. 406, 23 L. Ed. 245.

The place of mailing the policy is the place of the contract. Ford v. Buckeye State Ins. Co., 99 Am. Dec. 663.

Certificate of the commissioner to a foreign company to do business in this state is conclusive that such company has complied with the law. Citizens' Nat. Bank v. Great Western Elevator Co., 82 N. W. 186; McGuire v. Rapid City, 43 N. W. 706; State v. Carey, 2 N. D. 36, 49 N. W. 164; Dwelling House Ins. Co. v. Wilder, 20 Pac. 265; 13 Am. & Eng. Enc. Law, 903; Gurzill v. Pennie et al., 95 Cal. 598, 30 Pac. 836; Am. Ins. Co. v. Smith, 19 Mo. App. 627.

The action of directors is presumptive evidence of the validity of the assessment. Demmings v. Knights of Pythias, 30 N. E. 572, 131 N. Y. 527; Hardin et al. v. Iowa Ry. & Const. Co. et al., 43 N. W. 543.

Acceptance of a report of directors recommending an assessment is sufficient authority to assess. Citizens' Mutual, etc., Co. v. Sortwell, 92 Mass. 110.

Refusal of a witness outside of a state, not a party to the action, to attach to a deposition an original document, makes a copy admissible. Fisher v. Greene, 95 Ill. 94; Thom v. Wilson, 27 Ind. 370; L'Herbette v. Pittsfield Nat. Bank, 162 Mass. 137, 38 N. E. 368; 9 Am. & Eng. Enc. Law, 338; Burton v. Briggs, 20 Wall. 125; Hagaman v. Gillis, 68 N. W. 192; Abb. Trial Evidence, 23.

Lee Combs, for respondent.

A foreign insurance company can do business in this state only by a compliance with its laws. Thompson on Corporations, 7886; Clark v. Main Shore R. R. Co., 81 Me. 477; Attorney General v. Bay State Min. Co., 99 Mass. 148.

A state has same power over a foreign as a domestic corporation operating within it. N. Y. Life Ins. Co. v. Cravens, 178 U. S. 389; Montgomery v. Whitbeck, 12 N. D. 385; 96 N. W. 327.

While comity allows a foreign corporation to act in another state, it must comply with its distinctly marked policy. Clarke v. Central R. & Banking Co., 50 Fed. 338; Runyan v. Coster et al., 14 Pet. 122, 10 L. Ed. 382; McDonough et al v. Murdoch et al., 15 How. 367, 14 L. Ed. 732; Marshall v. B. & O. Railroad Co., 16 How. 313, 14 L. Ed. 953; Story on Conflict of Law, 203; Myer v. Manhattan Bank, 20 Ohio, 302.

A foreign corporation cannot exercise powers within a state that are forbidden to corporations of like character formed within its boundary. U. S. Mtge, Co. v. Gross et al., 93 Ill. 483; Carroll v. City of East St. Louis, 67 Ill. 568; State v. Cooke, 71 S. W. 829; Clark and Marshall on Private Corporations, section 838, p. 2686; Clark v. Central R. & Banking Co., 50 Fed. 338; People v. Howard, 50 Mich. 239; U. S. Mtge. Co. v. Gross et al., 93 Ill. 483; Stevens v. Pratt, 101 Ill. 206; Fowler v. Bell, 90 Tex. 150; Falls v. U. S. Sav. Loan & Bldg. Assn., 97 Ala. 417; White et al. v. Howard et al., 46 N. Y. 144; Cook on Corporations, 696; Toomen v. Supreme Lodge K. P., 74 Mo. App. 507.

In an action to collect an assessment, the complaint must aver a proper assessment and state how much was ordered, so as to make it conform to the charter and by-laws, or the general act under which the corporation was organized. Montgomery v. Harker, 9 N. D. 527, 84 N. W. 369; Atlantic Mut. Fire Ins. Co. v. Young, 75 Am. Dec. 200; Penn. & O. Canal Co. v. Webb, 9 Ohio, 136; M. C. & L. M. Ry. Co. v. Hall, 26 Ohio Stat. 310; Devendorf v.

Beardsley, 23 Barb. 656; Bibbart v. Junction Ry. Co., 12 Ind. 484; Hashagen v. Hanlove, 42 Ind. 330; Am. Mut. Aid Assn. v. Hilborn, 8 Ky. Law Rep. 627; Atlantic Mut. Ins. Co. v. Fitzpatrick, 2 Gray, 279; Embree v. Shideler, 36 Ind. 423; Pacific Mut. Ins. Co. v. Guse, 49 Mo. 329; Reliance Mut. Ins. Co. v. Sawyer, 160 Mass. 413, 36 N. E. 59; Cin. Mut. Ins. Co. v. Rosenthal, 35 Il. 85.

ENGERUD, J. This is an appeal by plaintiff from a judgment of dismissal on the merits entered in the district court pursuant to a directed verdict. The plaintiff sues as assignee of an alleged cause of action which was originally held by the Mankato Mutual Hail & Cyclone Insurance Company. It is clear from the record that the action is brought to enforce defendant's alleged liability for an assessment levied upon him by said company, of which the defendant was a member. Holding, as we do, that the evidence offered by the plaintiff shows affirmatively that the plaintiff has, in fact, no cause of action, it is unnecessary to discuss the sufficiency of the complaint or the propriety of the procedure on the trial. If the evidence offered had been admitted, a judgment of dismissal on the merits would have resulted. Consequently, even if that result was reached in an irregular manner, no prejudice resulted to the appellant.

The company was a mutual insurance corporation, and its only income with which to pay expenses and losses each year was derived from assessments to be levied annually upon its policy holders, not exceeding 5 per cent of the risks. It did not collect a fixed premium in cash or not payable absolutely at the time of issuing the policy. Its practice was, and so its by-laws provided, that policies were issued in consideration only of the promise of the insured to pay the annual assessment. The provisions of section 3108, Rev. Codes 1899, were wholly disregarded. This defendant signed a written application to the company for a policy insuring certain of his crops in the sum of $1,000 against loss by hail during the season of 1902. The application was in substantially the same farm as that involved in the case of Montgomery v. Whitbeck, 12 N. D. 385, 96 N. W. 327, and there was attached thereto a so-called premium note in the same form as that referred to in that case. In short, the evidence offered disclosed that this company was doing business on precisely the same plan as that condemned by this court in Montgomery v. Whitbeck, supra, in which it was held that a contract of insurance with a mutual insurance company

which violated the provisions of section 3108 was void, and the assessment could not be recovered.

Appellant contends, however, that the decision in Montgomery v. Whitbeck is not decisive of or applicable to this case, because the contract here involved was made and entered into in Minnesota with a corporation of that state. The Mankato Mutual Hail & Cyclone Insurance Company was organized under the laws of Minnesota, and its home office was at Winnebago City, in that state. It had been authorized by the commissioner of insurance to do business in this state in 1902, and had agents here authorized to solicit insurance. These agents procured applications for insurance, and these applications were forwarded to the home office of the company for approval. When the application was approved, a policy was issued at the home office, and forwarded to the insured. It appears that more than $2,000,000 of insurance had been written by the company in this state during 1902. The defendant was a resident of this state, and his application was made here, through the company's local agent; and the property insured was also in this state, but the application was accepted and the policy issued in Minnesota. We shall assume, for the purposes of this case, that the contract is a Minnesota contract, and is not forbidden in that state, and that section 3108 does not directly and ex proprio vigore apply to foreign corporations. As to the truth of these assumed propositions, we express no opinion, because we are clear that they are of no avail to the plaintiff in this case.

Section 5756, Rev. Codes 1899, provides: "A corporation created by or under the laws of any other state, territory or country, or of the United States may prosecute or defend an action or proceeding in the courts of this state in the same manner as corporations created under the laws of this state, except as otherwise specifically prescribed by law. But such foreign corporation cannot maintain any action founded upon an act or upon any liability or obligation, express or implied, arising out of or made or entered into in consideration of any act which the laws of this state forbid a corporation or any association of individuals to do without express authority of law." This provision of our Code of Civil Procedure is merely a recognition of that well-established principle of the law of nations, which requires the courts of one sovereignty to so far recognize the laws of another as to enforce and protect rights acquired under the laws of that other state or country, provided the right so acquired is neither injurious to the public rights, nor offen-

sive to the morals, nor contravenes the public policy or positive law of the country in whose courts it is asserted and sought to be enforced or protected. Thompson v. Waters, 25 Mich. 214, 12 Am. Rep. 243; 2 Kent's Commentaries, p. 458.

It is only by comity, express or implied, that a foreign corporation receives recognition in the courts of any state other than that to whose laws it owes its existence. A corporation is a mere creature of the law; and inasmuch as laws have no force beyond the limits of the territory over which the lawmaking power has jurisdiction, it necessarily follows that when a corporation extends its operations into another state than that by force of whose laws it exists, it can demand recognition only on the principles of comity, and not as a matter of strict right. As said by Judge Story: "Every independent community will and ought to judge for itself how far that comity ought to extend. The reasonable limitation is that it shall not suffer prejudice by its comity." Story on Conflict of Laws, section 244, p. 371. This well established rule has been recognized and applied in numberless cases, and its application is well illustrated by the following: Bank v. Earl, 13 Pet. 519, 10 L. Ed. 274; N. Y. Life Insurance Co. v. Cravens, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116; Attorney General v. Mining Co., 99 Mass. 148, 96 Am. Dec. 717; People v. Formosa, 131 N. Y. 479, 30 N. E. 492, 27 Am. St. Rep. 612; Stanhilber v. Insurance Co., 76 Wis. 285, 45 N. W. 221; Rose v. Kimberly & Clark Co., 89 Wis. 545, 62 N. W. 526, 27 L. R. A. 556, 46 Am. St. Rep. 855; Seamans v. Temple Co., 105 Mich. 400, 63 N. W. 408, 28 L. R. A. 430, 55 Am. St. Rep. 457; Seamans v. Zimmerman, 91 Iowa, 363, 59 N. W. 90; People v. Hanke, 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568.

The rule expressed by section 5756 is an expression of that rule of interstate comity above mentioned, as applied to foreign corporations; and is a rule which the courts of this state would apply even if it had not been expressly declared by the legislature. The contract which the plaintiff is seeking to enforce is one which the laws of this state prohibit on grounds of public policy, because it is likely to result in injury to our citizens. It is no less injurious or repugnant to public policy because made by a foreign corporation outside of the limits of our state. It was one which affected a citizen of and property within a state. This foreign insurance company was licensed to insure the property of residents of this state, and it received that license as matter of grace. It cannot abuse that

privilege by making contracts which the legislature, in order to protect our citizens, has forbidden domestic corporations to make. It cannot plead its foreign domicile as a ground for immunity from our laws and at the same time invoke the aid of our courts on the ground of comity to enforce a contract which is contrary to the policy of our laws. Comity cannot be thus extended to the injury of our own citizens and so as to discriminate in favor of foreign corporations, to the disadvantage of domestic corporations of like character. Section 5756 forbids such a misapplication of interstate comity.

The plaintiff is in no better position than his assignor. The statute is not a mere denial of the capacity of the foreign corporation to sue, but it is a complete bar to the assertion of a cause of action or defense which a domestic corporation or association would not be permitted to assert without express authority. It is needless to say that this contract is not one involving interstate commerce, and the plaintiff cannot invoke the federal constitution or laws on that subject. New York Life Insurance Co. v. Cravens, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116.

The judgment is affirmed. All concur.

(106 N. W. 405.)

AARON J. BESSIE v. NORTHERN PACIFIC RAILWAY CO.

Opinion filed December 14, 1905.

Dissolution of a Law Firm by Disbarment of a Member — Effect on Contracts.

1. After a dissolution of partnership between attorneys at law by operation of law, by reason of the suspension from practice of one of them, the remaining members may carry on the unfinished business of the firm, and their rights under existing contracts for services will be determined under the partnership contracts, in the absence of a showing that new contracts were made after the dissolution.

Same — Remaining Parties May Settle Firm Contract and Bind Other Members.

2. After the dissolution of a copartnership between attorneys at law by reason of the suspension of one member from practice, the remaining members of the copartnership can settle partnership contracts made with the dissolved firm and thereby bind the other members of the firm.

Same — New Contracts.

3. Evidence considered, and *held* not to show that a new contract was made as to attorney's fees after the firm was dissolved.

Appeal — Review — Findings of Fact.

4. Under section 5627, Rev. Codes 1899, the Supreme Court will review the evidence, in the absence of a motion for a new trial in actions at law tried by the court without a jury, to determine whether the findings of fact are sustained or not.

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

Action by Aaron J. Bessie against the Northern Pacific Railway Company. Judgment for plaintiff, defendant appeals.

Reversed.

Ball, Watson & Maclay, for respondents.

A firm of attorneys is entitled to no lien in an action of tort until the claim is merged in a judgment. Nanna v. Coal Co., 31 N. E. 846; Abbott v. Abbott, 26 N. W. 361; Randall v. Van Wagenen, 22 N. E. 361; Sherry v. Nav. Co., 72 Fed. 565; Simmons v. Almy, 103 Mass. 33.

A claim for unliquidated damages cannot be assigned before judgment. If a claim is not assignable, there can be no lien. Kusterer v. Beaver Dam, 56 Wis. 471, 43 Am. Rep. 75; Pulver v. Harris, 62 Barb. 500; affirmed, 52 N. Y. 73; Coughlin v. Railroad Co., 71 N. Y. 443; Hunt v. Conrad et al., 50 N. W. 614; Harris v. Tyson, 36 Am. Rep. 126; Hutchison v. Pottes, 18 Vt. 614, 3 Am. & Eng. Enc. Law, 465, note 2; Hammons v. Great Northern Railway Co., 54 N. W. 1108.

The obligation in a personal injury case is not a debt. Hammons v. Railway Co., supra; Winslow v. Central Iowa Railroad Co., 32 N. W. 330; Sonnesyn v. Akin et al., 12 N. D. 97 N. W. 561; In re Scoggin, 12511 Fed. Cases.

Attorneys of record alone can claim a lien. Foster v. Danforth, 59 Fed. 750.

Suspension of a member of a law firm works its dissolution as to new business, but it exists as to incomplete business. Bates on Partnership, section 707; Page v. Wolcott, 15 Gray, 536; Walker v. Goodrich, 16 Ill. 341; Osment v. McElrath, 9 Pac. 731; McCoon v. Galbraith, 29 Pa. St. 293; Denver v. Roane, 99 U. S. 355, 25 L. Ed. 476; Waldeck v. Brande, 21 N. W. 533; Smyth v. Harvie, 31 Ill. 62; 22 Am. & Eng. Enc. Law, 211.

The contract was with the firm, and work done under it gave rise to a claim due it as a copartnership, even after its dissolution, and individual partners could not sue. Parsons on Partnerships, 398; Hyde v. Moxie Nerve Food Co., 36 N. E. 585; Thompson v. McDonald, 10 S. E. 448; Snow v. Burnett, 1 S. W. 634; Mosgrove v. Golden, 101 Pa. St. 605; Dobbin v. Foster, 1 Car. & K. 323; Lindley on Partnership, 412; Fish v. Gates, 133 Mass. 441; Davis v. Megroz, 26 Atl. 1009; Bates on Partnership, 1018.

Attorney loses his right to practice by removal from the state. Re Mosness, 39 Wis. 509; Bank v. Risley, 6 Hill. 375; Rev. Codes, section 421.

Plaintiff's notice fails to state for what service a lien is claimed as required by statute. Ward et al. v. Sherbondy et al., 65 N. W. 413; Forbush v. Leonard et al., 8 Minn. 303 (Gil. 267); Henchey v. Chicago, 41 Ill. 136.

Payment to, or settlement with one member of a firm binds all. Bates on Partnership, section 682; Gordon v. Freeman, 11 Il.. 14; Major v. Hawkes, 12 Ill. 297; Gillilan v. Sun Mutual Ins. Co., 41 N. Y. 376; Granger v. McGilvra, 24 Ill. 152; Williams v. More, 63 Cal. 50; Jeffries v. Mutual Life Ins. Co., 110 U. S. 305, 28 L. Ed. 156.

Chas. E. Wolfe, for respondent.

Plaintiff's notice of lien was sufficient in form and substance. The statute giving a lien is remedial and to be liberally construed. Crowley v. LeDuc, 21 Minn. 412; Sutherland on Stat. Const., Par. 430; Weeks on Attorneys, par. 360.

An attorney's lien upon a judgment extends to the money arising from it and the cause of action upon which it is based. Winslow v. Central Railroad Company, 32 N. W. 330; Leighton v. Severson et al., 66 N. W. 938; Goodrich v. McDonald, 112 N. Y. 157, 19 N. E. 6409; Hrock v. Altman & Taylor Co., 3 S. D. 477.

Defendant's settlement with Ross was collusive and in fraud of plaintiff's rights. Porter v. Hanson, 36 Ark. 591; Tullis v. Bushnell, 65 How. 465; Eberhardt v. Schuster, 10 Abb. 374; Weeks on Attorneys, par. 377, 3 Am. & Eng. Enc. Law (2d Ed.) 471.

A settlement between parties to litigation with view of defrauding the attorney, or which in law might accomplish that, will not discharge the defendant from paying him. McDonald v. Napier, 14 Ga. 89; Young v. Dearborn, 27 N. H. 324; Courney v. McGavock,

23 Wis. 619; North Chicago Railroad v. Ackley, 58 Ill. App. 572; Hubbel v. Dunlap, 19 Ky. Law. Rep. 656, 41 S. W. 432.

Where a settlement is made collusively with intent to defraud the attorney, absence of actual notice will not protect a judgment debtor. Howard v. Osceola, 2 Wis. 433; Dietz v. McCallum, 44 How. Pr. 493.

MORGAN, C. J. On April 8, 1902, one George Ross commenced an action against the defendant in the district court of Cass county for damages for personal injuries to himself alleged to have been negligently caused by the defendant. The firm of Freerks, Bessie & Freerks was retained by Ross and were his attorneys in said action, and regularly signed the summons and complaint in the firm name. The plaintiff in this case, as a member of said firm, orally made a contract with said Ross on behalf of said firm relating to the attorney's fees and expenses in said action. The firm was to receive one-half of the amount recovered from the defendant, after deducting disbursements paid by the attorneys in the prosecution of the action. On May 12, 1902, said firm was dissolved by operation of law by the suspension from practice of M. C. Freerks. Thereafter all papers in the action were signed by or in the name of George W. Freerks, who also personally conducted the trial. On January 17, 1903, Ross made a contract with George W. Freerks that Freerks alone should act for him as his sole attorney in that case, and that he should receive 50 per cent of the amount recovered in the action less the disbursements. On January 19, 1903, the trial was commenced, and ended on January 22d with a verdict of $8,000 in favor of the plaintiff. The plaintiff in this action had done some work in the preparation of the case for trial, but was not present at the trial through no fault of his own, but by reason of the fact that George W. Freerks failed to advise him when the trial was to commence. After the firm was dissolved no new partnership was entered into between George W. Freerks and this plaintiff. They entered into an agreement as to the division of the fees in pending cases, under which Freerks was to receive two-thirds of all fees and this plaintiff one-third, and this was to apply to the Ross case, which had not then been tried. Freerks was to have charge of the firm office at Fargo, and the plaintiff of the Wahpeton office. On January 3, 1903, Freerks filed a claim for a lien against the judgment for the sum of $4,000. On March 17, 1903, the plaintiff filed a claim for a lien against said judgment for

the sum of $1,346.20, and served a notice on the defendant's attorneys of record in that case that he claimed a lien on the judgment for that sum. On July 2, 1903, the district court set aside the verdict of the jury and granted a new trial in the action. On July 15, 1903, Ross settled his case with the defendant for the sum of $5,000, and was paid $3,500 of said sum by defendant's attorneys, before Freerks or this plaintiff was advised of such settlement. The sum of $1,500 was turned over by said attorneys to one Ackerman, defendant's and Ross' agent, for and on account of Freerks' fees. Ross gave Ackerman instructions to pay it over to Freerks if he would give a "clear receipt" for the attorney's fees in the case. This sum was paid to Freerks, and he receipted therefor to Ross. The receipt is not in evidence, nor is it shown what it was. This plaintiff had no notice of such settlement until it was perfected, and has received no pay for his services. Before the new trial was granted one of the defendant's attorneys informed the plaintiff that he would be advised if the judgment was to be paid before it would be paid to anyone. Plaintiff made a request of the attorney that this notice be given to him, as he was having "trouble with Freerks & Freerks, and that he could not get his affairs settled with them, and that he did not want that case settled without having his rights protected." The attorney so agreeing to notify the plaintiff was taking his vacation when the settlement was made, and failed to notify the members of his firm of plaintiff's request, and they made the settlement in ignorance of such request. The plaintiff brings the action for the recovery of $1,346.20. The trial court gave him judgment for the sum of $833.33, upon the theory that he is entitled to receive one-third of one-half of the amount recovered in the settlement pursuant to the contract with Ross and the arrangement for division of fees between plaintiff and George W. Freerks on all pending cases, including the Ross case. The appeal is from the judgment, and no motion for a new trial was made in the district court.

The respondent contends that this court is without authority to review the evidence and thereby determine whether the findings are sustained by the evidence, for the reason that no motion for a new trial was made. This action is one properly triable to a jury, but a jury trial was regularly waived. The appeal is, therefore, not under section 5630, Rev. Codes 1899, but must be determined under the law applicable to appeals in actions at law tried by the

court. Whether the sufficiency of the evidence to sustain the findings can be reviewed without a motion for a new trial depends upon the construction of section 5627, Rev. Codes 1899, which reads as follows, so far as material: "Any question of fact or law decided upon trials by the court or by a referee and appearing upon the record properly excepted to in a case in which an exception is necessary, may be reviewed by the Supreme Court, whether a motion for a new trial was or was not made in the court below, but questions of fact shall not be reviewed in the Supreme Court in cases tried before a jury unless a motion for a new trial is first made in the court below." The findings of facts concerning which objections are made were duly excepted to by the appellant in the court below, and a statement of the case was settled embodying such exceptions. This entitled the appellant to have these findings reviewed in this court. The language of the section is too plain to require construction. Its language is susceptible of no other meaning than that the evidence may be reviewed to determine its sufficiency to sustain the findings in court cases not tried under section 5630, Rev. Codes 1899, although no motion for a new trial was made. In 1891 the legislature repealed section 5237, Comp. Laws 1887, and enacted section 5627, under which it is made clear that the legislature intended to permit a review of the evidence on which findings are based in appeals in law cases. Reliance is placed upon Le Claire v. Wells, 7 S. D. 426, 64 N. W. 519, to sustain respondent's contention that the findings cannot be reviewed. That case was decided under a statute in terms the same as section 5237, Comp. Laws 1887, which is entirely different from section 5627, supra. Under the latter section a review of questions of fact embodied in a finding is permissible under the express language of the section, although no motion for a new trial was made.

The pivotal question in the case is: Did the plaintiff have a lien for his services independent of the contract between Ross and the firm of Freerks, Bessie & Freerks? His contention is that the contract with that firm was abrogated by a new contract made between himself and George W. Freerks on the one hand, and Ross on the other, after the firm had been dissolved by virtue of the suspension from practice of M. C. Freerks. The evidence of this new contract relied on to sustain plaintiff's contention is as follows: "He (Ross) came in, and Mr. Freerks and myself were working there, and he used the following words: 'I understand that Mar-

tin Freerks has been fired,' and he asked if that would have any effect on his case. We then told him * * * that it would have no effect on his case at all; and we then told him of the manner in which the business of the firm had been settled. Told him that the case would be taken care of by Mr. Freerks and myself. He then stated that it was all right; that he was satisfied. * * * At the time of the first talk he made the statement that he understood that Martin had been fired. We told him that he had been suspended and could not practice any more, and the business would be conducted by Mr. Freerks and myself, and told him of the arrangement that had been made between George W. Freerks and myself in regard to the settlement of the business, and the continuation of the cases that were pending both there and here." The appellant contends that no new contract was made with Ross by virtue of this conversation. Ross became alarmed at the fact of the suspension from practice of one member of the firm with which he had contracted for the conduct of his suit, and was anxious to know how it affected his case. He was told that it had no effect upon it; that the two remaining members would take care of it. This was satisfactory to him. The mere fact that these two members told him they were going to divide the fees does not create a new relation by virtue of which each had a separate and individual contract with Ross. The law settled the rights and duties of Ross with these two members after the dissolution, and the conversation fails to show that a new contract was made whereby a different relation was to exist than that fixed by the law. It was of no consequence to Ross how these members divided the fees between themselves. He had a contract with the firm, and there is nothing to show that that contract was modified in any way.

Can the plaintiff recover judgment from Ross for his services in the case on the strength of the conversation had between him and the parties after the dissolution? We think not. Ross received assurance from the two members that his case would be cared for by them. Nothing was said as to whether it would be under the old contract, or as individuals. Unless proved to be under a new arrangement, it will be presumed to be as members of the dissolved firm. Martin C. Freerks, who was suspended, had an interest in the suit up to the dissolution. His suspension from practice did not prevent him from claiming what was due him upon an accounting with the firm for business done by it before the

dissolution. Nothing was said about that. Our conclusion is that the plaintiff and Freerks had no individual contract for fees with Ross, and that they conducted the litigation under the contract with the dissolved firm as they had a right to do. A settlement with George W. Freerks for the fees was a settlement with the firm and binding upon the plaintiff. This is conceded to be the law by the respondents that is applicable in such cases in the absence of a new contract. It is immaterial that Freerks now says that he settled for his own fees only, and not for those of the plaintiff. He had no claim for individual fees as against the plaintiff. He contracted with Ross as sole attorney just before the trial, and evidently intended to deprive the plaintiff of any participation in the fees, but this did not defeat plaintiff of his interest in the original contract. Ross could have discharged plaintiff from further participation in the case, but could not deprive him of his compensation under the contract, nor could Ross and Freerks do so. It is also immaterial that the plaintiff served notice that he claimed fees out of the judgment or settlement. Unless he had an individual lien, those notices could create none. The contract and lien were a partnership matter. The lien was not an individual or divisible one. It was an entirety and belonged to the partnership. It remained such after the firm dissolved for purposes of bringing to a close business commenced by the partnership, unless shown to have been changed by a new and valid contract. This is conceded to be the law by the respondents, and that principle is sustained by the cases. 22 A. & E. Enc. of Law, 211, and cases cited; Osment v. McElrath, 68 Cal. 466, 9 Pac. 731, 58 Am. Rep. 17; Waldeck v. Brande (Wis.) 21 N. W. 533; Page v. Wolcott, 15 Gray, 536; Bates on Partnership, section 707.

For these reasons plaintiff had no claim individually against Ross, and could therefore have none against the defendant for settling the suit without payment of fees claimed to be due and evidenced by a lien. There was no evidence to sustain the finding and conclusion that plaintiff has a valid attorney's lien in that case, nor any evidence to sustain the finding that the defendant is indebted to the plaintiff.

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

(105 N. W. 936.)

(Supreme Court of North Dakota. June 3, 1903.)

TAXATION OF OCCUPATIONS—HAWKERS AND PEDDLERS—CONSTITUTIONAL LAW—INTERSTATE COMMERCE—UNIFORMITY.

1. The power to raise revenue by taxation is a necessary attribute of sovereignty, which may be exercised by the legislature subject only to the restrictions imposed by the federal or the state constitution, and includes the power to tax occupations.

2. Neither the federal constitution nor the constitution of this state inhibits the taxation of occupations.

3. Chapter 165 of the Laws of 1903, entitled "An act taxing the occupation of hawking and peddling," etc., is not open to the objection that it authorizes a tax upon interstate commerce.

4. The rule of equality and uniformity in taxation required by section 176 of the state constitution applies only to taxes imposed upon property as such, and does not apply to taxes imposed upon occupations.

5. The objection that a law which the legislature had the power to enact will operate harshly goes merely to the policy of the law, and not to its validity. Such an objection should be addressed to the legislature and not to the courts.

6. Chapter 165 of the Laws of 1903 is a valid constitutional enactment.

(Syllabus by the Court.)

IN RE LIPSCHITZ.

Application of M. Lipschitz for writ of habeas corpus.

Writ denied.

Bosard & Bosard, for petitioner.
J. B. Wineman, State's Attorney, for the State.

YOUNG, C. J. The petitioner is in the custody of the defendant, as sheriff of Grand Forks county, upon a judgment of conviction for peddling without a license. After having been refused a writ of habeas corpus by the district court of that county, he applied to this court for such writ, and the same was issued. A written stipulation was entered into by counsel for petitioner and counsel for defendant in which the service of the writ and the presence of the petitioner before the court was waived. It was also agreed that the facts alleged in the petition, including the information, judge's minutes and commitment attached thereto, were true; further, that the only question as to the legality of defendant's confinement is the alleged unconstitutionality of Senate Bill No. 12 of the

Laws of 1903, entitled "An act taxing the occupation of hawkers and peddlers," etc., for violating which the defendant was convicted; and, further, that, in the event the court should hold said act to be constitutional, the writ should be quashed; and if, on the other hand, the act shall be held void, the writ shall be granted and defendant discharged. The petition alleges that the petitioner at the time of his arrest was "engaged in the business of peddling, bartering and exchanging goods, wares and merchandise within the county of Grand Forks, and for such purpose traveled from place to place in said county, carrying goods to sell, and offering and exposing goods to sell;" that he had no license from the auditor of said county; that he was informed against by the state's attorney of Grand Forks county, tried and convicted for violating the law entitled "An act taxing the occupation of hawkers and peddlers, regulating the licensing of persons engaged in such occupation, increasing the ordinary county revenue by such taxation, and prescribing penalties for the violation of its provisions," entitled "Senate Bill No. 12 of the Laws of 1903," and approved with an emergency clause on March 2, 1903; that the alleged unlawful act committed by him is not a public offense for the reason that said law is unconstitutional, and that his detention is therefore unlawful. The act in question consists of nine sections. Section 1 provides that "it shall be unlawful for any person to travel from place to place in any county of this state, for the purpose of carrying to sell, or exposing or offering to sell, barter or exchange any goods, wares, merchandise or any other property whatever, without first obtaining a license therefor from the auditor of said county." Sections 2, 3, 4 and 5 regulate the application for the license, prescribe the amount to be paid for the license, and provide for its issuance and recording by the county auditor. Section 6 provides that "all money paid into the county treasury under the provisions of this act, shall be placed to the credit of the ordinary county revenue, including the support of the poor, to be disbursed in the same manner as the funds derived from the usual course of taxation for such account." Section 7 makes a violation of the act a misdemeanor, punishable by a fine not exceeding $50, or by imprisonment not exceeding thirty days. Section 8 reserves to incorporated cities, towns and villages all existing rights to license and regulate peddlers within their corporate limits, and section 9 repeals all inconsistent acts.

By this act the legislature has attempted to tax the occupation of hawking and peddling. The first question which arises relates to the power of that body to tax occupations. This question must be resolved in favor of the existence of such power. It must be conceded that the power to raise revenue by taxation is a necessary attribute of sovereignty, which may be exercised by the legislature subject only to such restrictions or limitations as are imposed by the state or federal constitution; and, further, that the legislature, in exercising this power, and in selecting subjects for taxation, is not confined to property, but may also tax occupations. Neither the federal constitution nor the constitution of this state forbid the taxing of occupations. It cannot be questioned, therefore, that the legislature, in this absence of constitution inhibition, has the undoubted right to tax the occupation of peddling. This is not debatable. The authorities, both state and federal, are unanimous to the effect that "a state legislature may tax trades, professions and occupations in the absence of inhibition in the state constitution in that regard." Ficklen v. Taxing District of Shelby Co., 145 U. S. 1, 12 Sup. Ct. 810, 36 L. Ed. 601; Standard U. Cable Co. v. Attorney General, 46 N. J. Eq. 270, 19 Atl. 733, 19 Am. St. Rep. 394; People v. Coleman et al., 4 Cal. 46, 60 Am. Dec. 581; Cooley on Tax'n, 570. See, also, cases cited 21 Am. & Eng. Enc. Law (2d Ed.) 776, under note 7.

Counsel for petitioner rely chiefly upon grounds which were involved in and considered in State v. O'Connor, 5 N. D. 629, 67 N. W. 824, and State v. Klectzen, 8 N. D. 286, 78 N. W. 984, in which cases two prior acts licensing hawkers and peddlers were declared void by this court. In State v. O'Connor, chapter 142, p. 430, Laws 1890, amended and re-enacted in the Revised Codes of 1895 as sections 1738 to 1743, inclusive, was held void for the sole reason that the license tax imposed by that act was an unlawful interference with interstate commerce; following Brennan v. City of Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719. It is claimed that the act under consideration is void for the same reason. We are of opinion that it is not open to this objection. The act of 1890 not only exacted a license fee from persons who traveled about from place to place within the state carrying goods with them for delivery, but also in plain terms included persons who offered to sell goods, "whether by sample or otherwise, and whether such goods, wares, merchandise, notions or other articles of trade whatsoever, are delivered at the time of sale, or to be delivered

at some future time." Mr. Justice Corliss, who delivered the opinion of the court in the above case, said that upon the authority of Brennan v. City of Titusville, supra, the act "is, so far as it assumes to tax those who sell by sample goods of other states, to be thereafter delivered, an unlawful interference with the exclusive authority of congress to regulate interstate commerce, and therefore is, to that extent, void. * * * The statute * * * declares that all persons who offer for sale by sample any goods, wares, merchandise or other articles of trade must take out a license and pay the statutory fee therefor. It is obvious that this law cannot stand as it was enacted. All persons cannot be compelled to take out such license and pay such a fee. Those who offer for sale by sample goods to be shipped from other states cannot be affected by its provisions." That this is a correct interpretation of the act then under consideration, and also a correct statement of the law applicable thereto, cannot be doubted. The present act, however, does not come within either the letter or the spirit of the above case. It does not in fact place a tax or burden upon interstate commerce. On the contrary, it relates entirely to commerce within the state. It does not include persons soliciting sales of goods by sample for future delivery, as did the former act. It will be noticed by reference to section 1 that this act only includes persons traveling from place to place carrying goods to sell, etc. The objectionable provisions of the 1890 act, above quoted, imposing a license upon those who sold by sample for future delivery, and for which reason alone that act was held invalid, are not contained in the present act. In Emert v. Missouri, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430, a statute of Missouri, which required every peddler to procure a license and pay a tax therefor, and imposed a penalty for peddling without a license, was held, after an extended review of the federal authorities, not to be repugnant to the power given to congress to regulate commerce "as applied to a peddler within the state of sewing machines made in another state by a corporation of that state, and sent by it to him to sell on its account and as its agent." In State v. Montgomery, 92 Me. 433, 43 Atl. 13, the hawkers' and peddlers' act of 1889 of that state (Laws 1889, c. 298) was held valid against the objection we are now considering. The court said: "Nor is the license fee prescribed by the statute a tax upon interstate commerce. The statute has no reference to the business of soliciting orders for, or offering for sale, property situated without the state, to be followed by a transfer

of the goods from one state to another, as was the case in Brennan v. Titusville, supra; Crutcher v. Kentucky, 141 U. S. 47 (11 Sup. Ct. 851, 35 L. Ed. 649); Robins v. Shelby Co., 120 U. S. 489 (7 Sup. Ct. 592, 30 L. Ed. 694); Corson v. Maryland, 120 U. S. 502 (7 Sup. Ct. 655, 30 L. Ed. 699)— all of which cases were cited by the defendant. The statute contemplates the business of an itinerant peddler, going about from place to place, having his goods with him, exposing them for sale, selling them. Unless he has them with him, he cannot expose them for sale; he cannot sell them, within the meaning of the statute. The goods, if ever without the state, were within the state when exposed for sale, and thus had ceased to be the subject of interstate commerce. By breaking the packages, and traveling with them as an itinerant peddler, the owner or possessor had mixed them with the general property of the state. Brown v. Maryland, 12 Wheat. 419 [6 L. Ed. 678]. The distinction is clearly pointed out in Emert v. Missouri, supra, page 311 [156 U. S., page 370, 15 Sup. Ct. 370, 39 L. Ed. 430]. Emert was the agent of the Singer Manufacturing Company, a New Jersey corporation, which had forwarded to him in Missouri the machines in question, and which it was alleged he unlawfully sold, in violation of the peddlers' license law of that state. The court said: "There is nothing in this case to show that he [the peddler] ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer from one state to another; and were neither interstate commerce within themselves, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic; and, as far as appears, the only goods in which he was dealing had become part of the mass of property within the state. Both occupation and the goods, therefore, were subject to the taxing power and to the police power of the state.' The goods which this defendant is complained of for exposing for sale had been received by him within this state. He had broken the packages. He was traveling with them as a peddler. They had become a part of the general mass of property in the state. Hence a statute regulation of their sale would not be a regulation of interstate commerce." It is clear that persons engaged in the occupation of peddling as described in section 1 of the present act are not engaged in interstate commerce. The persons pursuing such occupation and the subject

of their sales are within the jurisdiction of the state, and in no sense can it be said that a tax imposed upon their occupation is an interference with interstate commerce.

It is also urged that the act violates section 176 of the state constitution, which provides that "laws shall be passed taxing by uniform rule all property according to its true value in money." This contention cannot be sustained. The rule of uniformity required by this section of the constitution does not apply to taxes imposed upon occupations. The same contention was urged in the case of State v. Kleetzen, supra, in which case chapter 118, p. 185, Laws 1899, was held void, and was overruled. The invalidity of the 1899 act was placed upon the single ground that it violated section 175 of the constitution in this, that it did not state the purpose to which the tax was to be applied. This defect is cured in the present act by section 6, previously quoted. In affirming that section 176 does not apply to an occupation tax, this court, speaking through Mr. Justice Wallin, said: "In my judgment, the act under consideration, in so far as it may be called a tax, is an occupation tax, framed to derive a revenue from the occupation of peddling, and hence the same is not restricted by the constitutional requirement of valuation and of uniformity." The correctness of the above holding is directly challenged in this case. It is contended that the tax imposed is, in effect, a tax upon the goods sold by the peddler—that is, that it is upon property—and that section 176 is therefore applicable. The unanimous voice of authority is against this contention. The courts are in entire harmony in holding that the constitutional requirement of uniformity and equality embodied in this section applies only to taxes imposed upon property as such, and that an occupation tax is not a tax upon property within the meaning of this and similar constitutional provisions. In Aulanier v. The Governor, 1 Tex. 653, the court, in construing a constitutional provision of that state which required that "taxation shall be equal and uniform throughout the state; all property in this state shall be taxed in proportion to its value," etc., said that the word 'property,' as used in the constitution, cannot by any forced construction be tortured into meaning an occupation, calling or profession." So, also, the supreme court of California, in People v. Coleman, 4 Cal. 46, 60 Am. Dec. 581, in construing a constitutional provision which required that "taxation shall be equal and uniform throughout the state," held that the provision did not operate as a limitation of the

taxing power of the legislature, and apply to every species of tax, but that it applied "only to direct taxation on property as such," and further, that the legislature might, in its discretion, discriminate in the imposition of taxes on certain classes of persons, occupations or species of property, taking some and exempting others. Likewise, the supreme court of Kansas in re Martin ,62 Kan. 638, 64 Pac. 43, after a review of the authorities, said, in reference to a license tax, that: "The express constitutional restrictions as to equality and uniformity of rate do not apply and the amount of the tax as well as the method of imposing it is left to legislative judgment and discretion." In Johnson v. Loper, 46 N. J. Law, 321, a license tax was assailed as repugnant to the "constitutional requirement that property shall be assessed under general laws and by uniform rules, according to its true value." The court said: "The constitutions of other states contain provisions analogous to the requirements contained in ours, and wherever the courts have been called upon to construe them in regard to their application to assessments upon occupations in the form of license fees they have been held inapplicable to the latter class of imposts. The almost, if not quite, unbroken course of decision has been in this direction; that these impositions are not taxes within the purview of the constitutional requirements"—citing numerous authorities. In Glasgow v. Rowse, 43 Mo. 479, it was held that a constitutional requirement that taxation upon property shall be in proportion to its value does not include every species of taxation, and that a tax upon incomes did not come within the term "property" as used in the constitution. So, also, it was held in the case of Knisely v. Cotterel, 196 Pa. 614, 46 Atl. 861, 50 L. R. A. 86, that a tax upon the business of vending merchandise was not a tax upon property, but upon an occupation, and that it did not violate the constitutional requirement that "all taxes shall be uniform." In Marmet v. State, 45 Ohio St. 63, 12 N. E. 463, the court, in construing the uniformity provision of the constitution of that state, said that the requirement was simply that taxes upon property as such shall be by uniform rule, and that it did not impair the power of the legislature to use its discretion when the burden was not placed upon property. So, also, it was held in Illinois that a license tax is not a tax in the constitutional sense, and that it does not, therefore, violate the constitutional requirement as to equality and uniformity. Lovingston v. Board, 99 Ill. 564; Wiggins Ferry Co. v. City of East St. Louis, 102 Ill. 560;

Walker v. City of Springfield, 94 Ill. 364; State v. French, 17 Mont. 54, 41 Pac. 1078, 30 L. R. A. 415—are to the same effect. See, also, 21 Am & Eng. Enc. Law (2d Ed.) 802, and cases collated by states at note 9; Home Insurance Co. v. City of Augusta, 50 Ga. 530; Western Union Telegraph Co. v. Mayer, 28 Ohio St. 521. In this state it has been held that section 176 does not even apply to all classes of taxes upon property. In the case of Rolph v. City of Fargo, 7 N. D. 640, 76 N. W. 242, 42 L. R. A. 646, this court, in harmony with the weight of authority, held that this provision of our state constitution "relates exclusively to general taxation, and has no reference to local assessments." See cases cited on page 652 of opinion (7 N. D., page 245, 76 N. W. 245, 42 L. R. A. 646); also Cooley on Taxation, pp. 626 to 636; 2 Dillon on Munic. Corp. 761, and cases cited. Counsel rely upon Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347, in which it was said that a license tax exacted from a peddler was, in effect, a tax upon the goods themselves. The case is not in point. The language was used in reference to the effect an occupation tax would have upon interstate commerce. The same court, in a later case—Ficklen v. Taxing District of Shelby Co., 145 U. S. 1, 12 Sup. Ct. 810, 36 L. Ed. 601—in considering the same question, said: "This tax is not on the goods or on the proceeds of the goods." In neither case, however, was the constitutional rule of equality and uniformity of taxation under consideration. The question involved was the right of a state to impose an occupation tax upon persons residing therein for the privilege of engaging in interstate commerce. As already stated, in all cases, so far as we are able to learn, in which the rule of equality and uniformity contained in section 176 and kindred constitutional provisions was involved, it has been held that the rule does not apply to a tax imposed upon occupations.

Finally, it is urged that the law is "unreasonable and unjust," and should, for that reason, be declared void. This objection goes to the policy of the law, and not to its validity. The fact that a law may be harsh in its operation does not defeat the power of the legislature to enact it. This objection should be addressed to the legislature, and not to the courts. The occupation of hawking and peddling has existed for centuries, and the power of the legislature to tax it is well established. Whether the scope of this act broadens the occupation so as to include persons not formerly included, we do not determine. The petitioner is not in

a debatable class. On the question as to what persons are subject to the provisions of the act, Commonwealth v. Gardner, 133 Pa. 284, 19 Atl. 550, 7 L. R. A. 666, 19 Am. St. Rep. 645, and note, Davenport v. Rice, 75 Iowa, 74, 39 N. W. 191, 9 Am. St. Rep. 454, and Davis & Company v. The Mayor, 64 Ga. 128, 37 Am. Rep. 60, will be found instructive.

(95 N. W. 160.)

INDEX

ACCOUNTING.

1. Where a trustee of a real estate mortgage secures title to the land by foreclosure and sells such land to an innocent purchaser, he must account for the land and the value of its use while actually used by him for cropping. Berry v. Evendon, 1.

ACTION. See CHATTEL MORTGAGE, 57; JUDGMENT, 95; PLEADING, 127; MORTGAGES, 238; JUSTICE OF THE PEACE, 414; RES ADJUDICATA, 423; PRACTICE, 430; ATTORNEYS AT LAW, 454; EQUITY, 465; ADVERSE CLAIMS, 476; PRINCIPAL AND AGENT, 587; APPEAL AND ERROR, 614.

1. An action to foreclose a mortgage is an action in personam, and comes within the operation of section 5210, Rev. Codes 1899, which excepts from the period limited for the commencement of an action the time during which the person against whom the cause of action accrued is absent from the state. Mortgage Co. v. Flemington, 181.
2. An action to foreclose a mortgage on real property is a remedy distinct from the remedies by which the creditor may enforce the personal obligation for the debt secured by the mortgage, and may become barred by the statute of limitations, even though the debt is not outlawed. Mortgage Co. v. Flemington, 181.
3. Since the amendment of section 5630, Rev. Codes 1899 by chapter 201, page 277, Laws 1903, actions which are properly triable by a jury are no longer triable in the district court or reviewable upon appeal under that section. Couch v. State, 361.
4. An action to recover a reward is an action at law, triable to a jury. Such an action is not changed to one of equitable cognizance by the fact that other claimants have been permitted to intervene under section 5239, Rev. Codes 1899, and assert their claims to the same reward. The rule is otherwise when a defendant against whom there are other claimants for the same debt interpleads such claimants, and secures his own discharge, and pays the money into court, pursuant to section 5240, Rev. Codes 1899. Couch v. State, 361.
5. The enforcement of the lien for fines and costs assessed under section 7610, Rev. Codes 1899, should be by action, and not by execution, in cases like the one under consideration. Larson v. Christianson, 476.

ADVERSE CLAIMS.

1. In an action to determine adverse claims under chapter 5, page 9, Laws 1901, the granting of plaintiff's motion for judgment on the pleadings is error, when the answer denies plaintiff's title to real estate, although it does not set forth a valid adverse interest. Larson v. Christianson, 476.

AFFIDAVIT.

1. Affidavits of jurors are not admissible to impeach their verdict upon the alleged ground that they misunderstood the instructions of the court, or to show their reasons for agreeing to a verdict. State v. Forrester, 335.
2. The fact that the affidavits on which a warrant is issued in contempt proceedings state some conclusions upon information and belief will not warrant the setting aside of the warrant, when the affidavits state positively the facts from which the conclusions are drawn. State v. Harris, 501.
3. The affidavits on which a warrant is issued in contempt proceedings are admissible in evidence on the hearing. State v. Harris, 501.

AGE OF CONSENT. See CRIMINAL LAW, 490.

AMENDMENT. See PLEADING, 19, 301, 507; PROCESS, 430.

1. Mistakes in pleading or process may be amended in Justice Court. Morgridge v. Stoeffer, 430.

AMERCEMENT. See CLERK OF THE DISTRICT COURT, 282.

1. A clerk of the district court cannot be amerced under section 5555 and 5556, Rev. Codes 1899, for failure to pay over money paid him for the satisfaction of a judgment on file in his office except in cases where such money is paid him under the terms of a statute. Milburn-Stoddard Co. v. Stickney, 282.

ANIMALS. See ESTRAYS, 460.

ANSWER. See PLEADING, 301, 511; TRIAL, 465; ADVERSE CLAIMS, 476.

APPEAL AND ERROR. See TRUST AND TRUSTEES, 482; TRIAL, 490.

1. Where the evidence shows 10 horses, worth $1,200 and that only 9 were covered by defendant's mortgage, but failed to show the separate value of each horse. *Held*, the judgment appealed from is not sustained and the appellant court cannot definitely determine the value of the property taken, and will not dispose of the appeal under section 5630, Rev. Codes 1899, but will order a new trial. Avery v. Crumb, 57.

APPEAL AND ERROR—Continued.

2. In appeals to this court under section 5630, Rev. Codes 1899, the evidence cannot be reviewed unless the appellant demands a trial anew of all the issues or of some particular fact. Bank v. Town of Norton, 143.

3. A certificate of probable cause is not alone sufficient to stay execution in a criminal case, and an application for such certificate with a view to suspending the execution of sentence pending appeal in a criminal case will not be entertained by the supreme court, when the defendant has neither offered to give bail, nor applied to the trial judge under section 8340, Rev. Codes 1899, for a stay of execution without bail. State v. Sanders, 203.

4. Section 6771a, Rev. Codes 1899, which provides that the district court may dismiss an appeal from justice court for failure on the part of the appellant to cause the transcript to be transmitted, does not make it the mandatory duty of the court to order a dismissal for that reason. DeFoe v. Zenith Coal Co. 236.

5. Where the transcript was filed before the motion to dismiss was granted, and the record affirmatively showed that the respondent had not been prejudiced by the delay, it was error to dismiss the appeal for failure to file the transcript in time. DeFoe v. Zenith Coal Co. 236.

6. The supreme court will not pass upon a question not presented by the record although parties agree in the argument before this court that the allegations of one of the causes of action were intended to allege the taking of usury. Weiker v. Stavely, 278.

7. Failure to comply with the rules of court in reference to appeals under section 5630, Rev. Codes 1899, is not ground for affirming the judgment or dismissing the appeal in case of an appeal from a judgment rendered pursuant to section 5555, Rev. Codes 1899. Milburn-Stoddard Co. v. Stickney, 282.

8. Under our statute regulating appeals from justice courts, the service and filing of the notice of appeal and the filing of the undertaking with the clerk of the district court are not alone sufficient to transfer jurisdiction. The undertaking must be served and the service must be made within thirty days after the judgment is rendered. Richardson v. Campbell, 81 N. W. 31; 9 N. D. 100 followed. Lough v. White, 353.

9. Since the amendment of section 5630, Rev. Codes 1899, by chapter 201, p. 277, Laws 1903, actions which are properly triable by a jury are no longer triable in the district court or reviewable upon appeal under that section. Couch v. State, 361.

10. The specifications contained in appellant's statement of case and set out in the opinion calls for a legal conclusion and not the determination of a question of fact, and does not, therefore, authorize a review of the evidence under section 5830, Rev. Codes 1899. Stevens v. Meyers, 398.

APPEAL AND ERROR—Continued.

11. The fact that the undertaking on appeal from justice court was presented to the clerk of the district court, and his approval indorsed thereon before the notice of appeal and undertaking were served, was not an irregularity which invalidated the appeal. Thompson v. Fargo Plumbing Co. 405.

12. Where a justice of the peace dismisses a case, instead of certifying it, as required by section 6670, Rev. Codes 1899, as amended by chapter 201, p. 259, Laws 1901, and the plaintiff appeals generally from the judgment, the district court has jurisdiction to try the action. Johnson v. Erickson, 414.

13. The cause of action was at law and the counterclaim in equity, but the issues on the equity side of the case involved all disputed questions on the law side. The action was tried as if both the cause of action and counterclaim were in equity. *Held*, that the case is triable *de novo* on appeal. Cotton v. Butterfield, 465.

14. The admission of immaterial and incompetent evidence is error without prejudice in trials to the court, where the evidence sustains the judgment without consideration of the incompetent evidence. In such cases the trial court will be presumed to have disregarded the inadmissible evidence. State v. Harris, 501.

15. Where the specifications of error in the notice of appeal from a justice's judgment on questions of law only do not raise any question as to the sufficiency of the pleading, that question cannot be raised on appeal, where the defect in the pleading is a mere defective statement of the cause of action or defense, as distinguished from a failure to show any right of recovery on defense. Rae v. Railway Co. 507.

16. Where the complaint does not state a cause of action, and the evidence affirmatively shows that no cause of action exists, the appellate court will direct the action to be dismissed. Hart v. Hanson, 570.

17. Errors assigned on the rulings of the trial court sustaining objections to questions propounded to a witness cannot be reviewed, in the absence from the record of any offer of proof showing what facts the appellant expected to establish by the questions objected to, where the questions themselves do not disclose the materiality and competency of the expected answers. Regan v. Jones, 591.

18. Under section 5627, Rev. Codes 1899, the supreme court will review the evidence, in the absence of a motion for a new trial in actions at law tried by the court without a jury to determine whether the findings of fact are sustained or not. Bessie v. Northern Pacific Ry. Co. 614.

ARCHITECT.

1. A supervising architect, who furnishes plans and specifications and supervises the construction of a building pursuant to a contract with the owner for such services, is entitled to a lien therefor under section 4788, Rev. Codes 1899, which gives a lien to "any person who shall perform any labor upon any building." Friedlander v. Taintor, 393..

ASSIGNMENT FOR BENEFIT OF CREDITORS. See JUDGMENT, 19.

ATTACHMENT.

1. The lien of an attachment is not dissolved by the bankruptcy of the attachment debtor, where the property attached is exempt as against the trustee in bankruptcy, but is not exempt from seizure for the debt upon which the attachment is based. Jewett Bros. v. Huffman, 110.
2. Attachment may hold until the decision of the bankrupt court as to exemptions. Jewett Bros. v. Huffman, 110.
3. False pretenses, as applied to the attachment, are not a part of the cause of action. Jewett Bros. v. Huffman, 110.
4. A trustee in bankruptcy cannot intervene to get possession of attached property. Jewett Bros. v. Huffman, 110.
5. Where the defendant gives notice of motion to dissolve an attachment, and the notice recites that the motion will be based upon an affidavit served therewith, which denies the truth of the attachment affidavit, the notice sufficiently shows that the ground for the motion to dissolve is that the attachment affidavit is false. Jones v. Hoefs & Heling, 232.
6. Where the defendant denies the existence of the grounds for attachment, and moves to dismiss the attachment for that reason, the burden of proving that one or more of the grounds alleged for the attachment are true is upon the plaintiff, and if the plaintiff fails to prove the existence of such grounds the motion to dissolve must be granted, even though there is no defense to the action on the merits. Jones v. Hoefs & Heling, 232.

ATTORNEYS AT LAW.

1. The legal presumption is that an attorney has authority to appear for the person for whom he assumes to act. Bacon v. Mitchell, 454.
2. A suitor who does not disclaim the authority of an attorney who assumes to repesent him in an action, when it is his duty to do so, may not do so afterwards. He cannot take the hazard of a trial, and, when unsuccessful, allege as ground for vacating the judgment that the attorney who conducted the trial had no authority. Bacon v. Mitchell, 454.

ATTORNEYS AT LAW—Continued.

3. Under his general authority an attorney has the exclusive control of the remedy, and he may discontinue the action by a dismissal without prejudice, and his client is bound by his act. Bacon v. Mitchell, 454.

4 An attorney's mistake of judgment as to the law or his ignorance of facts which he ought to have known is not sufficient ground for vacating a judgment of dismissal entered upon his motion. Bacon v. Mitchell, 454.

5. Evidence examined, and held not to sustain charges of corrupt conduct on the part of the accused attorney. In re Whittemore, 487.

6. Unless prompt objection is made to an unauthorized appearance of an attorney it is waived. State v. Harris, 501.

7. After a dissolution of partnership between attorneys at law by operation of law, by reason of the suspension from practice of one of them, the remaining members may carry on the unfinished business of the firm, and their rights under existing contracts for services will be determined under the partnership contracts, in the absence of a showing that new contracts were made after the dissolution. Bessie v. Northern Pacific Ry. Co., 614.

8. After the dissolution of a copartnership between attorneys at law by reason of the suspension of one member from practice, the remaining members of the copartnership can settle partnership contracts made with the dissolved firm and thereby bind the other members of the firm. Bessie v. Northern Pacific Ry. Co., 614.

9. Evidence considered, and held not to show that a new contract was made as to attorney's fees after the firm was dissolved. Bessie v. Northern Pacific Ry. Co., 614.

AUSTRALIAN BALLOT LAW. See ELECTIONS, 311.

BAIL. See SUPREME COURT, 203.

BALLOT. See ELECTION, 311.

BANKRUPTCY. See RECORDING TRANSFERS, 580; EXEMPTIONS, 110.

1. The lien of an attachment is not dissolved by the bankruptcy of the attachment debtor, where the property attached is exempt as against the trustee in bankruptcy, but is not exempt from seizure for the debt, upon which the attachment is based. Jewett Bros. v. Huffman, 110.

2. An attachment may hold until the decision of the bankrupt court as to property attached being exempt. Jewett Bros. v. Huffman, 110.

3. A trustee in bankruptcy cannot intervene to get possession of attached property. Jewett Bros. v. Huffman, 110.

BANKRUPTCY—Continued.

4. Under section 70 of the national bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565 U. S. Comp. St. 1901, p. 3451) a trustee in bankruptcy is vested with the title of all the bankrupt's property as of the date he was adjudged bankrupt, except exempt property, and he may enforce a trust in real estate existing in favor of the bankrupt. Currie v. Look, 482.
5. It is a settled doctrine in equity, and one declared by section 3386, Rev. Codes 1899, that when a transfer of real property is made to one person, and the consideration thereof is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made, and under section 4263, Rev. Codes 1899, "one who gains a thing by fraud" is an involuntary trustee for the benefit of the person who would otherwise have had it. Currie v. Look, 482.

BANKS AND BANKING.

1. A bank organized under the state banking act has authority, under section 3230, Rev. Codes 1899, to receive deeds of real property as security for past indebtedness, as well as for contemplated advances agreed upon. Bank v. Tufts, 238.
2. A director of a banking corporation owes no duty in a legal sense, by reason of his office, to the creditors of the bank or to the public. Hart v. Hanson, 570.
3. The directors of a bank are liable only to the corporation whose agents or trustees they are for violation or neglect of their official duty. Hart v. Hanson, 570.
4. In the absence of actionable deceit, directors are not directly liable in damages to a creditor of the corporation for loss suffered by the creditor through the insolvency of the corporation caused by the directors' neglect of their official duties. Hart v. Hanson, 570.
5. The mere fact that a director, who knows that the bank is insolvent, takes no action to close the bank, or announce its insolvency, does not make him liable for deceit to persons who have extended credit after the bank became insolvent on the assumption that it was solvent. Hart v. Hanson, 570.

BROKERS. See PRINCIPAL AND AGENT, 228; CUSTOM, 228..

1. Without the principal's consent a broker cannot contract in his own name. Robbins & Warner v. Maher, 228.
2. Where a broker so contracts he can recover for neither services nor advances. Robbins & Warner v. Maher, 228.
3. The fact that it was the custom of brokers at the place of sale to negotiate sales in their own names, without disclosing their principals, and to assume personal liability for the completion of such sales, is not sufficient to prove authority to sell in the broker's name, if it is not shown that the principal had knowledge of the custom. Robbins & Warner v. Maher, 228.

BURDEN OF PROOF. See EVIDENCE, 232.

CANCELLATION OF INSTRUMENTS.

1. The grantor in such cases must move promptly and within a reasonable time after the intoxication ceases and knowledge of the transaction has come to him, or he has notice of the facts sufficient to put him upon inquiry, or he will be deemed to have ratified the deed. Spoonheim v. Spoonheim, 380.

CAPITOL COMMISSION. See LEGISLATURE, 532; CONSTITUTIONAL LAW, 532.

1. Chapter 166, page 297, Laws 1905, provided for the appointment of a capitol commission by the governor. Said commission was thereby given authority to remodel and reconstruct the capitol building of the state, and to erect a governor's residence at the capital out of the proceeds of the lands donated to the state by congress. The law did not specify what sum should be used for the capitol building nor for the governor's residence, nor specify when the buildings shall be completed. Held, that the law is invalid, as an unwarranted delegation of purely legislative powers. State v. Budge, 532.

CASES CRITICIZED, MODIFIED AND OVERRULED.

1. Where judgment was obtained and docketed for personal property taxes pursuant to the provisions of section 57 and 58, c. 132, p. 398, 399, Laws 1890, and became a lien upon the property in question before the Revised Codes of 1895 took effect, such lien continued notwithstanding the repeal of the law under which the lien was acquired. Gull River Lumber Co. v. Lee, 73 N. W. 430, 7 N. D. 135, overruled. Hagler v. Kelley, 218.

2. An instruction in the following words, "On the other hand, the rule of law requiring the jurors to be satisfied of the defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that you should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient if, taking the testimony together, you are satisfied beyond a reasonable doubt that the defendant is guilty," is erroneous. State v. Young, 82 N. W. 420, 9 N. D. 165 followed. State v. Johnson, 288.

3. Under our statute regulating appeals from justice courts, the service and filing of the notice of appeal, and the filing of the undertaking with the clerk of the district court are not alone sufficient to transfer jurisdiction. The undertaking must be served and the service must be made within thirty days after the judgment is rendered. Richardson v. Campbell, 81 N. W. 31, 9 N. D. 100, followed. Lough v. White, 353.

CASES CRITICIZED—Continued.

4. Where the materials are furnished for the erection of a building on lands held by an occupant under the homestead laws of the United States, the person furnishing such materials is not entitled to a lien upon the building nor upon the land No lien attached to a building unless the owner thereof has some interest in the land that can be sold to enforce the lien, except in the cases provided for under section 4794 and 4795, Rev. Codes 1899. Gull River Lumber Co. v. Briggs, 9 N. D. 485, 84 N. W. 349, followed. Green v. Tenold, 46.
5. Schools in special districts are not under the official supervision of county superintendents, and are not to be taken into account in computing their salary, under section 652, Rev Codes 1899, following Dickey County v. Denning, 103 N. W. 422. Dickey County v. Hicks, 73.

CERTIORARI. See VENUE, 542.

CHATTEL MORTGAGE.

1. An action to foreclose a chattel mortgage is an equitable one, and a jury trial is not a matter of right. Avery Mfg. Co. v. Crumb, 57.
2. A mortgagor of chattels may counterclaim for their conversion by the mortgagee when sued upon the note secured by the mortgage. Hanson v. Skogman, 445.
3. Refusal of mortgagee to return the mortgaged property in his possession, or foreclose, is conversion. Hanson v. Skogman. 445.

CITIES. See MUNICIPAL CORPORATIONS, 88.

CLERK OF THE DISTRICT COURT. See JUSTICE OF THE PEACE, 405.

1. A clerk of the district court has no authority to satisfy a judgment upon a deposit with him of the full amount of the judgment. He has authority to satisfy judgment only in the cases where the statute gives him authority so to do. Milburn-Stoddard Co. v. Stickney, 282.
2. Receipt of money by clerk, except as provided by law, not an official act. Milburn-Stoddard v. Stickney, 282.
3. A clerk of the district court cannot be amerced under sections 5555 and 5556, Rev. Codes 1899, for failure to pay over money paid him for the satisfaction of a judgment on file in his office, except in cases where such money is paid him under the terms of a statute. Milburn-Stoddard Co. v. Stickney, 282.

COMITY.

1. The rule of comity expressed by section 5756, Rev. Codes 1899, bars not only the assertion by the foreign corporation itself of a cause of action or defense which a domestic corporation is forbidden to assert without express authority, but also bars the assignee of the foreign corporation. Walker v. Rein, 608.

COMMITTING MAGISTRATE. See JUSTICE OF THE PEACE, 561.

COMMON CARRIERS. See CONTRACTS, 19.

COMPLAINT. See PLEADING, 301, 340, 423, 511, 608.

CONSIDERATION. See FINDINGS OF FACT, 398.

CONTEMPT.

1. Unless an objection is promptly made to the appearance of an attorney without authority, in contempt proceedings growing out of a violation of an injunctional order, the defendant waives the right to make an objection to such appearance thereafter. State v. Harris, 501.
2. The fact that the affidavits on which a warrant is issued in contempt proceedings states some conclusions upon information and belief will not warrant the setting aside of the warrant, when the affidavits state positively the facts from which the conclusions are drawn. State v. Harris, 501.
3. The interrogatories to be filed under section 5942, Rev. Codes 1899, in contempt proceedings must relate to, and are intended to elicit, facts in respect to the contempt charged and to no other offense. State v. Harris, 501.
4. The affidavits on which a warrant is issued in contempt proceedings are admissible in evidence on the hearing. State v. Harris, 501.

CONTRACTS. See DECEIT, 26; BROKERS, 228; GAMING, 435; PRINCIPAL AND AGENT, 587; DEEDS, 596; INSURANCE, 608.

1. A contract between a common carrier and a shipper, drawn by the former for his benefit, so far as limiting his liability is concerned, will be construed liberally in favor of the shipper. Welch v. N. P. Ry. Co. 19.
2. One who is defrauded by a false statement, which is made to induce and does induce the execution of a contract, has a choice of remedies: (1) To affirm the contract and take its benefits, so far as obtainable, and recover any damages sustained by the false statement; or (2) to rescind the contract and recover any moneys paid on property delivered under it. Sonnesyn v. Akin, 248.
3. Plaintiff employed the defendant to appear at a public sale of a tract of land provided for by the federal laws, and to bid in and purchase the land in plaintiff's name, and pay for the same with defendant's money. Plaintiff was to repay to defendant the funds paid out for the land immediately upon ascertaining the amount, and was to pay defendant a fixed sum for his compensation. Defendant bid in the land in his own name and refused to convey to plaintiff. *Held*, that the contract is a contract of agency, and not within the statute of frauds, and that an action at law for damages for a breach of such contract is properly brought by the principal. Schmidt v. Beiseker, 587.

CONTRACTS—Continued.

4. While either party to a written contract may show that the true consideration therefor is different from that recited in the writing, yet it is not permissible, under the guise of proving the true consideration, to establish as a cause of action an oral agreement within the statute of frauds, or one which violates the rule embodied in section 3888, Rev. Codes 1899, that a written contract supersedes all prior or contemporaneous oral agreements or stipulations concerning its matter. Alsterberg v. Bennett, 596.
5. A foreign corporation, although licensed to do business in this state, will not be permitted to recover on a contract of insurance made with a resident of this state upon property located here, if the contract is one which domestic corporationus are forbidden to make. Walker v. Rein, 608.
6. The same rule applies even though the contract was actually made in another state, where such contract is not forbidden. Walker v. Rein, 608.
7. After a dissolution of a partnership between attorneys at law by operation of law, by reason of the suspension from practice of one of them, the remaining members may carry on the unfinished business of the firm, and their rights under existing contracts for services will be determined under the partnership contracts, in the absence of a showing that new contracts were made after the dissolution. Bessie v. Northern Pacific Ry. Co, 614.
8. After the dissolution of a copartnership between attorneys at law by reason of the suspension of one member from practice, the remaining members of the copartnership can settle partnership contracts made with the dissolved firm and thereby bind the other members of the firm. Bessie v. Northern Pacific Ry. Co., 614.
9. Evidence considered, and *held,* not to show that a new contract was made as to attorney's fees after the firm was dissolved. Bessie v. Northern Pacific Ry. Co. 614.

CONSTITUTIONAL LAW.

1. Section 5420, Rev. Codes 1899, amending section 5032, Comp. Laws, 1887, and providing that all issues of fact in an action for the recovery of money only shall be tried by a jury, does not restrict or change the trial by jury, and its enactment was not a violation of section 7 of Article 1 of the constitution, providing that right to a trial by jury "shall be secured to all and remain inviolate." Avery Mfg. Co. v. Crumb, 57.
2. Where the city has received from the property owners the amount of taxes and special assessments levied for the specific purpose of paying for a work of local improvement, it cannot justify its refusal to redeem the warrants issued in payment for such work on the ground that the contract and the taxes and assessments for the improvement were invalid because in violation of constitutional or statutory provisions designed solely for the protection of the taxpayers. Bank v. Fargo, 88.

CONSTITUTIONAL LAW—Contiuued.

3. Under section 14 of the constitution, prohibiting the taking or damaging of private property for public use without just compensation being first made or paid into court for the owner, it would be partially nullifying such provision if the compensation awarded him be diminished by his being compelled to pay the taxable costs. School v. Peterson, 344.
4. Section 168 of the constitution applies to organized counties only. State v. Stark County, 368.
5. Chapter 69, page 78, Laws 1903, is in conflict with section 168 of the constitution, because it authorized the extension of the boundaries of the organized county of Stark so as to include in the latter two unorganized counties and certain unorganized territory, without the consent of a majority of the voters of Stark county. State v. Stark County, 368.
6. The fact that a majority of the voters in Stark county voted for the extension of boundaries under the law did not avoid the constitutional objection, because, the law being void, all proceedings under it were also void. State v. Stark County, 368.
7. Where the constitutionality of a statute depends upon the power of the legislature to enact it, its validity must be tested by what might be done under color of the law, and not by what has been done. State v. Stark County, 368.
8. Chapter 69, page 78, Laws 1903, is a special law for the alteration of county boundaries, and is therefore in conflict with section 167 of the organic law. State v. Stark County, 368.
9. All legislative power in this state is vested in the senate and house of representatives, and the legislature cannot delegate such power in relation to purely legislative matters. State v. Budge, 532.
10. The power to determine the manner of the use of the land granted by section 17 of the enabling act (25 Stat. 681, c. 180) is purely legislative, and cannot be delegated to a commisison. State v. Budge, 532.
11. The power to limit the sum that will be used for each public building authorized by section 17 of the enabling act (25 Stat. 681 c. 180) is purely legislative and cannot be delegated to a commission. State v. Budge, 532.
12. Chapter 166, page 297, Laws 1905, provided for the appointment of a capitol commission by the governor. Said commission was thereby given authority to remodel and reconstruct the capitol building of the state, and to erect a governor's residence at the capital out of the proceeds of the lands donated to the state by congress. The law did not specify what sum should be used for the capitol building nor what sum should be used for the governor's residence, nor specify when the buildings shall be completed. *Held*, that the law is invalid, as an unwarranted delegation of purely legislative powers. State v. Budge, 532.

CONSTITUTIONAL LAW—Continued.

13. The power to raise revenue by taxation is a necessary attribute of sovereignty, which may be exercised by the legislature subject only to the restrictions imposed by the federal or the state constitution, and includes the power to tax occupations. In re Lipschitz, 622.
14. Neither the federal constitution nor the constitution of this state inhibits the taxation of occupations. In re Lipschitz, 622.
15. Chapter 165 of the laws of 1903, entitled, "An act taxing the occupation of hawking and peddling," etc., is not open to the objection that it authorizes a tax upon interstate commerce. In re Lipschitz, 622.
16. The rule of equality and uniformity in taxation required by section 176 of the state constitution applies only to taxes imposed upon property as such, and does not apply to taxes imposed upon occupations. In re Lipschitz, 622.
17. Chapter 1765 of the Laws of 1903 is a valid constitutional enactment. In re Lipschitz, 622.

CONVERSION.

1. Under subdivision 1, section 5274, Rev. Codes 1899, which authorizes a defendant to counterclaim upon "a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action," a mortgagor of chattels may counterclaim for their conversion by the mortgagee when sued upon the note secured by the mortgage. Hanson v. Skogman, 445.
2. Where, in such case, the value of the property converted does not exceed the amount of the mortgage debt, an affirmative judgment upon the counterclaim cannot be sustained. Hanson v. Skogman, 445.
3. Refusal of mortgagee to return the mortgaged property in his possession, or foreclose, is conversion. Hanson v. Skogman, 445.

CORPORATIONS. See BANKS AND BANKING, 570.

1. A foreign corporation which has complied with the laws of this state governing such corporations, and which has been reguarly and continuously doing business in this state during the entire period required to bar an action, and during all that time has had an agent resident here upon whom process could be served, can avail itself of the statute of limitations of this state. Mortgage Co. v. Thresher Co. 147.
2. A foreign insurance corporation, although licensed to do business in this state, will not be permitted to recover on a contract of insurance made with a resident of this state upon property located here, if the contract is one which domestic corporations are forbidden to make. Walker v. Rein, 608.

CORPORATIONS—Continued.

3. The rule of comity expressed by section 5756, Rev. Codes 1899, bars not only the assertion by the foreign corporation itself of a cause of action or defense which a domestic corporation is forbidden to assert without express authority, but also bars the assignees of the foreign corporation. Walker v. Rein, 608.

COSTS AND DISBURSEMENTS.

1. A landowner who resists the taking of his land for public purposes upon a failure to agree upon the value thereof and recovers judgment therefor, is entitled to recover his taxable costs in the action. School v. Peterson, 344.
2. Under section 14 of the constitution, prohibiting the taking or damaging of private property for public use without just compensation being first made or paid into court for the owner, it would be partially nullifying such provision if the compensation awarded him be diminished by his being compelled to pay the taxable costs. School v. Peterson, 344.

COUNTERCLAIM. See PLEADINGS, 445, 449, 591.

1. Where, in an action at law, the answer interposes an equitable counterclaim, the issues arising on the latter should be heard and determined by the court before trial of the legal issues, as if the counterclaim were a separate suit in equity. Cotton v. Butterfield, 465.
2. The cause of action was at law and the counterclaim in equity, but the issues on the equity side of the case involved all disputed questions on the law side. The action was tried as if both the cause of action and counterclaim were in equity. *Held,* that the case is triable *de novo* on appeal. Cotton v. Butterfield, 465.
3. Where facts which might be used either as a defense or counterclaim are pleaded in the answer as a defense merely, and the answer demands no affirmative relief indicating that a counterclaim was intended, no reply is necessary. Regan v. Jones, 591.

COUNTIES.

1. The purchasing of blank books, blanks and stationery for the use of county officers is to be made by a committee consisting of the county treasurer, county auditor and chairman of the board of county commissioners, pursuant to section 1906, Rev. Codes 1895, as amended by chapter 59, p. 69, Laws 1899. Knight v. Comm'rs of Cass County, 340.
2. The purchase of blanks and stationery for the use of county officers need not be made under competitive bids under section 1925, Rev. Codes 1895, as amended by chapter 59, p. 69, Laws 1899. Knight v. Comm'rs of Cass County, 340.

COUNTIES—Continued.

3. Chapter 69, p. 78, Laws 1903, is in conflict with section 168 of the constitution, because it authorized the extension of the boundaries of the organized county of Stark so as to include in the latter two unorganized counties and certain unorganized territory, without the consent of a majority of the voters of Stark county. State v. Stark County, 368.
4. The fact that a majority of the voters in Stark county voted for the extension of boundaries under the law did not avoid the constitutional objection, because, the law being void, all proceedings under it were also void. State v. Stark County, 368.
5. Chapter 69, p. 78, Laws 1903, is a special law for the alteration of county boundaries, and is therefore in conflict with section 167 of the organic law. State v. Stark County, 368.

COUNTY COMMISSIONERS. See COUNTIES, 340.

1. The board of county commissioners may sell and assign such judgment for less than the amount due thereon if the transaction is free from fraud or other illegality. Hagler v. Kelley, 218.
2. The board of county commissioners has power to sell and assign a judgment obtained for personal property taxes under the general revenue law of 1890. Hagler v. Kelley, 218.
3. The allegations of the complaint considered and held not to state a cause of action for an injunction against the board of county commissioners to prohibit it from carrying out the terms of a contract for the furnishing of blank books, blanks and stationery to the county officers, although the power to enter into such contract is not vested in such board. Knight v. Comm'rs of Cass County, 340.

COUNTY SUPERINTENDENT. See SCHOOLS, 73, 77.

COURTS. See JURISDICTION, 449; SUPREME COURT, 542; LEGISLATURE, 622.

CREDITORS. See RECORDING TRANSFERS, 580.

1. A director of a banking corporation owes no duty in a legal sense, by reason of his office, to the creditors of the bank or to the public. Hart v. Hanson, 570.
2. In the absence of actionable deceit, directors are not directly liable in damages to a creditor of the corporation for loss suffered by the creditor through the insolvency of the corporation caused by the directors' neglect of their official duties. Hart v. Hanson, 570.
3. The mere fact that a director who knows that the bank is insolvent, takes no action to close the bank, or announce its insolvency, does not make him liable for deceit to persons who have extended credit after the bank became insolvent on the assumption that it was solvent. Hart v. Hanson, 570.

CREDITORS—Continued.

4. General creditors are not within the protection of the recording laws of this state relating to real estate. Vallely v. First National Bank, 580.
5. Section 4730, Rev. Codes 1899, which declares that a grant absolute in form but intended to be defeasible is not affected "as against any person other than the grantee," etc., unless a defeasance is recorded, construed and held, that the term "any other person" means any person otherwise entitled to the protection of the recording laws, namely, subsequent purchasers and incumbrancers, and does not include general creditors. Vallely v. First National Bank, 580.

CRIMINAL LAW. See INDICTMENT AND INFORMATION, 139, 203; APPEAL AND ERROR, 203; EVIDENCE, 288; INTOXICATING LIQUORS, 291, 293; TRIAL, 557.

1. In a trial for robbery, where the defendant, besides denying the commission of the acts charged, claims that he was by reason of intoxication, incapable of forming an intent, it is error to instruct the jury, in effect, that the intent to steal should be conclusively presumed from the unlawful and forcible taking unless the defendant was so intoxicated as to be incapable of forming an intent. State v. O'Malley, 200.
2. The complaining witness was compelled to submit to the robbery by the defendant aiming a pistol at him and ordering him to throw up his hands. *Held*, that the robbery was accomplished by putting in fear. State v. Sanders, 203.
3. Proof that a robbery as accomplished by both force and fear is not a variance from an information that alleges that the taking was accomplished by fear. State v. Sanders, 203.
4. To sustain a plea of former acquittal, it must appear that the offense for which the defendant was acquitted was the same offense as that for which he is being tried. State v. Virgo, 293.
5. The defendant and another procured two kegs of beer, without previous arrangement with any one as to the conditions under which it was to be disposed of. All who came to the place where it was kept were permitted to drink all they desired of it. Those drinking paid for what they drank generally 40 cents. The price was fixed by the defendant, and he generally requested pay for it. *Held*, that the facts are sufficient to show, as a matter of law, that there was an unlawful sale of the beer. State v. Nelson, 297.
6. That part of section 8246 ,Rev. Codes 1899, which authorizes trial judges to receive verdicts in criminal cases in which the jury has fixed the punishment higher or lower than provided by law, and to pronounce judgment thereon for the highest punishment or the lowest punishment authorized by statute for the offense of which

CRIMINAL LAW—Continued.

the defendant is found guilty, is mandatory. Verdicts coming within the exception contained in this section are legal and valid verdicts, and it is the duty of trial judges to receive the same and enter judgment thereon. State v. Barry, 316.

7. The defendant was tried and found guilty of murder in the first degree, and sentenced to imprisonment for life. At the trial he interposed the plea of former conviction under the same information, and supported his plea by offering a verdict returned by the jury at the former trial, in which they found him guilty of murder in the second degree and fixed the period of his punishment at seven years. The trial court instructed the jury to find against the defendant upon his plea. *Held,* that this was error, that, for the reasons stated in the opinion, the verdict was legal and valid, and it was the duty of the trial judge to sentence defendant thereunder, and that the trial court exceeded its authority in sentencing the defendant for life. The judgment must therefore be modified to correspond with the lawful punishment which he was authorized to impose, and as of the date of the former verdict. State v. Barry, 316.
8. A sale of a patent medicine by a storekeeper in good faith is not a violation of law under section 7281, Rev. Codes 1899, although the same contains alcohol as one of its ingredients. State v. Williams, 411.
9. Whether a sale of liquids is made as a medicine or as a beverage, under section 7598 ,Rev. Codes 1899, is a question of fact for the jury. State v. Williams, 411.
10. Instructions considered, and held erroneous, as stating to the jury that the sale of patent medicines is unlawful unless made by a registered pharmacist. State v. Williams, 411.
11. On a conviction for keeping and maintaining a nuisance, in violation of section 7605, Rev. Codes 1899, the court adjudged that the fine imposed and costs accrued should be a lien on the real estate on which the nuisance was kept, pursuant to section 7610, Rev. Codes 1899. These premises were owned by the plaintiff in this action, who was not a party in the criminal action. Execution was issued on the judgment in the criminal action, and plaintiff's land levied on and sold to defendant. *Held,* that the sale was void, as based on a judgment or proceeding to which plaintiff was not a party. Larson v. Christianson, 476.
12. The enforcement of the lien for fines and costs assessed under section 7610, Rev. Codes 1899, should be by action, and not by execution, in cases like the one under consideration. Larson v. Christianson, 476.
13. Where, in a rape case, the record discloses that almost the entire direct testimony of the prosecutrix, who was apparently a willing witness over fifteen years of age, was elicited by extremely leading questions, without any attempt to obtain her answers in some other way, an abuse of discretion is shown. State v. Hazlett, 490.

CRIMINAL LAW—Continued.

14. Misconduct warranting a new trial is shown where the trial judge unnecessarily and repeatedly interrupted the cross-examination of the state's witnesses by questions and remarks which hindered effective cross-examination and tended to create the impression that the trial judge was convinced of the truthfulness of the witness and the merits of the state's case. State v. Hazlett, 490.

15. On the trial of a charge of rape, where the state's case depends almost wholly on the testimony of the prosecutrix, ample latitude in cross examination should be allowed. State v. Hazlett, 490.

16. A family Bible formerly belonging to the prosecutrix's deceased grandfather, in which the latter had recorded the dates of birth of his own children and also of the prosecutrix and her brothers, was competent evidence of the prosecutrix's age. State v. Hazlett, 490.

17. It was error to exclude impeaching testimony for which sufficient foundation had been laid in the cross examination of the prosecutrix. State v. Hazlett, 490.

18. An information for a continuing offense, which alleges that the offense was committed "on the 1st day of January, 1904, and on the divers and sundry days and times between that day and the 24th day of April, 1905, and on the 24th day of April, 1905," is sufficiently certain as to time and does not allege more than one offense. State v. Brown, 529.

19. An information which alleges that the defendant, during a stated time, kept and maintained a nuisance defined and prohibited by section 7605, Rev. Codes 1899, in two adjacent buildings within the same curtilage, particularly describing the place, is neither uncertain nor double. State v. Brown, 529.

20. Under the statute of the state regulating changes of place of trial in criminal cases, the judge is not limited to adjoining counties and districts in ordering such change. Murphy v. District Court, 542.

21. When a change of place of trial is obtained by a defendant because of local prejudice, the duty of selecting the place for trial rests exclusively upon the presiding judge, in the exercise of sound judicial discretion. Murphy v. District Court, 542.

22. On a trial for the offense of maintaining a nuisance in violation of section 7605, Rev. Codes 1899, under an information charging the maintenance of a certain frame building on certain described lots, evidence that a nuisance was also maintained in another building on the same lots is not relevant to the issue. State v. Poull, 557.

23. Where the evidence tends to show that two independent offenses were committed under such circumstances, it is prejudicial error to refuse to compel the state to elect which transaction it will rely on for conviction before the defendant offers any evidence in his defense. State v. Poull, 557.

CRIMINAL LAW—Continued.

24. In information charging the keeping and maintaining of nuisances in violation of section 7605, Rev. Codes 1899, the information should particularly describe the place where the nuisance is maintained before abatement proceedings can be based on a conviction thereon. State v. Poull, 557.
25. The word "place," as used in Rev. Codes 1899, section 7605, means the particular building or apartment where the unlawful sale is made or the intoxicating beverages are kept for sale. State v. Poull, 557.
26. Adjournment of a preliminary examination for more than three days is not invalid where there is no injury. State v. Foster, 561.
27. Statutory grounds for setting aside information excludes all others. State v. Foster, 561.
28. A regular term of court, within the meaning of section 8497, Rev. Codes 1899, which in the absence of good cause shown, requires the dismissal of a prosecution when an information is not filed at the next regular term after the defendant's commitment, means, a jury term, as distinguished from a statutory term without a jury. State v. Foster, 561.
29. There is no legal distinction, so far as the weight and effect to be given to it is concerned, between circumstantial and direct evidence, and it is not error to refuse a request which disparages it as a species of evidence. State v. Foster, 561.

CROSS EXAMINATION. See TRIAL, 375.

CUSTOM.

1. The fact that it was the custom of brokers at the place of sale to negotiate sales in their own names, without disclosing their principals' and to assume personal liability for the completion of such sales, is not sufficient to prove authority to sell in the broker's name, if it is not shown that the principal had knowledge of the custom. Robbins & Warner v. Maher, 228.

DAMAGES. See VERDICT, 218; PRINCIPAL AND AGENT, 587.

1. The measure of damages for false and fraudulent representations inducing an exchange of real property for stock in a corporation, when contract is affirmed after discovery of the deceit, in the absence of claims for special or exemplary damages, is the difference in value between what was received or parted with, as the case may be, and what would have been received or parted with, had the representations been true. Beare v. Wright, 26.
2. Where the evidence showed the value of ten horses taken by plaintiff was $1,200, and, proof further showed only nine covered by defendant's mortgages, and failed to show the separate value of each; and the court in trying the action under section 5630, it cannot determine the damages and will order a new trial. Avery Mfg. Co. v. Crumb, 57.

DAMAGES—Continued.

3. Where a decree of specific performance of a contract, under which the vendee is not entitled to possession until conveyance is awarded to the vendor, who appears to have used some or all of the land after the time when, as determined by the decree, the conveyance should take effect, the value of such use or the net profits thereof, as the vendee may elect, will be deducted from the purchase price remaining unpaid. Cotton v. Butterfield, 465.

DEATH.

1. At common law and independent of statute, there was no right of recovery for death by wrongful act. Harshman v. N. P. Ry. Co., 69.
2. Where the right of recovery is given by statute, and the exercise of that right is committed to particular persons, it cannot be exercised by another person, even though he be the sole beneficiary. Harshman v. N. P. Ry. Co., 69.
3. A complaint by the father of a minor in an action prosecuted in his own name to recover for the death of his minor son does not state a cause of action, where the statute which designates those who can bring an action for damages for death by wrongful act and does not include surviving parents. Harshman v. N. P. Ry. Co., 69.
4. Death by suicide is not presumed; and that death did not so occur will be presumed until overcome by evidence. Clemens v. R. N. of A., 116.

DECEIT. See DAMAGES, 26.

1. Misrepresentations of the price paid for property by the vendor or others do not constitute actionable deceit, in the absence of fiduciary relations between the parties, or other facts or circumstances giving rise to an express or implied agreement that the price paid should determine the price in the contract. Beare v. Wright, 26.
2. In the absence of actionable deceit, directors are not directly liable in damages to a creditor of the corporation for loss suffered by the creditor through the insolvency of the corporation caused by the directors' neglect of their official duties. Hart v. Hanson, 570.
3. The mere fact that a director, who knows that the bank is insolvent, takes no action to close the bank, or announce its insolvency, does not make him liable for deceit to persons who have extended credit after the bank became insolvent on the assumption that it was solvent. Hart v. Hanson, 570.

DEEDS. See MORTGAGE, 238; BANKS AND BANKING, 238.

1. Where the plaintiff's father, intending to make a gift to his daughter of a tract of land, bought and paid for the same, and caused his vendor to execute and deliver to him a deed thereof, naming his daughter as grantee, such delivery was sufficient to pass title to the

DEEDS—Continued.

plaintiff immediately upon the delivery of the deed to the father, even though the deed remained unrecorded in his custody until produced at the trial. Hulet v. N. P. Ry. Co., 209.

2. Evidence examined, and held, that it shows that the donor intended a present gift at the time of the delivery of the deed. Hulet v. N. P. Ry. Co., 209.
3. A deed absolute on its face, but intended to be a mortgage under a parol contract, is properly recorded in a book provided for the record of deeds, and such record is notice to subsequent incumbrancers or purchasers. Bank v. Tufts, 238.
4. A deed absolute in terms, but in equity a mortgage under a parol agreement for reconveyance, is security for the present indebtedness for which it was given, as well as for moneys advanced, after its execution, pursuant to a parol contract that such deed should be security therefor; and, before a reconveyance will be decreed, payment must be made, or a willingness to do so shown, of all sums due thereon in accordance with the contract, whether furnished before or after the deed was executed. Bank v. Tufts, 238.
5. A grantee in a deed intended as security for a present debt and for future advances, based on a parol agreement, is not permitted to make advances under such parol contract after actual notice that subsequent incumbrancers or purchasers have a lien on the property covered by the deed taken without notice of the parol contract for future advances. Bank v. Tufts, 238.
6. All advances made under such a deed before actual notice of a judgment obtained against the grantor are secured by such deed as against the judgment lien. Bank v. Tufts, 238.
7. In such a case the judgment creditor stands in the same position as the grantor in the deed, so far as his right to contest the amount secured by the deed or mortgage is concerned. Bank v. Tufts, 238.
8. In an action brought to have a deed declared to be a mortgage and for its foreclosure, in which judgment creditors are made defendants, and it appears that the grantee in the deed has other security for his indebtedness besides the deed, and that the judgment creditors have security on the land only, a court of equity will in a proper case, compel the grantee to exhaust his security in the property not covered by the judgment lien. Bank v. Tufts, 238.
9. A deed is voidable if the grantor at the time of executing it was so intoxicated as to be incapable of understanding the nature and effect of the transaction. Spoonheim v. Spoonheim, 380.
10. The grantor in such cases must move promptly and within a reasonable time after the intoxication ceases, and knowledge of the transaction has come to him, or he has notice of facts sufficient to put him upon inquiry, or he will be deemed to have ratified the deed. Spoonheim v. Spoonheim, 380.

DEEDS—Continued.

11. An unexplained delay of nearly seven years before commencing an action to set aside the deed is unreasonable, especially in view of the fact that the land has materially increased in value. Spoonheim v. Spoonheim, 380.

12. The fact that a purchaser from B, who claimed title under a recorded deed from E, valid on its face, knew that the deed from a previous owner to E was missing and unrecorded, was not sufficient to charge such purchaser with constructive notice of the fact that B's deed had been wrongfully obtained by the latter. Johnson v. Erlandson, 518.

13. Where the grantor in a deed deposited in escrow knew that the grantee named therein had wrongfully obtained possession thereof and had it recorded and negligently permitted the grantee's apparent ownership to remain unchallenged for an unreasonable length of time, such grantor is estopped to deny the grantee's title as against an innocent purchaser from the latter. Johnson v. Erlandson, 518.

14. Section 4730, Rev. Codes 1899, which declares that a grant absolute in form but intended to be defeasible is not affected "as against any person other than the grantee," etc., unless a defeasance is recorded, construed and *held,* that the term "any other person" means any person otherwise entitled to the protection of the recording laws, namely, subsequent purchasers and incumbrancers, and does not include general creditors. Vallely v. First National Bank, 580.

15. One Savard, the owner of certain real estate, executed a conveyance to Deschenes, in form a warranty deed, to secure a debt which he afterwards paid. No defeasance was recorded. Thereafter Deschenes' trustee in bankruptcy gave a deed to plaintiff, who had actual notice that the conveyance to Deschenes was for security. *Held,* (1) that the trustee's deed to plaintiff did not convey title, and (2) that the trial court did not err in sustaining a mortgage subsequently executed by Savard, the true owner. Vallely v. First National Bank, 580.

16. The function of a deed is not only to transfer to the grantee the grantor's rights, but is also a written contract evidencing the obligations, if any, assumed by the grantor with respect to the nature and condition of the estate or title which the deed purports to convey. Alsterberg v. Bennett, 596.

17. A deed delivered and accepted merely transferring the grantor's right, title and interest in the land described, and containing no express or implied covenants as to title or incumbrancers, is, in the absence of actionable deceit, conclusively presumed, in an action at law, to show that the grantor assumed no obligations as to the validity or extent of his title or interest, or as to incumbrances. Alsterberg v. Bennett, 596.

DEEDS—Continued.

18. The grantee who has accepted a quitclaim deed cannot recover in an action at law, on the grantor's alleged oral promise made before or at the time the deed was delivered and accepted, to pay certain taxes, which were then an incumbrance on the land conveyed. Alsterberg v. Bennett, 596.

DEFINITIONS. See WORDS AND PHRASES, 293.

1. The definition of "intoxicating liquors," contained in section 7598, Rev. Codes 1899, includes liquors or liquids "that will produce intoxication," and not those which will not intoxicate. State v. Virgo, 293.

DELEGATION OF POWER. See LEGISLATURE, 532.

DEMURRER. See PLEADING, 19, 278, 449.

1. A statement in the complaint that "said real property was not described in the assessment thereof purported to have been made in said year," is, as against a demurrer insufficient to show that the property had not been assessed. Scott & Barrett Co. v. Nelson County, 407.
2. The defendant demurred to the complaint for misjoinder of causes of action, claiming that the plaintiff had improperly joined with a claim for money had and received a claim for the statutory penalty for the exaction of usury. The allegations of the complaint affirmatively showed that there was no usurious transaction, but both parties agreed in the argument before this court that the allegations of one of the causes of action were intended, and should be construed, to sufficiently allege the taking of usury. *Held*, that this court will not pass upon a question not presented by the record. Weicker v. Stavely, 278.

DISBARMENT. See ATTORNEYS AT LAW, 487, 614.

DISCRETION. See TRIAL, 490.

1. The calling of a witness by a plaintiff in rebuttal who gives testimony that pertains to his main case is not necessarily prejudicial, but is a matter resting largely in the discretion of the trial court. School v. Peterson, 344.
2. The latitude to be allowed in cross examination is largely discretionary with the trial court and its rulings in that respect will not be disturbed, except in cases of abuse. Schwoebel v. Fugina, 375.
3. In application for relief under section 5298, Rev. Codes 1899, trial courts are vested with large discretion and their action will not be disturbed unless such discretion has been abused. Keeney v. City of Fargo, 419.
4. Permitting leading questions is error only when the discretion is abused to the prejudice of a party. State v. Hazlett, 490.

DISCRETION—Continued.

5. Where in a rape case the record discloses that almost the entire direct testimony of the prosecutrix, who was apparently a willing witness over fifteen years of age, was elicited by extremely leading questions, without any attempt to obtain her answer in some other way, an abuse of discretion is shown. State v. Hazlett, 490.
6. The general rules governing the exercise of the discretionary power of the court with respect to allowing amendments to pleadings are the same in justice court as in district court. Rae v. Railway Co., 507.
7. When a change of place of trial is obtained by a defendant because of local prejudice, the duty of selecting the place for trial rests exclusively upon the presiding judge, in the exercise of sound judicial discretion. Murphy v. District Court, 542.
8. When a change has been granted and another county selected, it will be presumed that the discretion of the presiding judge was exercised properly, and the burden is upon one attacking his order to show affirmatively a manifest case of abuse; and this court will not, under its superintending power over inferior courts, revise his order, in the absence of such a showing, and in no case will it substitute and enforce its discretion as against the discretion of the presiding judge. Murphy v. District Court, 542.
9. It is discretionary with the trial court at what stage of the trial it will compel an election up to the time when the state rests its case in the first instance. State v. Poull, 557.
10. An opportunity to cross examine is a matter of right, but the latitude and extent of the cross-examination rests largely in the discretion of the trial judge. The limitation imposed in this case does not show an abuse of discretion. State v. Foster, 561.

DISTRICT COURT. See VERDICT, 316; APPEAL AND ERROR, 353.

EASEMENT. See JUDGMENT, 423.

ELECTIONS. See SCHOOL AND SCHOOL DISTRICTS, 344; COUNTIES, 368.

1. Under the Australian ballot law of this state an elector may indicate his choice by writing or pasting the name of a candidate in the space provided for that purpose, and over the name of an opposing candidate, even though the name so written or pasted on is printed on the official ballot in another column, and it must be counted. Roberts v. Bope, 311.
2. Where the voter indicates his choice by writing the name upon, or by pasting a printed sticker containing the name upon the official ballot, a cross-mark after the name, so written or pasted is not necessary to entitle it to be counted. Roberts v. Bope, 311.
3. Official ballots upon which the elector has placed printed stickers in the manner provided by statute are not rendered unofficial by that fact, and must be received and counted. Roberts v. Bope, 311.

ELECTIONS—Continued.

4. The fact that the voter has attached a combination of stickers, covering the names of several candidates, and substituting the names of those upon the stickers and attaching them separately, does not render the ballot invalid. Roberts v. Bope, 311.
5. The fact that a majority of the voters in Stark county voted for the extension of boundaries under the law did not avoid the constitutional objection, because, the law being void, all proceedings under it were also void. State v. Stark County, 368.

EMINENT DOMAIN.

1. A land owner who resists the taking of his land for public purposes upon a failure to agree upon the value thereof, and recovers judgment therefor, is entitled to recover his taxable costs in the action. School v. Peterson, 344.
2. Under section 14 of the constitution, prohibiting the taking or damaging of private property for public use without just compensation being first made or paid into court for the owner, it would be partially nullifying such provision if the compensation awarded him be diminished by his being compelled to pay the taxable costs. School v. Peterson, 344.
3. In condemnation proceedings based on the right to acquire land for public purposes under the power of eminent domain, if a statute confers such power, it will be liberally and reasonably construed so as to make its purpose effective. School v. Peterson, 344.

ENABLING ACT.

1. The erection of a residence for the governor at the capital is within the purposes of the grant of land made by congress to the state for public buildings at the capital, under section 17 of the enabling act (25 Stat. 681, c. 180). State v. Budge, 532.
2. The disposition of such lands is exclusively with the legislature, and its action in such matters is final, unless violative of some constitutional provision and clearly contrary to the terms of the grant. State v. Budge, 532.
3. It is the province of the legislature alone to determine the manner in which said lands may be disposed of in furtherance of the purposes of said grant. State v. Budge, 532.
4. The power to limit the sum that shall be used for each public building authorized by section 17 of the enabling act (25 Stat. 681, c. 180) is purely legislative, and cannot be delegated to a commission. State v. Budge, 532.

EQUITY. See JUDGMENT, 19, 218.

1. Action to foreclose a chattel mortgage is an equitable action. Avery Mfg. Co. v. Crumb, 57.

EQUITY—Continued.

2. Where, in an action at law, the answer interposes an equitable counterclaim, the issues arising on the latter should be heard and determined by the court before a trial of the legal issues as if the counterclaim were a separate suit in equity. Cotton v. Butterfield, 465.
3. If the decree entered on the equity side of the case renders unnecessary the trial of any question arising on the law side, then such decree is the final determination of the action. Cotton v. Butterfield, 465.
4. It is a settled doctrine in equity and one declared by section 3386, Rev. Codes 1899, that "when a transfer of real property is made to one person, and the consideration thereof is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made," and under section 4263, Rev. Codes 1899, "one who gains a thing by fraud" is an involuntary trustee for the benefit of the person who would otherwise have had it. Currie v. Look, 482.
5. Upon the facts stated in the opinion, and upon a review of the entire case in this court in an action prosecuted by a trustee in bankruptcy to subject certain real estate which had been transferred to the bankrupt's wife to the payment of his debts, it is *held*, (1) that the bankrupt's wife was merely a trustee of the title, and (2) that the plaintiff is entitled to a decree transferring title to him. Currie v. Look, 482.

ESCROW. See DEEDS, 518.

ESTOPPEL.

1. The defendants, who were the real owners of a note and mortgage, foreclosed the mortgage by action in the name of the nominal holder, and collected the greater part of the debt. They concealed from the present plaintiff, who was a defendant in the foreclosure suit, the fact that they were the real owners of the cause of action in the foreclosure suit, and represented to her that the nominal plaintiff was the real creditor. The plaintiff was not misled thereby, to her prejudice, but after discovering the facts as to the true ownership, procured from the nominal creditor an instrument purporting to assign to her said creditor's claim for the money so collected. *Held*, that the defendants were not estopped to assert that they were the real owners of the money collected. Parsons v. McCumber, 213.
2. Where the grantor in a deed deposited in escrow knew that the grantee named therein had wrongfully obtained possession thereof and had it recorded, and negligently permitted the grantee's apparent ownership to remain unchallenged for an unreasonable length of time, such grantor is estopped to deny the grantee's title as against an innocent purchaser from the latter. Johnson v. Erlandson, 518.

ESTRAYS.

1. One who claims a lien upon an animal as an estray must show a full and strict compliance with every requirement of the statute under which the lien is claimed. Mills v. Fortune, 460.
2. If the person taking up an estray fails to observe all the requirements of the estray law, he is in the position of a mere trespasser, and can claim no lien for compensation. Mills v. Fortune, 460.
3. An estray can be taken up as such only when found in the vicinity of the residence of the person taking it up. Mills v. Fortune, 460.
4. The demand for appraisement required by section 1578, Rev. Codes 1899, must be made within a reasonable time after the estray is taken up. Mills v. Fortune, 460.
5. The person taking up an estray has no right to demand more proof of ownership on the part of the claimant than that prescribed by section 1575, Rev. Codes 1899. Mills v. Fortune, 460.
6. If the person holding an estray refuses to surrender the estray unless the claimant furnished other evidence of ownership than that prescribed by section 1575, Rev. Codes 1899, such denial of the claimant's right works a forfeiture of the estray lien, if the claimant is in fact the owner. Mills v. Fortune, 460.
7. Evidence examined, and held insufficient to justify a verdict, which found that the defendant was entitled to the possession of a horse as an estray. Mills v. Fortune, 460.

EVIDENCE.

See TRUST, 1, 66; RES JUDICATA, 66; NEW TRIAL, 189; CRIMINAL LAW, 200, 297; ESTOPPEL, 213; ATTACHMENT, 232; TRIAL, 344, 490, 523; APPEAL AND ERROR, 398; FRAUDULENT CONVEYANCE, 398; CONVERSION, 445; CONTEMPT, 501; ESTRAYS, 460; VENDOR AND PURCHASER, 465; PLEADING, 608; ATTORNEYS AT LAW, 614.

1. A trust may be created in personal property and proved by parol. Berry v. Evendon, 1.
2. Variance between proof and complaint will not warrant judgment notwithstanding the verdict under chapter 63, p. 74, Laws 1901, unless amendment of complaint can properly be made. Welch v. N. P. Ry. Co., 19.
3. Judgment notwithstanding the verdict will not be sustained under chapter 63, p. 74, Laws 1901, on account of failure of proof as to some essential element of the cause of action, unless it further appeared that no amendment of the complaint can properly be made. Welch v. N. P. Ry. Co., 19.
4. To establish a resulting trust in real property by parol testimony, the evidence must be clear, convincing and satisfactory, and of such a character as to leave in the mind of the judge no hesitation or substantial doubt. Carter v. Carter, 66.

EVIDENCE—Continued.

5. In case of death under circumstances not explained, the legal presumption is that such death was not by suicide, and that presumption will remain until overcome by evidence establishing a death by suicide. Clemens v. R. N. of A., 116.

6. Where a note is found in a room where a person is found dead, caused by violence, and such note is in the handwriting of the deceased, and gives directions as to burial and other matters, such note is competent evidence on the question whether the death was suicide or not. Clemens v. R. N. of A., 116.

7. Defendants who were attorneys, admitted the receipt of money from plaintiff, and its retention by them, and sought to justify their conduct by alleging that plaintiff employed them to defend another, charged with crime, and authorized them to retain said money for the purpose of paying for such legal services and for their disbursements. *Held,* that the burden was upon defendants to establish such defense. Logan v. Freerks, 127.

8. Books of account to refresh memory may be offered in connection with cross-examination of defendant using them. Logan v. Freerks, 127.

9. Proof that a robbery as accomplished by both force and fear is not a variance from an information that alleges that the taking was accomplished by fear. State v. Sanders, 203.

10. Where, in a case of robbery, the proof is such that defendant is either guilty of the crime charged or wholly innocent, it is proper for the court to so instruct the jury. State v. Sanders, 203.

11. Although an information for robbery alleges the taking of several articles it is sufficient to prove the taking of some of them. State v. Sanders, 203.

12. Where the defendant denies the existence of the grounds for attachment, and moves to dismiss the attachment, for that reason, the burden of proving that one or more of the grounds alleged for the attachment are true is upon the plaintiff, and if the plaintiff fails to prove the existence of such grounds the motion to dissolve must be granted, even though there is no defense to the action on the merits. Jones v. Hoefs, 232.

13. An instruction given to a jury in the following language: "If you find from the evidence that any witness has sworn falsely as to any material fact or issue in this case, you should receive the testimony of such witness with caution. You have a right to reject the statement of such witnesses, excepting in so far as they may be corroborated by other credible evidence," is error warranting the granting of a new trial. State v. Johnson, 288.

14. An instruction in the following words: "On the other hand, the rule of law requiring the jurors to be satisfied of the defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does

EVIDENCE—Continued.

not require that you should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient if, taking the testimony together, you are satisfied beyond a reasonable doubt that the defendant is guilty," is erroneous. State v. Young, 82 N. W. 420, 9 N. D. 165 followed. State v. Johnson, 288.

15. Construing section 7614, Rev. Codes 1899, which makes the fact that one has or keeps posted in or about his place of business a United States revenue receipt or license for the sale of distilled or malt or fermented liquors prima facie evidence that he is selling and keeping for sale intoxicating liquor contrary to law, it is held, that by prima facie evidence it is meant competent evidence, and evidence which is legally sufficient to justify the jury in finding the fact of unlawful sales, provided it satisfies them beyond a reasonable doubt, but not otherwise. It is not conclusive, and to so instruct is error. State v. Momberg, 291.
16. In proving the value of an engine under an answer alleging it to be worthless on account of defects within the terms of a written warranty, the evidence should be confined to the value of the engine when delivered, and not to a time after its delivery, when it was in a different condition on account of breakages. Houghton Implement Co. v. Doughty, 331.
17. A written warranty of the quality of an article cannot be enlarged by proof of parol warranties of quality made before the written warranty was made. Houghton Implement Co. v. Doughty, 331.
18. A witness is not competent to testify in reference to the rental value of real estate, concerning which rental value he has no knowledge nor any knowledge of the rental of real estate similarly located. The knowledge of the witness as to the rental value of lots used for business purposes does not render such witness competent to testify as to the rental value of real estate of different character and location, and having no rental value for business purposes. Keeney & Devitt v. City of Fargo, 423.
19. There was no sufficient evidence requiring the trial court to submit to the jury the issues raised by defendant's answer, and hence the ruling of the court in directing a verdict for the plaintiff was proper. Miller Co. v. Klovstad, 435.
20. A legal presumption is that an attorney has authority to appear for the person for whom he assumes to act. Bacon v. Mitchell, 454.
21. The person taking up an estray has no right to demand more proof of ownership on the part of the claimant than that prescribed by section 1575, Rev. Codes 1899. Mills v. Fortune, 460.
22. The word "permit," as used in section 7610, Rev. Codes 1899, is to be construed as authorizing the enforcement of a lien on the premises on which a nuisance is maintained in violation of section 7605, Rev. Codes 1899, when the proof shows that the owner knowingly permitted such use. Larson v. Christianson, 476.

EVIDENCE—Continued.

23. A family Bible formerly belonging to the prosecutrix's deceased grandfather, in which the latter had recorded the dates of birth of his own children and also of the prosecutrix and her brothers, was competent evidence of the prosecutrix's age. State v. Hazlett, 490.

24. It was error to exclude impeaching testimony for which sufficient foundation had been laid, in the cross-examination of the prosecutrix. State v. Hazlett, 490.

25. The admission of immaterial and incompetent evidence is error without prejudice in trials to the court, where the evidence sustains the judgment without consideration of the incompetent evidence. In such cases the trial court will be presumed to have disregarded the inadmissible evidence. State v. Harris, 501.

26. Evidence considered, and held to sustain a conviction for contempt for a violation of an injunctional order. State v. Harris, 51.

27. On cross-examination, the examining party has an absolute right within reasonable limits, to interrogate the witness as to specific facts and circumstances which tend to show ill will or other motive for falsifying, although the witness has denied the existence of such motives. State v. Malmberg, 523.

28. Where the facts which it is sought to establish by cross-examination, for the purpose of discrediting the witness, are such as to detract from his credit or capacity to testify truly in the particular case on trial as distinguished from facts discrediting him generally, the rule forbidding contradiction of a witness on collateral matters does not apply. State v. Malmberg, 532.

29. Where a party is seeking to show that an adverse witness's testimony should be discredited by reason of ill will or an existing temptation to falsify in the case on trial, he has the right to show so much of the facts and circumstances as may be necessary to fairly inform the jury of the cause, nature and extent of the alleged improper influence. State v. Malmberg, 523.

30. On a trial for the offense of maintaining a nuisance in violation of section 7605, Rev. Codes 1899, under an information charging the maintenance of a certain frame building on certain described lots, evidence that a nuisance was also maintained in another building on the same lots is not relevant to the issue. State v. Poull, 557.

31. Where the evidence tends to show that two independent offenses were committed under such circumstances, it is prejudicial error to refuse to compel the state to elect which transaction it will rely on for conviction before the defendant offers any evidencee in his defense. State v. Poull, 557.

32. It is not error to fail to refuse to charge the law as to circumstantial evidence, when the state's case rests in part upon direct evidence. State v. Foster, 561.

EVIDENCE—Continued.

33. There is no legal distinction, so far as the weight and effect to be given to it is concerned, between circumstantial and direct evidence, and it is not error to refuse a request which disparages it as a species of evidence. State v. Foster, 561.

34. The verdict in this case rests upon evidence of a substantial nature, and it was not error to refuse a new trial because of its alleged insufficiency. State v. Foster, 561.

35. Where the complaint does not state a cause of action, and the evidence affirmatively shows, that no cause of action exists, the appellate court will direct the action to be dismissed. Hart v. Hanson, 570.

36. In an action on a note by the legal representatives of the deceased payee, the defendant sought by his own testimony to prove when and where the note was given and who was present when the transaction with the testator took place pursuant to which the note was afterwards given, in order to lay a foundation for the testimony of a third person, by whom he expected to prove what the bargain was. *Held*, that the testimony was properly excluded under section 5653, Rev. Codes 1899. Regan v. Jones. 591.

37. Testimony by the defendant in such action to the effect that the note in suit was the only note he ever gave to the deceased, and that he never had any other transaction with the deceased, was likewise prohibited by section 5653, Rev. Codes 1899. Regan v. Jones, 591.

38. Errors assigned on the rulings of the trial court sustaining objections to questions propounded to a witness, cannot be reviewed, in the absence from the record of any offer of proof showing what facts the appellant expected to establish by the questions objected to, where the questions themselves do not disclose the materiality and competency of the expected answers. Regan v. Jones, 591.

39. While either party to a written contract may show that the true consideration therefor is different from that recited in the writing, yet it is not permissible under the guise of proving the true consideration, to establish as a cause of action an oral agreement within the statute of frauds, or one which violates the rule embodied in section 3888, Rev. Codes 1899, that a written contract supersedes all prior or contemporaneous oral agreements or stipulations concerning its matter. Alsterberg v. Bennett, 596.

EXECUTION.

1. Under section 5500, Rev. Codes 1899, providing that a judgment may be enforced by execution at any time within ten years after its entry, a judgment cannot properly be enforced by execution issued after said time, although the judgment debtor has been absent from the state during said time, and the judgment remains in force for that reason. Weisbecker v. Cahn, 390.

EXECUTION—Continued.

2. Execution was issued on the judgment in a criminal action, wherein premises owned by the plaintiff, not the accused, were adjudged a nuisance and plaintiff's land levied on and sold to defendant. *Held*, that the sale was void, as based on a judgment or proceeding to which plaintiff was not a party. Larson v. Christianson, 476.
3. The enforcement of the lien for fines and costs assessed under section 7610, Rev. Codes 1899, should be by action, and not by execution, in cases like the one under consideration. Larson v. Christianson, 476.

EXECUTORS AND ADMINISTRATORS.

1. The failure to appoint an administrator of the estate of the deceased mortgagor and debtor does not prevent the statute of limitations from running in favor of the mortgagor's heirs against an action to foreclose the mortgage. Mortgage Co. v. Flemington, 181.
2. In an action on a note by the legal representatives of the deceased payee, the defendant sought by his own testimony to prove when and where the note was given and who was present when the transaction with the testator took place pursuant to which the note was afterwards given, in order to lay a foundation for the testimony of a third person, by whom he expected to prove what the bargain was. *Held*, that the testimony was properly excluded under section 5653, Rev. Codes 1899. Regan v. Jones, 591.
3. Testimony by the defendant in such action to the effect that the note in suit was the only note he ever gave to the deceased, and that he never had any other transaction with the deceased, was likewise prohibited by section 5653. Regan v. Jones, 591.

EXEMPTIONS. See BANKRUPTCY, 482.

1. The lien of an attachment is not dissolved by the bankruptcy of the attachment debtor, where the property attached is exempt as against the trustee in bankruptcy but is not exempt from seizure for the debt upon which the attachment is based. Jewett v. Huffman, 110.
2. Where it is conceded that part and possibly all of the property attached is exempt from the bankruptcy proceedings, the property may be held under the attachment until it has been determined in the bankruptcy proceedings what part, if any, of the attached property has passed to the trustee in bankruptcy, freed from the bankrupt's claims for exemptions. Jewett v. Huffman, 110.
3. False pretenses which are relied upon solely as a basis for the provisional remedy by attachment, and to defeat the defendant's right to exemptions, do not constitute part of the cause of the action, where the plaintiff sues on a contract to recover the purchase price of goods sold and delivered. Jewett v. Huffman, 110.

EXPERT TESTIMONY. See EVIDENCE, 423.

FINDINGS OF FACT. See APPEAL AND ERROR, 614.

1. Where the facts found in a special verdict are insufficient to support a judgment for the plaintiff, by reason of the absence of findings on matters in dispute essential to the complete determination of the issues, a new trial must be granted. Beare v. Wright, 26.
2. To entitle one to recover a reward, he must show a rendition of the services required in the offer after knowledge of, and with a view of obtaining the reward. Couch v. State, 361.
3. The state offered a reward of $300 "for the arrest or information leading to arrest" of one James Smith, who escaped from jail where he was held upon a charge of murder. There were three claimants for the reward. The trial judge rendered judgment in favor of each for $100. Each claimant alleged in his complaint that he relied upon the offer of reward, which allegation was denied by the state's answer. The findings are silent upon the issue. *Held,* that the findings do not support the judgment. Couch v. State, 361.
4. The absence of a valuable consideration and the insolvency of the grantor are evidentiary and not ultimate facts, and will not, when embodied in additional findings, control an express finding that a transfer was made without fraudulent intent. Stevens v. Meyers, 398.

FORECLOSURE. See MORTGAGE, 81, 287; LIMITATION OF ACTION, 147, 181; ESTOPPEL, 213, 518; CHATTEL MORTGAGES, 445.

FOREIGN CORPORATIONS. See CORPORATIONS, 147, 608.

FORMER ACQUITTAL AND JEOPARDY. See PLEADING, 293; CRIMINAL LAW, 317.

1. To sustain a plea of former acquittal it must appear that the offense for which the defendant was acquitted was the same offense as that for which he is being tried. State v. Virgo, 293.

FRAUD. See DAMAGES, 26; ATTACHMENT, 110; SALE, 417.

1. To authorize a recovery of money paid under mistake, it must appear that the plaintiff had not received the equivalent contemplated by the payment, and that it is against conscience for the defendant to retain it. Dickey County v. Hicks, 73.
2. One who is defrauded by a false statement, which is made to induce and does induce the execution of a contract, has a choice of remedies: (1) To affirm the contract and take its benefits, so far as obtainable, and recover any damages sustained by the false statement; or (2) to rescind the contract and recover any moneys paid or property delivered under it. Sonnesyn v. Akin, 248.
3. A false statement, to be actionable, must be attended or followed by injury. Sonnesyn v. Akin, 248.

FRAUD—Continued,

4. The plaintiff made a written contract to purchase certain real estate from the defendants. One of the inducements to make the contract was their false statement that they had the legal title to that land. Defendants perfected their title and tendered proper conveyances of title at the time and place fixed by the contract. At the trial of plaintiff's action to recover damages for the false statement the jury returned a verdict in his favor, general in form, but without fixing any sum as damages. They also made certain special findings. They were also silent as to the amount of damages. The trial judge therefore awarded a recovery to plaintiff. Defendants moved, upon the minutes, to vacate the verdict and judgment upon the ground that (1) the verdict and damages were excessive, (2) that the evidence is insufficient to justify the verdict, and (3) that the verdict is against and contrary to law. *Held,* (1) that there is no evidence that the false statement was attended with or followed by injury or damages; (2) that the record presents a case of mistrial, and that the motion was properly granted and must be affirmed. Sonnesyn v. Akin, 248.
5. One who gains a thing by fraud is an involuntary trustee for the benefit of the person who would otherwise have had it. Currie v. Look, 482.

FRAUDS, STATUTE OF. See STATUTE OF FRAUDS, 1.

FRAUDULENT CONVEYANCE.

1. Under our statute (section 5055, Rev. Codes 1899) a fraudulent intent will not necessarily be conclusively presumed as a matter of law from the fact that a conveyance was made without a valuable consideration and by one who was at the time insolvent. Under the above section the intent is a question of fact and not of law. Stevens v. Meyers, 398.
2. The absence of a valuable consideration and the insolvency of the grantor are evidentiary, and not ultimate facts, and will not, when embodied in additional findings, control an express finding that a transfer was made without fraudulent intent. Stevens v. Meyers, 398.

GAMING.

1. An agent sues its principal to recover for losses sustained in transactions on the Duluth board of trade in the sale of grain for future delivery. *Held,* that there was no sufficient evidence requiring the trial court to submit to the jury the issues raised by defendant's answer, and hence the ruling of the court in directing a verdict for the plaintiff was proper. Sales of commodities for future delivery are presumed to be legitimate, and the burden is upon the party asserting the contrary to establish such fact. Miller Co. v. Klovstad, 435.

GAMING—Continued.

2. A contract for the sale of a commodity for future delivery is valid if the parties intend that there shall be an actual delivery; but if the parties do not contemplate an actual delivery of the commodity sold, but agree that one party shall pay the other the difference between the contract price and the market price at the date set for the execution of the contract, it is void as a wagering or gaming contract. Miller Co. v. Klovstad, 435.
3. In an action on such a contract, it is no defense that the vendor did not intend an actual delivery of the commodity, if the other party contemplated such delivery. The test of illegality is the intention not alone of one of the parties, but of both. Miller Co. v. Klovstad, 435.

GIFT. See DEEDS, 209.

1. Where the plaintiff's father, intending to make a gift to his daughter of a tract of land, bought and paid for the same, and caused his vendor to execute and deliver to him a deed thereof, naming his daughter as grantee, such delivery was sufficient to pass title to the plaintiff immediately upon the delivery of the deed to the father, even though the deed remained unrecorded in his custody until produced at the trial. Hulet v. N. P. Ry. Co., 209.
2. Evidence examined, and *held*, that it shows that the donor intended a present gift at the time of the delivery of the deed. Hulet v. N. P. Ry. Co., 209.

GOVERNOR'S RESIDENCE. See LEGISLATURE, 532.

1. The erection of a residence for the governor, at the capital, is within the purposes of the grant of land made by congress to the state for public buildings at the capital, under section 17 of the enabling act (25 Stat. 681, c. 180). State v. Budge, 532.
2. Chapter 166, p. 297, Laws 1905, provided for the appointment of a capitol commission by the governor. Said commission was thereby given authority to remodel and reconstruct the capitol building of the state, and to erect a governor's residence at the capital out of the proceeds of the lands donated to the state by congress. The law did not specify what sum should be used for the capitol building, nor what sum should be used for the governor's residence, nor specify when the buildings shall be completed. *Held*, that the law is invalid as an unwarranted delegation of purely legislative powers. State v. Budge, 532.

HOMESTEAD. See PUBLIC LANDS, 301, 449.

HAWKERS AND PEDDLERS. See CONSTITUTIONAL LAW, 622.

INDICTMENT AND INFORMATION. See CRIMINAL LAW, 557.

1. Under section 8047, subd. 7, Rev. Codes 1899, an indictment otherwise sufficient will be held sufficient when "the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition and in such a manner as to enable a person of common understanding to know what is intended." State v. Erickson, 139.
2. The indictment in this case charges the defendant with committing the crime of keeping a common nuisance, and, in charging the acts constituting the crime alleges that the defendant "willfully and unlawfully" kept a place (describing it) where intoxicating liquors were sold, bartered and given away without first requiring the persons receiving the same to subscribe affidavits, etc. *Held,* (1) that the allegations that the defendant unlawfully kept a place where intoxicating liquors were sold necessarily implies that the sales were unlawful; and (2) that the further allegations which attempt to expressly negative lawful sales may be treated as surplusage, and are not misleading or prejudicial, and the indictment is sufficient. State v. Erickson, 139.
3. An information for robbery sufficiently describes the property alleged to have been taken if the property is described with sufficient certainty to enable the jury to say whether the chattels proved to have been stolen are the same as those referred to in the information, and to enable the court to know judicially that the articles could have been the subject matter of the offense charged. State v. Sanders, 203.
4. In an information for robbery accomplished by fear, it is not necessary to allege the means whereby the fear was created. State v. Sanders, 203.
5. Proof that a robbery as accomplished by both force and fear is not a variance from an information that alleges that the taking was accomplished by fear. State v. Sanders, 203.
6. Although an information for robbery alleges the taking of several articles, it is sufficient to prove the taking of some of them. State v. Sanders, 203.
7. An information for a continuing offense, which alleges that the offense was committed "on the 1st day of January, 1904, and on divers and sundry days and times between that day and the 24th day of April, 1905, and on the 24th day of April, 1905," is sufficiently certain as to time, and does not allege more than one offense. State v. Brown, 529.
8. An information which alleges that the defendant, during a stated time, kept and maintained a nuisance defined and prohibited by section 7605, Rev. Codes 1899, in two adjacent buildings within the same curtilage, particularly describing the place, is neither uncertain nor double. State v. Brown, 529.

INDICTMENT AND INFORMATION—Continued.

9. In informations charging the keeping and maintaining of nuisances in violation of section 7605, Rev. Codes 1899, the information should particularly describe the place where the nuisance is maintained before abatement proceedings can be based on a conviction thereon. State v. Poull, 557.
10. Statutory grounds for setting aside information excludes all others. State v. Foster, 561.
11. A regular term of court within the meaning of section 8497, Rev. Codes 1899, which, in the absence of good cause shown, requires the dismissal of a prosecution, when an information is not filed at the next regular term after the defendant's commitment, means a jury term, as distinguished from a statutory term without a jury. State v. Foster, 561.

INJUNCTION. See PRACTICE, 301; PLEADING, 340; CONTEMPT, 501.

INSTRUCTION. See EVIDENCE, 291; CRIMINAL LAW, 316; TRIAL, 335.

1. In a trial for robbery, where the defendant besides denying the commission of the acts charged, claims that he was, by reason of intoxication, incapable of forming an intent, it is error to instruct the jury, in effect, that the intent to steal should be conclusively presumed from the unlawful and forcible taking unless the defendant was so intoxicated as to be incapable of forming an intent. State v. O'Malley, 200.
2. Where, in a case of robbery, the proof is such that defendant is either guilty of the crime charged, or wholly innocent, it is proper for the court to so instruct the jury. State v. Sanders, 203.
3. An instruction given to a jury in the following language: "If you find from the evidence that any witness has sworn falsely as to any material fact or issue in this case, you should receive the testimony of such witness with caution. You have a right to reject the statement of such witnesses, excepting in so far as they may be corroborated by other credible evidence" is error warranting the granting of a new trial. State v. Johnson, 288.
4. An instruction in the following words: "On the other hand, the rule of law requiring the jurors to be satisfied of the defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that you should be satisfied, beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient if, taking the testimony together, you are satisfied beyond a reasonable doubt that the defendant is guilty" is erroneous. State v. Young, 82 N. W. 420, 9 N. D. 165 followed. State v. Johnson, 288.

INSTRUCTION—Continued.

5. United States revenue receipt or license for the sale of intoxicants is *prima facie* evidence that the holder is selling or keeping for sale intoxicating liquor contrary to law, but not conclusive, and it is error to so instruct. State v. Momberg, 291.
6. The definition of "intoxicating liquors" contained in section 7598, Rev. Codes 1899, includes liquors or liquids "that willl produce intoxication," and not those which will not intoxicate. It was error, therefore, to instruct the jury in this case that "any liquors which contain any percentage of alcohol, if sold as a beverage," are intoxicating liquors under our law. State v. Virgo, 293.
7. Instructions on the question of what facts may be considered by the jury in determining the value of the property involved considered, and held not erroneous. School v. Peterson, 344.
8. Instructions considered, and held erroneous, as stating to the jury that the sale of patent medicines is unlawful unless made by a registered pharmacist. State v. Williams, 411.
9. It is not error to fail to refuse to charge the law as to circumstantial evidence, when the state's case rests in part upon direct evidence. State v. Foster, 561.
10. There is no legal distinction, so far as the weight and effect to be given to it is concerned, between circumstantial and direct evidence, and it is not error to refuse a request which disparages it as a species of evidence. State v. Foster, 561.

INSURANCE.

1. Under the language of a benefit certificate of insurance in a fraternal society, stating that said certificate shall be void "if the member holding this certificate shall die by any means or act which if used or done by such member while in the possession of all natural faculties unimpaired would be self destruction," a death by suicide avoids the policy; and such language is equivalent to providing that death by self destruction, whether sane or insane, avoids the policy. Clemens v. R. N. of A., 116.
2. Ambiguous language in a certificate of insurance will be construed in favor of the insured. Clemens v. R. N. of A. 116.
3. A foreign insurance corporation, although licensed to do business in this state, will not be permitted to recover on a contract of insurance made with a resident of this state upon property located here, if the contract is one which domestic corporations are forbidden to make. Walker v. Rein, 608.
4. The same rule applies, even though the contract was actually made in another state where such contract is not forbidden. Walker v. Rein, 608.
5. The rule of comity expressed by section 5756, Rev. Codes 1899, bars not only the assertion by the foreign corporation itself of a cause of action or defense which a domestic corporation is forbidden to assert without express authority, but also bars the assignee of the foreign corporation. Walker v. Rein, 608.

INTEREST. See USURY, 278.

INTERPLEADER. See PLEADING, 361.

INTERSTATE COMMERCE. See CONSTITUTIONAL LAW, 622.

INTERVENTION. See PRACTICE, 110.

INTOXICATING LIQUORS. See INDICTMENT AND INFORMATION, 139, 557; NUISANCE, 557.

1. Construing section 7614, Rev. Codes 1899, which makes the fact that one has or keeps posted in or about his place of business a United States revenue receipt or license for the sale of distilled, malt or fermented liquors *prima facie* evidence that he is selling and keeping for sale intoxicating liquor contrary to law, it is *held*, that by *prima facie* evidence is meant competent evidence, and evidence which is legally sufficient to justify the jury in finding the fact of unlawful sales; provided, it satisfies them beyond a reasonable doubt, but not otherwise. It is not conclusive and to so instruct is error. State v. Momberg, 291.
2. The definition of "intoxicating liquors" contained in section 7598, Rev. Codes 1899, includes liquors or liquids "that will produce intoxication," and not those which will not intoxicate. It was error, therefore, to instruct the jury in this case that "any liquors which contain any percentage of alcohol, if sold as a beverage," are intoxicating liquors under our law. State v. Virgo, 293.
3. The defendant and another procured two kegs of beer, without previous arrangement with anyone as to the conditions under which it was to be disposed of. All who came to the place where it was kept were permitted to drink all they desired of it. Those drinking paid for what they drank, generally 40 cents. The price was fixed by defendant and he generally requested pay for it. *Held*, that the facts are sufficient to show, as a matter of law, that there was an unlawful sale of the beer. State v. Nelson, 297.
4. A sale of patent medicine as medicine by a storekeeper in good faith is not a violation of law under section 7281, Rev. Codes 1899, although the same contains alcohol as one of its ingredients. State v. Williams, 411.
5. Whether a sale of liquids is made as a medicine or as a beverage, under section 7598, Rev. Codes 1899, is a question of fact for the jury. State v. Williams, 411.
6. Instructions considered, and held erroneous, as stating to the jury that the sale of patent medicines is unlawful unless made by a registered pharmacist. State v. Williams, 411.
7. An information for a continuing offense, which alleges that the offense was committed "on the 1st day of January, 1904, and on divers and sundry days and times between that day and the 24th day of April, 1905, and on the 24th day of April, 1905," is sufficiently certain as to time, and does not allege more than one offense. State v. Brown, 529.

INTOXICATING LIQUORS--Continued.

8. An information which alleges that the defendant, during a stated time, kept and maintained a nuisance, defined and prohibited by section 7605, Rev. Codes 1899, in two adjacent buildings within the same curtilage, particularly describing the place, is neither uncertain nor double. State v. Brown, 529.
9. On a trial for maintaining a nuisance in violation of section 7605, Rev. Codes 1899, under an information charging the maintenance of a certain frame building on certain described lots, evidence that a nuisance was also maintained in another building on the same lots is not relevant to the issue. State v. Poull, 557.
10. In informations charging the keeping and maintaining of nuisances in violation of section 7605, Rev. Codes 1899, the information should particularly describe the place where the nuisance is maintained before abatement proceedings can be based on a conviction thereon. State v. Poull, 557.
11. The word "place," as used in Rev. Codes 1899 section 7605, means the particular building or apartment where the unlawful sale is made or the intoxicating beverages are kept for sale. State v. Poull, 557.

INTOXICATION.

1. In a trial for robbery, where the defendant, besides denying the commission of the act charged, claims that he was by reason of intoxication incapable of forming an intent, it is error to instruct the jury, in effect, that the intent to steal should be conclusively presumed from unlawful and forcible taking unless the defendant was so intoxicated as to be incapable of forming an intent. State v. O'Malley, 200.
2. A deed is voidable if the grantor at the time of executing it was so intoxicated as to be incapable of understanding the nature and effect of the transaction. Spoonheim v. Spoonheim, 380.
3. The grantor in such cases must move promptly and within a reasonable time after the intoxication ceases and knowledge of the transaction has come to him, or he has notice of facts sufficient to put him upon inquiry, or he will be deemed to have ratified the deed. Spoonheim v. Spoonheim, 380.

JUDGE. See VERDICT, 316; TRIAL, 490.

1. That part of section 8246, Rev. Codes 1899, which authorizes trial judges to receive verdicts in criminal cases in which the jury has fixed the punishment higher or lower than provided by law, and to pronounce judgment thereon for the highest punishment thereon or the lowest punishment authorized by statute for the offense of which the defendant is found guilty, is mandatory. Verdicts coming within the exception contained in this section are legal and valid verdicts, and it is the duty of trial judges to receive the same and enter judgment thereon. State v. Barry, 316.

JUDGMENT. See VERDICT, 26; COUNTY COMMISSIONERS, 218; CLERK OF THE DISTRICT COURT, 282; APPEAL AND ERROR, 282; EXECUTION, 390; TRIAL, 465; SPECIFIC PERFORMANCE, 465; PLEADING, 476; PRACTICE, 301.

1. Judgment *non obstante* will not be upheld, under chapter 63, p. 74, Laws 1901, on ground of variance between proof and cause of action stated; it must further appear that the complaint cannot properly be amended. Welch v. N. P. Ry. Co., 19.
2. Judgment *non obstante* will not be sustained under chapter 63, p. 74, Laws of 1901, on account of failure of proof as to some essential element of the cause of action, unless it further reasonably appears that such defect of proof cannot be supplied at another trial. Welch v. N. P. Ry. Co., 19.
3. In 1892, following the irregular practice which then generally prevailed in this jurisdiction with respect to the manner of entering judgment in the district court, an order for judgment, which embodied the final determination of the action made by the trial court, and was in the form required for a judgment, but concluded with the direction to enter judgment, signed by the judge and attested by the clerk, was recorded in full in the judgment book, where it was again signed by the judge and clerk. *Held,* that such record is a valid judgment. Hagler v. Kelly, 218.
4. All advances made under a deed intended as security for a present debt and for future advances, before actual notice of judgment obtained against the grantor, are secured by such deed as against the judgment lien. Bank v. Tufts, 238.
5. Judgment creditor has same right to contest advances as the grantor in such a deed. Bank v. Tufts, 238.
6. An independent action to set aside a judgment is not maintainable when the remedy by motion provided by section 5298, Rev. Codes 1899, is available and adequate. Freeman v. Wood, 95.
7. The order of discharge of an assignee for the benefit of creditors, which the court is authorized by section 4675, Comp. Laws 1887, to make after a hearing and upon notice, is in effect, a final judgment, and as such is binding upon assignors and creditors and is subject to attack only upon grounds upon which other judgments are assailable. Freeman v. Wood, 95.
8. Where, in an action in equity to set aside a judgment, newly discovered evidence is presented as the ground therefor and for a new trial, it must appear that the failure to secure and present such evidence at the proper time was unmixed with the fault or negligence of the party asking relief. Freeman v. Wood, 95.
9. In an action brought to have a deed declared to be a mortgage and for its foreclosure, in which judgment creditors are made defendants, and it appears that the grantee in the deed has other security for his indebtedness besides the deed, and that the judgment credi-

JUDGMENT—Continued.

tors have security on the land only, a court of equity will in a proper case, compel the grantee to exhaust his security in the property not covered by the judgment lien. Bank v. Tufts, 238.

10. A clerk of the district court has no authority to satisfy a judgment upon a deposit with him of the full amount of the judgment. He has authority to satisfy judgments only in the cases where the statute gives him authority so to do. Milburn-Stoddard Co. v. Stickney, 282.

11. The receipt of money by a clerk of the district court for the satisfaction of a judgment, except as provided by law, is not an official act of the clerk. Milburn-Stoddard Co. v. Stickney, 282.

12. A judgment taken by default, without notice, in an action for equitable relief after the defendant had appeared, is irregular, but is not void. Martinson v. Marzolf, 301.

13. To warrant a court in setting aside a judgment upon a showing of surprise under section 5298, Rev. Codes 1899, the party must move promptly and within one year after notice. Keeney v. City of Fargo, 419.

14. In cases of motions to set aside judgments not within the provisions of section 5298, Rev. Codes 1899, the party seeking relief must move seasonably. Keeney v. City of Fargo, 419.

15. In applications for relief under section 5298, Rev. Codes 1899, trial courts are vested with large discretion, and their action will not be disturbed unless such discretion has been abused. Keeney v. City of Fargo, 419.

16. In an action to quiet title to real estate, in which the complaint alleges that the plaintiff is the owner of the land in fee and that the defendant has no right, title or interest therein, a judgment that the plaintiff does own the land and that the defendant has no right, title or interest therein conclusively adjudicates all questions affecting the title to such land, and bars a claim to an interest in the real estate in the nature of an easement in or license or consent to use the land existing when such adjudication was made, in a subsequent action by the same plaintiff for damages on account of the unlawful occupation of said real estate by the defendant. Keeney & Dewitt v. City of Fargo, 423.

17. Where in the conversion of mortgaged property, the value of the property converted does not exceed the amount of the mortgage debt, an affirmative judgment upon the counterclaim cannot be sustained. Hanson v. Skogman, 445.

18. An attorney's mistake of judgment as to the law or his ignorance of facts which he ought to have known is not sufficient ground for vacating a judgment of dismissal entered upon his motion. Bacon v. Mitchell, 454.

JUDGMENT—Continued.

19. Execution was issued on the judgment in a criminal action, wherein premises owned by the plaintiff, not the accused, were adjudged a nuisance and plaintiff's land levied on and sold to defendant. *Held*, that the sale was void, as based on a judgment or proceeding to which plaintiff was not a party. Larson v. Christianson, 476.

JURISDICTION. See JUSTICE OF THE PEACE, 414; VENUE, 542.

1. Under our statute regulating appeals from justice courts, the service and filing of the notice of appeal, and the filing of the undertaking with the clerk of the district court are not alone sufficient to transfer jurisdiction. The undertaking must be served and the service must be made within thirty days after the judgment is rendered. Richardson v. Campbell, 81 N, W. 31, 9 N. D. 100 followed. Lough v. White, 353.
2. Under section 6670, Rev. Codes 1899, as amended by chapter 201, p. 259, Laws 1901, a justice of the peace does not lose complete jurisdiction of a case because a question of the title to or boundary of real property arises. He is authorized, and it is his duty, to certify the case to the district court for trial. Johnson v. Erickson, 414.
3. Where a justice of the peace dismisses a case, instead of certifying it, as required by the above section, and the plaintiff appeals generally from the judgment, the district court has jurisdiction to try the action. Johnson v. Erickson, 414.
4. Until the title to public land passes from the United States to a homestead claimant, the land department has exclusive jurisdiction of the question of title. The jurisdiction of the court arises after the title passes. Healey v. Forman, 449.

JUSTICE OF THE PEACE.

1. Section 6771, Rev. Codes 1899, which provides that the district court may dismiss an appeal from justice court for failure on the part of the appellant to cause the transcript to be transmitted, does not make it the mandatory duty of the court to order a dismissal for that reason. DeFoe v. Zenith Coal Co., 236.
2. Where the transcript was filed before the motion to dismiss was granted, and the record affirmatively showed that the respondent had not been prejudiced by the delay, it was error to dismiss the appeal for failure to file the transcript in time. DeFoe v. Zenith Coal Co., 236.
3. Under our statute regulating appeals from justice courts, the service and filing of the notice of appeal and the filing of the undertaking with the clerk of the district court are not alone sufficient to transfer jurisdiction. The undertaking must be served and the service must be made within thirty days after the judgment is rendered. Richardson v. Campbell, 81, N. W. 31, 9 N. D. 100 followed. Lough v. White, 353.

JUSTICE OF THE PEACE--Continued.

4. The fact that the undertaking on appeal from justice court was presented to the clerk of the district court, and his approval indorsed thereon before the notice of appeal and undertaking were served, was not an irregularity which invalidated the appeal. Thompson v. Fargo Plumbing Co., 405.
5. Under section 6670, Rev. Codes 1899, as amended by chapter 201, p. 259, Laws 1901, a justice of the peace does not lose complete jurisdiction of a case because a question of the title to or boundary of real property arises. He is authorized, and it is his duty, to certify the case to the district court for trial. Johnson v. Erickson, 414.
6. Where a justice of the peace dismisses a case, instead of certifying it, as required by the above section, and the plaintiff appeals generally from the judgment, the district court has jurisdiction to try the action. Johnson v. Erickson, 414.
7. A summons in justice court, which contained a partnership name without showing the christian name of each partner, is not a nullity, but is merely irregular and may be cured by amendment. Morgridge v. Stoeffer, 430.
8. The provisions of section 5237, Rev. Codes 1899, relating to the correction of mistakes in pleading, process or proceeding, is applicable to justice court. Morgridge v. Stoeffer, 430.
9. The general rules governing the exercise of the discretionary power of the court with respect to allowing amendments to pleadings are the same in justice court as in district court. Rae v. Railway Co., 507.
10. It was not error in justice court to allow a complaint, which alleged that plaintiff's cattle had been killed by the negligent running of defendant's train, to be amended before trial so as to allege that the injury was due to the failure of the defendant to keep its right of way fence in repair. Rae v. Railway Co., 507.
11. Where the specifications of error in the notice of appeal from a justice's judgment on questions of law only do not raise any question as to the sufficiency of the pleading, that question cannot be raised on appeal, where the defect in the pleading is a mere defective statement of the cause of action or defense, as distinguished from a failure to show any right of recovery or defense. Rae v. Railway Co., 507.
12. Adjournment of a preliminary examination for more than three days not invalid where there is no injury. State v. Foster, 561.

JURY. See VERDICT, 316; CONVERSION, 445; EVIDENCE, 523.

1. An action to foreclose a chattel mortgage is an equitable one, and a trial by jury is not a matter of right. Avery Mfg. Co. v. Crumb, 57.
2. Section 5032, Comp. Laws 1887, providing that all issues of fact for the recovery of money only must be tried by a jury does not entitle

JURY—Continued.

a plaintiff in an action to foreclose a chattel mortgage to a jury trial as a matter of right. Avery Mfg. Co. v. Crumb, 57.

3. Section 5420, Rev. Codes 1899, amending section 5032, Comp. Laws 1887, and providing that all issues of fact in an action for the recovery of money only shall be tried by a jury, does not restrict or change the right to a trial by jury, nor violate section 7, art. 1, of the Constitution, providing that the right of trial by jury "shall be secured to all and remain inviolate." Avery Mfg. Co. v. Crumb, 57.
4. Affidavits of jurors are not admissable to impeach their verdict upon the alleged ground that they misunderstand the instructions of the court, or to show their reasons for agreeing to a verdict. State v. Forrester, 335.
5. Since the amendment of section 5630, Rev. Codes 1899, by chapter 201, p. 277, Laws 1903, actions which are properly triable by a jury are no longer triable in the district court or reviewable upon appeal under that section. Couch v. State, 361.
6. Whether a sale of liquids is made as a medicine or as a beverage, under section 7598, Rev. Codes 1899, is a question of fact for the jury. State v. Willliams, 411.

LANDLORD AND TENANT.

1. If the tenant denies his landlord's title, the latter may at his election treat it as a disseisin, and the tenancy is thereby terminated without notice to quit. Schwoebel v. Fugina, 375.
2. When the former tenant retains possession of the premises after the termination of the relation of landlord and tenant, he is liable for the value of the use and occupation of the premises. Schwoebel v. Fugina, 375.

LEGISLATURE. See CONSTITUTIONAL LAW, 368, 532, 622.

1. The erection of a residence for the governor at the capital is within the purposes of the grant of land made by congress to the state for public buildings at the capital, under section 17 of the enabling act (25 Stat. 681, c. 180). State v. Budge, 532.
2. The disposition of such lands is exclusively with the legislature, and its action in such matters is final, unless violative of some constitutional provision and clearly contrary to the terms of the grant. State v. Budge, 532.
3. It is the province of the legislature alone to determine the manner in which said lands may be disposed of in furtherance of the purposes of said grant. State v. Budge, 532.
4. All legislative power in this state is vested in the senate and house of representatives, and the legislature cannot delegate such power in relation to purely legislative matters. State v. Budge, 532.

LEGISLATURE—Continued.

5. The power to determine the manner of the use of the land granted by section 17 of the enabling act (25 Stat. 681, c. 180) is purely legislative, and cannot be delegated to a commission. State v. Budge, 532.
6. The power to limit the sum that shall be used for each public building authorized by section 17 of the enabling act (25 Stat. 681, c. 180) is purely legislative, and cannot be delegated to a commission. State v. Budge, 532.
7. Chapter 166, p. 297, Laws, 1905, provided for the appointment of a capitol commission by the governor. Said commission was thereby given authority to remodel and reconstruct the capitol building of the state, and to erect a governor's residence at the capital out of the proceeds of the lands donated to the state by congress. The law did not specify what sum should be used for the capitol building, nor what sum should be used for the governor's residence, nor specify when the buildings shall be completed. *Held*, that the law is invalid, as an unwarranted delegation of purely legislative powers. State v. Budge, 532.
8. The power to raise revenue by taxation is a necessary attribute of sovereignty, which may be exercised by the legislature subject only to the restrictions imposed by the federal or the state constitution, and includes the power to tax occupations. *In re* Lipschitz, 622.
9. The objection that a law which the legislature had the power to enact will operate harshly goes merely to the policy of the law, and not to its validity. Such an objection should be addressed to the legislature and not to the courts. *In re* Lipschitz, 622.

LICENSE. See JUDGMENT, 423.

LIENS. See MECHANIC'S LIEN, 393, 511; EXECUTION, 476.

1. One who claims a lien upon an animal as an estray must show a full and strict compliance with every requirement of the statute under which the lien is claimed. Mills v. Fortune, 460.
2. If the person taking up an estray fails to observe all the requirements of the estray law, he is in the position of a mere trespasser, and can claim no lien for compensation. Mills v. Fortune, 460.
3. If the person holding an estray refuses to surrender the estray unless the claimant furnishes other evidence of ownership than that prescribed by section 1575, Rev. Codes 1899, such denial of the claimant's right works a forfeiture of the estray lien, if the claimant is in fact the owner. Mills v. Fortune, 460.
4. On a conviction for keeping and maintaining a nuisance in violation of section 7605, Rev. Codes 1899, the court adjudged that the fine imposed and costs accrued should be a lien on the real estate on which the nuisance was kept pursuant to section 7610, Rev. Codes 1899. These premises were owned by the plaintiff in this action,

LIENS—Continued.

who was not a party in the criminal action. Execution was issued on the judgment in the criminal action, and plaintiff's land levied on and sold to the defendant. Held, that the sale was void, as based on a judgment or proceeding to which plaintiff was not a party. Larson v. Christianson, 476.

5. The word "permit" as used in section 7610, Rev. Codes, 1899, is to be construed as authorizing the enforcement of a lien on which a nuisance is maintained in violation of section 7605, Rev. Codes 1899, when the proof shows that the owner knowingly permitted such use. Larson v. Christianson, 476.

LIMITATION OF ACTIONS.

1. Action to foreclose a mortgage on real property is not a proceeding in rem, but is an action in personam, and comes within the operation of section 5210, Rev. Codes 1899, which excepts from the period limited for commencing an action the time during which the person against whom the cause of action has accrued is absent from the state. Mortgage Co. v. Thresher Co., 147.

2. A foreign corporation which has complied with the laws of this state governing such corporations, and which has been regularly and continuously doing business in this state during the entire period required to bar an action, and during all that time has had an agent resident here upon whom process could be served, can avail itself of the statute of limitations of this state. Mortgage Co. v. Thresher Co., 147.

3. The absence of the mortgagee from the state after he has parted with the title to the mortgaged property does not prevent the statute of limitations from running in favor of his grantee. Mortgage Co. v. Thresher Co. 147.

4. An action to foreclose a mortgage on real property is a remedy distinct from the remedies by which the creditor may enforce the personal obligation for the debt secured by the mortgage, and may become barred by the statute of limitations, even though the debt is not outlawed. Mortgage Co. v. Thresher Co. 147.

5. Although the property passed to the defendant's grantor subject to the mortgage, and was in equity the primary fund for the payment of the mortgage debt, that doctrine cannot be extended so as to prevent the defendant from availing himself of the statute of limitations as a defense against an action to foreclose the mortgage, even though the debt is neither discharged nor barred against the debtor. Mortgage Co. v. Thresher Co., 147.

6. An action to foreclose a mortgage is an action in personam, and comes within the operation of section 5210, Rev. Codes 1899, which excepts from the period limited for commencing an action the time during which the person against whom the cause of action accrued is absent from the state. Mortgage Co. v. Flemington, 181.

LIMITATION OF ACTIONS—Continued.

7. Foreclosure of mortgage may be barred although the mortgage debt is not outlawed. Mortgage Co. v. Flemington, 181.

8. Failure to appoint an administrator does not bar deceased mortgagor's heirs from pleading the statute of limitations. Mortgage Co. v. Flemington, 181.

9. Mortgagor's grantee may plead statute of limitation although the mortgage debt is neither barred nor discharged. Mortgage Co. v. Flemington, 181.

10. The mortgagor died intestate, seized of the mortgaged land, before the mortgage debt was due, and left four heirs, only one of whom was a resident of the state. No administrator was ever appointed. Nearly fourteen years after the debt was due the heir conveyed the land to defendant. Held, that an action to foreclose the mortgage was barred as to one-fourth of the land, but was not barred as to the remaining three-fourths. Mortgage Co. v. Flemington, 181.

11. Action to foreclose a mortgage on real property is not a proceeding in rem, but is an action in personam, and comes within the operation of section 5210, Rev. Codes 1899, which excepts from the period limited for commencing an action the time during which the person against whom the cause of action has accrued is absent from the state. Paine v. Dodds, 189.

12. Although the property passed to the defendant's grantor subject to the mortgage and was in equity the primary fund for the payment of the mortgage debt, the doctrine cannot be extended so as to prevent the defendant from availing himself of the statute of limitations as a defense against an action to foreclose the mortgage. Paine v. Dodds, 189.

13. When the person against whom a cause of action has accrued departs from and establishes his residence out of this state, the statute of limitations has run in his favor since he acquired the land, the parture. The clause in section 5210, Rev. Codes 1899, to the effect that only absences of one year or more shall toll the statute, refers to absences by one who has not established a residence out of the state. Paine v. Dodds, 189.

14. A grantee of mortgaged premises may add to the time the statute of limitations has run in his favor since he acquired the land the time it had run in favor of his grantors, in order to make up the aggregate period required to bar the action to foreclose. Paine v. Dodds, 189.

15. When the plaintiff's own pleadings and evidence show that more time than that limited by the statute for commencing the action has expired since the cause of action accrued, the burden is on the plaintiff to show that the running of the statute had been suspended a sufficient length of time to avoid the statutory bar pleaded by the defendant. Paine v. Dodds, 189.

LIMITATION OF ACTIONS—Continued.

16. In an action tried and appealed under section 5630, Rev. Codes 1899, where the evidence tends to show that the action is barred as to one or more undivided and unequal parts of the land and not barred as to other parts, but fails to disclose as to which parts the bar is complete, and the uncertainty in the proof is due to the fact that neither the trial court nor counsel for either party deemed such proof material, a new trial will be ordered. Paine v. Dodds, 189.
17. Rev. Codes 1899, section 5200, subdivision 2, limiting to ten years the time for commencing an action to foreclose a real estate mortgage, had no application to a proceeding to foreclose by advertisement, before the amendment of that section by chapter 120, page 152, Laws 1901. Clark v. Beck, 287.
18. The time that had run since the accrual of the right to foreclose by advertisement before the taking effect of chapter 120, page 52, Laws 1901, is not to be computed as part of the time limited by that amendatory act for commencing a proceeding to foreclose by advertisement. Clark v. Beck, 287.

MARSHALING SECURITIES. See MORTGAGES, 238.

MECHANIC'S LIEN. See PLEADING, 511.

1. A supervising architect, who furnishes plans and specifications and supervises the construction of a building pursuant to a contract with the owner for such services, is entitled to a lien therefor under section 4788, Rev. Codes 1899, which gives a lien to "any person who shall perform any labor upon any building." Friedlander v. Taintor, 393.
2. Subcontractors are entitled to a direct lien for work done or materials furnished under contract between contractors and the owner of the land or buildings, under section 4788, Rev. Codes 1899. Lumber Co. v. Bank, 511.
3. A claim for a lien by a subcontractor must be filed within ninety days after the materials are furnished or the work done, and, unless filed within said time, the lien is defeated as against purchasers and incumbrancers in good faith acquiring rights to the property after said time and before a lien is filed. Lumber Co. v. Bank, 511.
4. If the claim or demand for a lien be not filed within ninety days, but is filed after said time, the lien is not defeated as against the owner, except as to payments made after the ninety days and before the claim or demand for a lien is filed. Lumber Co. v. Bank, 511.
5. A complaint setting forth all the facts necessary to create a lien states a cause of action, although it contains no allegations that there is anything due the contractor from the owner. Lumber Co. v. Bank, 511

MISTRIAL. See VERDICT, 248.

MORTGAGE. See LIMITATION OF ACTIONS, 147, 181; ESTOPPEL, 213, 518.

1. Evidence examined, and held, not to sustain plaintiff's contention that the defendant who purchased the certificate of sale under foreclosure of real estate mortgage, agreed, before the year for redemption had expired, to permit her to redeem from such sale at any time. Becker v. Lough, 81.
2. A deed absolute on its face, but intended to be a mortgage under a parol contract, is properly recorded in a book provided for the record of deeds, and such record is notice to subsequent incumbrancers or purchasers. Bank v. Tufts, 238.
3. A deed absolute in terms, but in equity a mortgage under a parol agreement for reconveyance, is security for the present indebtedness for which it was given, as well as for moneys advanced after its execution, pursuant to a parol contract that such deed should be security therefor; and, before a reconveyance will be decreed, payment must be made, or a willingness to do so shown, of all sums due thereon in accordance with the contract, whether furnished before or after the deed was executed. Bank v. Tufts, 238.
4. A grantee in a deed intended as security for a present debt and for future advances, based on a parol agreement, is not permitted to make advances under such parol contract after actual notice that subsequent incumbrancers or purchasers have a lien on the property covered by the deed taken without notice of the parol contract for future advances. Bank v. Tufts, 238.
5. All advances made under such a deed before actual notice of a judgment obtained against the grantor are secured by such deed as against the judgment lien. Bank v. Tufts, 238.
6. In such a case the judgment creditor stands in the same position as the grantor in the deed, so far as his right to contest the amount secured by the deed or mortgage is concerned. Bank v. Tufts, 238.
7. In an action brought to have a deed declared to be a mortgage and for its foreclosure, in which judgment creditors are made defendants, and it appears that the grantee in the deed has other security for his indebtedness besides the deed, and that the judgment creditors have security on the land only, a court of equity will, in a proper case, compel the grantee to exhaust his security in the property not covered by the judgment lien. Bank v. Tufts, 238.
8. Rev. Codes 1899, section 5200, subdivision 2, limiting to ten years the time for commencing an action to foreclose a real estate mortgage, has no application to a proceeding to foreclose by advertisement, before the amendment of that section by chapter 120, page 152, Laws 1901. Clark v. Beck, 287.
9. The time that had run since the accrual of the right to foreclose by advertisement before the taking effect of chapter 120, page 152,

MORTGAGE—Continued.

Laws 1901, is not to be computed as part of the time limited by that amendatory act for commencing a proceeding to forclose by advertisement. Clark v. Beck, 287.

10. Section 4730, Rev. Codes 1899, which declares that a grant, absolute in form, but intended to be defeasible, is not affected "as against any person other than the grantee," etc., unless a defeasance is recorded, construed and held, that the term "any other person" means any person otherwise entitled to the protection of the recording laws, namely, subsequent purchasers and incumbrancers, and does not include general creditors. Vallely v. First National Bank, 580.

11. One Savard, the owner of certain real estate, executed a conveyance to Deschenes, in form a warranty deed, to secure a debt which he afterwards paid. No defeasance was recorded. Thereafter Deschenes' trustee in bankruptcy gave a deed to plaintiff, who had actual notice that the conveyance to Deschenes was for security. Held, (1) that the trustee's deed to plaintiff did not convey title; and (2) that the trial court did not err in sustaining a mortgage subsequently executed by Savard, the true owner. Vallely v. First National Bank, 580.

MUNICIPAL CORPORATIONS.

1. Where the city has received from the property owners the amount of taxes and special assessments levied for the specific purpose of paying for a work of local improvement, it cannot justify its refusal to redeem the warrants issued in payment for such work on the ground that the contract and the taxes and assessments for the improvement were invalid because in violation of constitutional or statutory provisions designed solely for the protection of the taxpayers. Bank v. Fargo, 88.

2. Money derived by a city from special assessments becomes a trust fund in its custody, to be applied to the redemption of warrants drawn upon such funds in the order in which the warrants were presented for payment, and the city is liable to any warrant holder whose rights have been infringed by a misapplication of such funds. Bank v. Fargo, 88.

MURDER. See CRIMINAL LAW, 316.

NEGLIGENCE. See PLEADING, 507.

1. It was not error in justice court to allow a complaint, which alleged that plaintiff's cattle had been killed by the negligent running of defendant's train to be amended before trial so as to allege that the injury was due to the failure of the defendant to keep its right of way fence in repair. Rae v. Railway Co., 507.

NEGOTIABLE INSTRUMENTS. See EXECUTORS AND ADMINISTRATORS, 591.

NEW TRIAL. See DAMAGES, 57; LIMITATION OF ACTIONS, 189; APPEAL AND ERROR, 614.

1. When the facts found in a special verdict are insufficient to support the judgment for plaintiff, by reason of absence of findings on matters in dispute essential to a complete determination of the issues, a new trial must be granted. Beare v. Wright, 26.
2. Where the evidence shows ten horses worth $1,200 and further shows that only nine were covered by defendant's mortgage, and there was no evidence of the value of the horses separately, held, judgment is not sustained, and the supreme court cannot definitely determine the value of the property taken and will not dispose of an appeal under section 5630, Rev. Codes 1899, but will order another trial. Avery Mfg. Co. v. Crumb, 57.
3. In an action tried and appealed under section 5630, Rev Codes 1899, where the evidence tends to show that the action is barred as to one or more undivided and unequal parts of the land and not barred as to other parts, but fails to disclose as to which parts the bar is complete, and the uncertainty in the proof is due to the fact that neither the trial court nor counsel for either party deemed such proof material, a new trial will be ordered. Paine v. Dodds, 189.
4. If it clearly appears that the departure from the general rule against leading questions was unwarranted and prejudicial to the appellant, a new trial will be granted. State v. Hazlett, 490.
5. Misconduct warranting a new trial is shown where the trial judge unnecessarily and repeatedly interrupted the cross-examination of the state's witness by questions and remarks which hindered effective cross-examination and tended to create the impression that the trial judge was convinced of the truthfulness of the witness and the merits of the state's case. State v. Hazlett, 490.
6. The verdict in this case rests upon evidence of a substantial nature and it is not error to refuse a new trial because of its alleged insufficiency. State v. Foster, 561.

NOTICE. See JUDGMENT, 301; JUSTICE OF THE PEACE, 405.

1. A judgment taken by default, without notice, in an action for equitable relief, after the defendant had appeared, is irregular, but is not void. Martinson v. Marzolf, 301.
2. A motion to vacate a judgment for irregularity may be heard and granted, even though more than one year has elapsed since notice of the entry of judgment. Martinson v. Marzolf, 301.
3. If the tenant denies his landlord's title, the latter may at his election treat it as a disseisin, and the tenancy is thereby terminated without notice to quit. Schwoebel v. Fugina, 375.

NOTICE—Continued.

4. To warrant a court in setting aside a judgment upon a showing of surprise under section 5298, Rev. Codes 1899, the party must move promptly and within one year after notice. Keeney v. City of Fargo, 419.
5. An allegation of a complaint "that prior to the filing of said lien the plaintiff had notified defendant by registered letter that it had furnished said materials to the said company" is not the statement of a conclusion, and is sufficient as an allegation of notice. Lumber Co. v. Bank, 511.
6. Where a person by reason of actual notice of a given fact, is sought to be charged with notice of other facts which inquiry would disclose, there must appear in the nature of the case such a connection between the known fact and the fact with notice of which he is sought to be charged that the former may be said to furnish a reasonable and natural clue to the latter. Johnson v. Erlandson, 518.
7. The fact that a purchaser from B, who claimed title under a recorded deed from E, valid on its face, knew that the deed from a previous owner to E was missing and unrecorded, was not sufficient to charge such purchaser with constructive notice of the fact that B's deed had been wrongfully obtained by the latter. Johnson v. Erlandson, 518.
8. Where the grantor in a deed deposited in escrow knew that the grantee named therein had wrongfully obtained possesion thereof and had it recorded, and negligently permitted the grantee's apparent ownership to remain unchallenged for an unreasonable length of time, such grantor is estopped to deny the grantee's title as against an innocent purchaser from the latter. Johnson v. Erlandson, 518.
9. One Savard, the owner of certain real estate, executed a conveyance to Deschenes, in form a warranty deed to secure a debt which he afterwards paid. No defeasance was recorded. Thereafter Deschenes' trustee in bankruptcy gave a deed to plaintiff, who had actual notice that the conveyance to Deschenes was for security. Held, (1) that the trustee's deed to plaintiff did not convey title; and (2) that the trial court did not err in sustaining a mortgage subsequently executed by Savard, the true owner. Vallely v. First National Bank, 580.

NUISANCE. See INDICTMENT AND INFORMATION, 139.

1. Execution was issued on a judgment in a criminal action, wherein premises owned by the plaintiff, not the accused, were adjudged a nuisance and plaintiff's land levied on and sold to defendant. Held, that the sale was void, as based on a judgment or proceeding to which plaintiff was not a party. Larson v. Christianson, 476.
2. The enforcement of the liens for fines and costs assessed under section 7610, Rev. Codes 1899, should be by action and not by execu-

NUISANCE—Continued.

tion, in cases like the one under consideration. Larson v. Christianson, 476.

3. The word "permit" as used in section 7610, Rev. Codes 1899, is to be construed as authorizing the enforcement of a lien on the premises on which a nuisance is maintained in violation of section 7605, Rev. Codes 1899, when the proof shows that the owner knowingly permitted such use. Larson v. Christianson, 476.
4. An information which alleges that the defendant, during a stated time, kept and maintained a nuisance defined and prohibited by section 7605, Rev. Codes 1899, in two adjacent buildings within the same curtilage, particularly describing the place, is neither uncertain nor double. State v. Brown, 529.
5. On a trial for the offense of maintaining a nuisance in violation of section 7605, Rev. Codes 1899, under an information charging the maintenance of a certain frame building on certain described lots, evidence that a nuisance was also maintained in another building on the same lots is not relevant to the issue. State v. Poull, 557.
6. In informations charging the keeping and maintaining of nuisances in violation of section 7605, Rev. Codes 1899, the information should particularly describe the place where the nuisance is maintained before abatement proceedings can be based on a conviction thereon. State v. Poull, 557.

OCCUPATION TAX. See HAWKERS AND PEDDLERS, 622; CONSTITUTIONAL LAW, 622.

OFFICERS. See SCHOOLS, 73, 77; COUNTY COMMISSIONERS, 218; CLERK OF THE DISTRICT COURT, 282; COUNTY, 340.

1. Schools in special districts are not under the official supervision of county superintendents, and are not to be taken into account in computing their salaries, under section 652, Rev. Codes 1899, Dickey County v. Hicks, 73.
2. The county auditor of Dickey county in good faith, but without authority of law, included in the defendant's monthly salary warrants the amounts which were due from the county to the clerks employed in his office. It was stipulated and the trial court found, that the defendant paid said clerks amounts in excess of those received from the county; that the sums paid were the reasonable value of their services; that their services were necessary; and that such payments were accepted by the clerks "as a complete discharge and satisfaction for the work done by each." Held, that a recovery by the county of the money thus paid to the defendant (its obligations to the clerks having been discharged) cannot be sustained. Dickey County v. Hicks, 73.

OPTION. See GAMING, 435.

PARTIES.

1. Where a right of recovery is given by statute and its exercise committed to particular persons, it cannot be exercised by another. Harshman v. N. P. Ry. Co., 69.
2. A complaint by a father in an action prosecuted in his own name to recover for the death of his minor son, does not state a cause of action. Harshman v. N. P. Ry. Co., 69.
3. Execution was issued on the judgment in a criminal action wherein premises owned by the plaintiff, not the accused, were adjudged a nuisance and plaintiff's land levied on and sold to defendant. Held, that the sale was void, as based on a judgment or proceeding to which plaintiff was not a party. Larson v. Christianson, 476.

PARTNERSHIP.

1. A summons in justice court, which contained a partnership name without showing the Christian name, of each partner, is not a nullity, but is merely irregular, and may be cured by amendment. Morgridge v. Stoeffer, 430.
2. After a dissolution of partnership between attorneys at law by operation of law by reason of the suspension from practice of one of them, the remaining members may carry on the unfinished business of the firm, and their rights under existing contracts for services will be determined under the partnership contracts, in the absence of a showing that new contracts were made after the dissolution. Bessie v. N. P. Ry. Co., 614.
3. After the dissolution of a copartnership between attorneys at law by reason of the suspension of one member from practice, the remaining members of the copartnership can settle partnership contracts made with the dissolved firm and thereby bind the other members of the firm. Bessie v. N. P. Ry. Co., 614.
4. Evidence considered and held, not to show that a new contract was made as to attorney's fees after the firm was dissolved. Bessie v. N. P. Ry. Co., 614.

PAYMENTS. See PLEADING, 511.

1. To authorize a recovery of money paid under mistake, it must appear that the plaintiff has not received the equivalent contemplated by the payment, and that it is against conscience for the defendant to retain it. Dickey County v. Hicks, 73.

PEDDLERS. See HAWKERS AND PEDDLERS, 622.

PERSONAL PROPERTY. See SALES, 417; CONVERSION, 445.

1. A trust of personal property is not within the statute of frauds, and may be created by spoken words and proved by parol. Berry v. Evendon, 1.
2. Where a trustee of personal property converts it into real estate the trust attaches to the real estate in the hands of the trustee. Berry v. Evendon, 1.

PERSONAL PROPERTY—Continued.

3. An oral sale of personal property without actual or constructive delivery or payment of any part of the price, and without any special agreement as to immediate delivery or change of title, does not pass to the purchaser, but remains in the seller, and the property was properly assessed against the seller in whose possession it remained on April 1, 1897. Elevator Co. v. Cass County, 601.

PLEADING. See INDICTMENT AND INFORMATION, 139, 203, 529; DEMURRER, 278.

1. A judgment non obstante under chapter 63, page 74, Laws 1901, will not be sustained on the ground merely that there was a variance between the cause of action stated and the proof adduced, unless it further appear that no amendment can properly be made. Welch v. N. P. Ry. Co. 19.
2. A complaint by a father to recover for the death of his minor son, prosecuted in his own name, does not state a cause of action. Harshman v. N. P. Ry. Co., 69.
3. A failure to plead a substantial cause of action where the pleading cannot be made good by amendment, may be urged at any stage of the action. Harshman v. N. P. Ry. Co., 69.
4. The complaint in this case shows that the defendant was made assignee for the benefit of creditors September 27, 1893, and that he was regularly discharged in July, 1895; that within thirty days prior to the commencement of this action to set aside the judgment of discharge and to secure a new accounting, which was five years after such judgment was rendered, the plaintiff "accidentally discovered that the account was not true in several particulars." It is held upon a general demurrer that the complaint does not state a cause of action for the following reasons: (1) It does not show that the remedy by motion is not available, or is inadequate. (2) It does not show that the evidence which plaintiffs seek to present on the new accounting could not have been secured and presented at the hearing, or within one year thereafter, when the remedy by motion was available by the exercise of reasonable diligence. (3) It does not set forth the nature and character of the newly discovered evidence. Whether equity will ever intervene to grant a new trial for newly discovered evidence under our statute is not determined. Freeman v. Wood, 95.
5. A complaint alleged that the plaintiff intrusted certain money to defendants, to be used by them for the purpose of securing bail for one B, and also alleged the defendants were to return the same to plaintiff when such bail was exonerated, and further alleged that such bail was thereafter exonerated and defendants received said money into their possession and converted the same to their own use, and refused to repay the same to plaintiff. Held, that the cause of action should be treated as ex contractu, instead of ex delicto, and a recovery permitted upon the theory of money had and

PLEADING—Continued.

received under an implied promise to pay the same. Held, further, that it must be so treated in view of the defendant's answer. Logan v. Freerks, 127.

6. When the defendant pleads the statute of limitations, plaintiff must show its suspension. Paine v. Dodds, 189.
7. The defendant demurred to the complaint for misjoinder of causes of action, claiming that the plaintiff had improperly joined with a claim for money had and received a claim for the statutory penalty for the exaction of usury. The allegations of the complaint affirmatively showed that there was no usurious transaction, but both parties agreed in the argument before this court that the allegations of one of the causes of action were intended, and should be construed, to sufficiently allege the taking of usury. *Held*, that this court will not pass upon a question not presented by the record. Weicker v. Stavely, 278.
8. To sustain a plea of former acquittal, it must appear that the offense for which the defendant was acquitted was the same offense as that for which he is being tried. State v. Virgo, 293.
9. Where, after an answer has been served, the complaint is amended, but the amendment is merely formal, and does not make any substantial change in the facts alleged as grounds for relief, it is not necessary to serve another answer and the defendant is not in default for failure to do so. Martinson v. Marzolf, 301.
10. The allegations of the complaint considered, and held, not to state a cause of action for an injunction against the board of county commissioners to prohibit it from carrying out the terms of a contract for the furnishing of blank books, blanks and stationery to the county officers, although the power to enter into such contract is not vested in such board. Knight v. Commissioners of Cass County, 340.
11. An action to recover a reward is an action at law, triable to a jury. Such an action is not changed to one of equitable cognizance by the fact that other claimants have been permitted to intervene under section 5239, Rev. Codes 1899, and assert their claims to the same reward. The rule is otherwise when a defendant against whom there are other claimants for the same debt interpleads such claimants, and secures his own discharge, and pays the money into court, pursuant to section 5240, Rev. Codes 1899. Couch v. State, 361.
12. A statement in the complaint that "said real property was not described in the assessment thereof purported to have been made in said year," is, as against a demurrer, insufficient to show that the property had not been assessed. Scott v. Nelson County, 407.
13. In an action to quiet title to real estate, in which the complaint alleges that the plaintiff is the owner of the land in fee and that the defendant has no right, title or interest therein, a judgment that the plaintiff does own the land and that the defendant had no

PLEADING—Continued.

right, title or interest therein conclusively adjudicates all questions affecting the title to such land and bars a claim to an interest in the real estate in the nature of an easement in or license or consent to use the land existing when such adjudication was made, in a subsequent action by the same plaintiff for damages on account of the unlawful occupation of said real estate by the defendant. Keeney & Dewitt v. City of Fargo, 423.

14. A summons in justice court, which contained a partnership name without showing the Christian name of each partner, is not a nullity, but is merely irregular, and may be cured by amendment. Morgridge v. Stoeffer, 430.
15. The provisions of section 5297, Rev. Codes 1899, relating to correction of mistakes in pleading, process or proceeding, is applicable to justice court. Morgridge v. Stoeffer, 430.
16. Under subdivision 1, section 5274, Rev. Codes 1899, which authorizes a defendant to counterclaim upon "a cause of action arising out of the transaction set forth in the complaint as the foundations of the plaintiff's claim or connected with the subject of the action," a mortgagor of chattels may counterclaim for their conversion by the mortgagee when sued upon the note secured by the mortgage. Hanson v. Skogman, 445.
17. In an action for the possession of real estate, the defendant in a counterclaim, sought to have the plaintiff declared a trustee of the title and required to convey the same to him, basing his right thereto upon certain erroneous rulings of the land department in canceling his entry and sustaining that of the plaintiff. His pleading showed that the title had not yet passed from the United States. Held, that the demurrer to the counterclaim was properly sustained. Healey v. Forman, 449.
18. In an action to determine adverse claims under chapter 5, page 9, Laws 1901, the granting of plaintiff's motion for judgment on the pleadings is error, when the answer denies plaintiff's title to real estate, although it does not set forth a valid adverse interest. Larson v. Christianson, 476.
19. The general rules governing the exercise of the discretionary power of the court with respect to allowing amendments to pleadings are the same in justice court as in district court. Rae v. Railway Co., 507.
20. It was not error in justice court to allow a complaint, which alleged that plaintiff's cattle had been killed by the negligent running of defendant's train, to be amended before trial so as to allege that the injury was due to the failure of the defendant to keep its right of way fence in repair. Rae v. Railway Co., 507.
21. Where the specifications of error in the notice of appeal from a justice's judgment on questions of law only do not raise any question as to the sufficiency of the pleading, that question cannot be raised on appeal where the defect in the pleading is a mere defective state-

PLEADING—Continued.

ment of the cause of action or defense, as distinguished from a failure to show any right of recovery or defense. Rae v. Railway Co., 507.

22. A complaint setting forth all the facts necessary to create a lien state a cause of action, although it contains no allegation that there is anything due the contractor from the owner. Lumber Co. v. Bank, 511.
23. The fact of payment being an affirmative defense, is a matter to be alleged in the answer, and need not be negatived by an allegation in the complaint. Lumber Co. v. Bank, 511.
24. An allegation of a complaint "that prior to the filing of said lien the plaintiff had notified defendant by registered letter that it had furnished said materials to the said company" is not the statement of conclusions, and is sufficient as an allegation of notice. Lumber Co. v. Bank, 511.
25. Where the complaint does not state a cause of action, and the evidence affirmatively shows that no cause of action exists, the appellate court will direct the action to be dismissed. Hart v. Hanson, 570.
26. Where facts might be used either as a defense or counterclaim are pleaded in the answer as a defense merely, and the answer demands no affirmative relief indicating that a counterclaim was intended, no reply is necessary. Regan v. Jones, 591.
27. Where the evidence offered by the plaintiff shows affirmatively and conclusively that the plaintiff has in fact no cause of action upon the claim which the complaint attempts to allege as a ground of recovery, it is unnecessary to pass upon the technical sufficiency of the complaint. Walker v. Rein, 608.

PRACTICE. See NEW TRIAL, 189; ATTACHMENT, 232; TRIAL, 335, 344, 465, 557; VENUE, 542; JUSTICE OF THE PEACE, 561; INDICTMENT AND INFORMATION, 561.

1. An independent action to set aside a judgment is not maintainable when the remedy by motion provided by section 5298, Rev. Codes 1899, is available and adequate. Freeman v. Wood, 95.
2. The order of discharge of assignee for the benefit of creditors, which the court is authorized by section 4675, Comp. Laws 1887, to make after a hearing and upon notice, is, in effect, a final judgment, and as such is binding upon assignors and creditors and is subject to attack only upon grounds upon which other judgments are assailable. Freeman v. Wood, 95.
3. Where in an action in equity to set aside a judgment, newly discovered evidence is presented as the ground therefor, and for a new trial, it must appear that the failure to secure and present such evidence at the proper time was unmixed with the fault or negligence of the party asking relief. Freeman v. Wood, 95.

PRACTICE—Continued.

4. The fact that the warrant of attachment has been levied upon the property of the bankrupt does not authorize the trustee in bankruptcy to intervene in the action in which the attachment issued for the purpose of obtaining possession of the attached property. Jewett v. Huffman, 110.

5. In 1892, following the irregular practice which then generally prevailed in this jurisdiction with respect to the manner of entering judgment in the district court, an order for judgment, which embodied the final determination of the action made by the trial court, and was in the form required for a judgment, but concluded with the direction, to enter judgment, signed by the judge and attested by the clerk, was recorded in full in the judgment book, where it was again signed by the judge and clerk. Held, that such record is a valid judgment. Hagler v. Kelley, 218.

6. Where the defendant gives notice of motion to dissolve an attachment and the notice recites that the motion will be based upon an affidavit served therewith, which denies the truth of the attachment affidavit, the notice sufficiently shows that the ground for the motion to dissolve is that the attachment affidavit is false. Jones v. Hoefs, 232.

7. A judgment taken by default without notice, in an action for equitable relief, after the defendant had appeared, is irregular, but is not void. Martinson v. Marzolf, 301.

8. Where, after an answer has been served, the complaint is amended, but the amendment is merely formal and does not make any substantial change in the facts alleged as grounds for relief, it is not necessary to serve another answer, and the defendant is not in default for failure to do so. Martinson v. Marzolf, 301.

9. Where the plaintiff claims the right to possession of land under a homestead filing and the land is in the actual adverse possession of the defendant, he cannot resort to equity to recover possession by means of an injunction, even though the defendants are insolvent. Martinson v. Marzolf, 301.

10. Where a temporary injunction pending the action had been ordered, and the injunction had been superseded by a judgment which was irregular but not void, a motion to vacate the injunction was ineffectual, unless it was coupled with a motion to vacate the judgment for irregularity. Martinson v. Marzolf, 301.

11. A motion to vacate a judgment for irregularity may be heard and granted, even though more than one year has elapsed since notice of the entry of judgment. Martinson v. Marzolf, 301.

12. In granting or denying a motion to vacate a judgment for irregularity, the court exercised the discretion governed by equitable principles; and the relief will not be granted if the moving party has, by conduct or otherwise, waived the irregularity, or if his conduct has been such as to render it inequitable to grant relief. Martinson v. Marzolf, 301.

PRACTICE—Continued.

13. Under our statute regulating appeals from justice courts, the service and filing of the notice of appeal and the filing of the undertaking with the clerk of the district court are not alone sufficient to transfer jurisdiction. The undertaking must be served and the service must be made within thirty days after the judgment is rendered. Richardson v. Campbell, 81 N. W. 31, 9 N. D. 100, followed. Lough v. White, 353.

14. Since the amendment of section 5630, Rev. Codes 1899, by chapter 201, page 277, Laws 1903, actions which are properly triable by a jury are no longer triable in the district court or reviewable upon appeal under that section. Couch v. State, 361.

15. To warrant a court in setting aside a judgment upon a showing of surprise under section 5298, Rev. Codes 1899, the party must move promptly and within one year after notice. Keeney v. City of Fargo, 419.

16. In cases of motions to set aside judgments not within the provisions of section 5298, Rev. Codes 1899, the party seeking relief must move seasonably. Keeney v. City of Fargo, 419.

17. In application for relief under section 5298, Rev. Codes 1899, trial courts are vested with large discretion, and their action will not be disturbed unless such discretion has been abused. Keeney v. City of Fargo, 419.

18. A summons in justice court, which contained a partnership name, without showing the Christian name of each partner, is not a nullity, but is merely irregular, and may be cured by amendment. Morgridge v. Stoeffer, 430.

19. An action should not be dismissed for a mere irregularity of practice which can be remedied by amendment without prejudice to the substantial rights of the parties. Morgridge v. Stoeffer, 430.

20. In an action to determine adverse claims under chapter 5, page 9, Laws 1901, the granting of plaintiff's motion for judgment on the pleadings is error, when the answer denies plaintiff's title to real estate, although it does not set forth a valid adverse interest. Larson v. Christianson, 476.

21. On the trial of a charge of rape, where the state's case depends almost wholly on the testimony of the prosecutrix, ample latitude in cross-examination should be allowed. State v. Hazlett, 490.

22. Unless an objection is promptly made to the appearance of an attorney without authority in contempt proceedings growing out of a violation of an injunctional order, the defendant waives the right to make an objection to such appearance thereafter. State v. Harris, 501.

23. The interrogatories to be filed under section 5942, Rev. Codes 1899, in contempt proceedings must relate to, and are intended to elicit, facts in respect to the contempt charged and to no other offense. State v. Harris, 501.

PRACTICE—Continued.

24. Under section 5627, Rev. Codes 1899, the supreme court will review the evidence, in the absence of a motion for a new trial in actions at law tried by the court without a jury, to determine whether the findings of fact are sustained or not. Bessie v. Northern Pacific Ry. Co., 614.

PRELIMINARY EXAMINATION. See INDICTMENT AND INFORMATION, 561.

1. Adjournment of a preliminary examination for more than three days does not invalidate where there is no injury. State v. Foster, 561.

PRESUMPTION. See EVIDENCE, 454.

PRINCIPAL AND AGENT. See GAMING, 435; ATTORNEYS AT LAW, 454.

1. A broker employed to negotiate a sale of grain for future delivery has no authority, without his principal's consent, to make the contract for such sale in his own name. Robbins v. Maher, 228.
2. A broker cannot recover from his principal either for services or for money advanced by reason of a sale of grain negotiated for the principal, where, without the latter's consent, the broker has contracted in his own name. Robbins v. Maher, 228.
3. The fact that it was the custom of brokers at the place of sale to negotiate sales in their own names, without disclosing their principals, and to assume personal liability, for the completion of such sales, is not sufficient to prove authority to sell in the broker's name, if it is not shown that the principal had knowledge of the custom. Robbins v. Maher, 228.
4. Plaintiff employed the defendant to appear at a public sale of a tract of land provided for by the federal laws, and to bid in and purchase the land in plaintiff's name, and to pay for the same with defendant's money. Plaintiff was to repay to defendant the funds paid out for the land immediately upon ascertaining the amount, and was to pay defendant a fixed sum for his compensation. Defendant bid in the land in his own name and refused to convey to plaintiff. Held, that the contract is a contract of agency, and not within the statute of frauds, and that an action at law for damages for a breach of such contract is properly brought by the principal. Schmidt v. Beiseker, 587.

PROCESS.

1. Under our statute regulating appeals from justice courts, the service and filing of the notice of appeal, and the filing of the undertaking with the clerk of the district court are not alone sufficient to transfer jurisdiction. The undertaking must be served and the service must be made within thirty days after the judgment is rendered.

PROCESS—Continued.

Richardson v. Campbell, 81 N. W. 31, 9 N. D. 100, followed. Lough v. White, 353.

2. A summons in justice court, which contained a partnership name without showing the Christian name of each partner, is not a nullity, but is merely irregular, and may be cured by amendment. Morgridge v. Stoeffer, 430.
3. The provisions of section 5297, Rev. Codes 1899, relating to the correction of mistakes in pleading, process or proceeding, is applicable to justice court. Morgridge v. Stoeffer, 430.
4. Execution was issued on the judgment in a criminal action, wherein premises owned by the plaintiff, not the accused, were adjudged a nuisance and plaintiff's land levied on and sold to defendant. Held, that the sale was void as based on a judgment or proceeding to which plaintiff was not a party. Larson v. Christianson, 476.
5. The enforcement of the lien for fines and costs assessed under section 7610, Rev. Codes 1899, should be by action, in cases like the one under consideration. Larson v. Christianson, 476.

PROMISSORY NOTES. See NEGOTIABLE INSTRUMENTS, 591.

PUBLIC LANDS. See ENABLING ACT, 532.

1. Where the plaintiff claims the right to possession of land under a homestead filing, and the land is in the actual adverse possession of the defendants, he cannot resort to equity to recover possession by means of an injunction, even though the defendants are insolvent. Martinson v. Marzolf, 301.
2. While this action was pending there was a contest in progress before the federal land office between the same parties, involving the validity of the conflicting homestead filings, under which the respective parties claimed the right to occupy the land. The contest had resulted in a decision by the secretary of the interior in favor of defendants, but there was a petition for review of that decision still pending and undetermined. Held, that if the petition for review resulted in a decision for plaintiff, the judgment should not be vacated, except as to costs, but, if the secretary affirmed the decision under review, then the judgment ought to be vacated. Martinson v. Marzolf, 301.
3. Until the title to public land passes from the United States to a homestead claimant, the land department has exclusive jurisdiction of the question of title. The jurisdiction of the court arises after the title passes and not before. Healey v. Forman, 449.
4. In an action for the possession of real estate, the defendant, in a counterclaim, sought to have the plaintiff declared a trustee of the title and required to convey the same to him, basing his right thereto upon certain erroneous rulings of the land department in canceling his entry and sustaining that of the plaintiff. His plead-

PUBLIC LANDS—Continued.

ing showed that the title had not yet passed from the United States. Held, that the demurrer to the counterclaim was properly sustained. Healey v. Forman, 449.

5. Plaintiff employed the defendant to appear at a public sale of a tract of land provided for by the federal laws, and to bid in and purchase the land in plaintiff's name, and pay for the same with defendant's money. Plaintiff was to repay the defendant the funds paid out for the land immediately upon ascertaining the amount, and was to pay defendant a fixed sum for his compensation. Defendant bid in the land in his own name and refused to convey to plaintiff. Held, that the contract is a contract of agency, and not within the statute of frauds, and that an action at law for damages for a breach of such contract is properly brought by the principal. Schmidt v. Beiseker, 587.

QUIETING TITLE. See ADVERSE CLAIMS, 476.

1. In an action to quiet title to real estate, in which the complaint alleges that the plaintiff is the owner of the land in fee and that the defendant has no right, title or interest therein, a judgment that the plaintiff does own the land and that the defendant had no right title or interest therein conclusively adjudicates all questions affecting the title to such land, and bars a claim to an interest in the real estate in the nature of an easement in or license or consent to use the land existing when such adjudication was made in a subsequent action by the same plaintiff for damages on account of the unlawful occupation of said real estate by the defendant. Keeney & Dewitt v. City of Fargo, 423.

RAPE. See CRIMINAL LAW, 490.

RATIFICATION. See Deed, 382.

REAL ESTATE. See TRUSTS AND TRUSTEES, 449, 482; BANKS AND BANKING, 283; JUSTICE OF THE PEACE, 414; JUDGMENT, 423; ADVERSE CLAIMS, 476; RECORDING TRANSFERS, 580.

1. Under section 70 of the national bankruptcy act (act July 1, 1898, c. 541, 30 Stat. 565, U. S. Comp. St. page 3451), a trustee in bankruptcy is vested with the title of all the bankrupt's property as of the date he was adjudged bankrupt, except exempt property, and he may enforce a trust in real estate existing in favor of the bankrupt. Currie v. Look, 482.

RESCISSION. See CONTRACTS, 248; CANCELLATION OF INSTRUMENTS, 380.

1. An unexplained delay of nearly seven years before commencing an action to set aside the deed is unreasonable, especially in view of the fact that the land has materially increased in value. Spoonheim v. Spoonheim, 380.
2. A breach of warranty of the quality of personal property upon an exchange or sale thereof does not entitle a person to rescind such sale or exchange where it has become fully executed, unless fraud be shown or the agreement authorized a rescission. Simonson v. Jenson, 417.
3. Where there is no rescission by vendee, vendor is entitled to specific performance. Cotton v. Butterfield, 465.

RECORDING TRANSFERS.

1. A deed absolute on its face, but intended to be a mortgage under a parol contract, is properly recorded in a book provided for the record of deeds, and such record is notice to subsequent incumbrancers or purchasers. Bank v. Tufts, 238.
2. The fact that a purchaser from B, who claimed title under a recorded deed from E, valid on its face, knew that the deed from a previous owner to E was missing and unrecorded, was not sufficient to charge such purchaser with constructive notice of the fact that B's deed had been wrongfully obtained by the latter. Johnson v. Erlandson, 518.
3. Where the grantor in a deed deposited in escrow knew that the grantee named therein had wrongfully obtained possession thereof and had it recorded and negligently permitted the grantee's apparent ownership to remain unchallenged for an unreasonable length of time, such grantor is estopped to deny the grantee's title as against an innocent purchaser from the latter. Johnson v. Erlander, 518.
4. General creditors are not within the protection of the recording laws of this state relating to real estate. Vallely v. First National Bank, 580.
5. Section 4730, Rev. Codes 1899, which declares that a grant absolute in form, but intended to be defeasible, is not affected "as against any person other than the grantee," etc., unless a defeasance is recorded, construed and *held*, that the term "any other person" means persons otherwise entitled to the protection of the recording laws, namely, subsequent purchasers and incumbrancers, and does not include general creditors. Vallely v. First National Bank, 580.
6. One Savard, the owner of certain real estate, executed a conveyance to Deschenes, in form a warranty deed, to secure a debt which he afterwards paid. No defeasance was recorded. Thereafter Deschenes' trustee in bankruptcy gave a deed to plaintiff, who

RECORDING TRANSFERS—Continued.

had actual notice that the conveyance to Deschenes was for security. *Held*, (1) that the trustee's deed to plaintiff did not convey title; and (2) that the trial court did not err in sustaining a mortgage subsequently executed by Savard, the true owner. Vallely v. First National Bank, 580.

REDEMPTION. See MORTGAGE, 81.

REPLY. See PLEADING, 590.

RES JUDICATA.

1. A judgment in a former action between the same parties is not conclusive evidence in a subsequent suit on a different cause of action unless it is made to appear that the particular question sought to be concluded was necesarily tried and determined in the former proceeding. Carter v. Carter, 66.
2. In an action to quiet title to real estate, in which the complaint alleges that the plaintiff is the owner of the land in fee and that the defendant has no right, title or interest therein, a judgment that the plaintiff does own the land and that the defendant had no right, title or interest therein conclusively adjudicates all questions affecting the title to such land, and bars a claim to an interest in the real estate in the nature of an easement in or license or consent to use the land existing when such adjudication was made in a subsequent action by the same plaintiff for damages on account of the unlawful occupation of said real estate by the defendant. Keeney & Dewitt v. City of Fargo, 423.

REWARD.

1. To entitle one to recover a reward, he must show a rendition of the services required in the offer after knowledge of, and with a view of obtaining the reward. Couch v. State, 361.
2. The state offered a reward of $300 "for the arrest or information leading to the arrest" of one James Smith, who escaped from jail where he was held upon a charge of murder. There were three claimants for the reward. The trial judge rendered judgment in favor of each for $100.00. Each claimant alleged in his complaint that he relied upon the offer of reward, which allegation was denied by the state's answer. The findings are silent upon the issue. *Held*, that the findings do not support the judgment. Couch v. State, 361.
3. An action to recover a reward is an action at law, triable to a jury. such an action is not changed to one of equitable congnizance by the fact that other claimants have been permitted to intervene under section 5239, Rev. Codes, 1899, and assert their claims to the same reward. The rule is otherwise when the defendant against whom there are other claimants for the said debt interpleads such claimants and secures his own discharge, and pays the money into court, pursuant to section 5240, Rev. Codes 1899. Couch v. State, 361.

ROAD MACHINERY. See TOWNSHIPS, 143.

ROBBERY. See CRIMINAL LAW, 200, 203; INDICTMENT AND INFORMATION, 203; INSTRUCTIONS, 200.

SALES. See INTOXICATING LIQUORS, 411; GAMING, 435; EXECUTION, 476.

1. In proving the value of an engine under an answer alleging it to be worthless on account of defects within the terms of a written warranty, the evidence should be confined to the value of the engine when delivered, and not to a time after its delivery, when it was in a different condition on account of breakages. Houghton Implement Co. v. Doughty, 331.
2. A written warranty of the quality of an article cannot be enlarged by proof of parol warranties of quality made before the written warranty was made. Houghton Implement Co. v. Doughty, 331.
3. On a sale of seventy bushels of flax mixed with flax of like quality and grade, the mere fact that there has been no separation of the part sold from the mass will not prevent the title from passing if the parties intend that title shall pass and the property sold has been identified. O'Keefe v. Leistikow, 355.
4. A breach of a warranty of the quality of personal property upon an exchange or sale thereof does not entitle a person to rescind such sale or exchange where it has become fully executed, unless fraud be shown or the agreement authorizes a rescission. Simonson v. Jenson, 417.
5. Sales of commodities for future delivery are presumed to be legitimate, and the burden is upon the party asserting the contrary to establish such fact. Miller Co. v. Klovstad, 435.
6. An oral sale of personal property without actual or constructive delivery or payment of any part of the price, and without any special agreement as to immediate delivery or change of title, does not pass to the purchaser, but remains in the seller, and the property was properly assessed against the seller in whose possession it remained on April 1st, 1897. Elevator Co. v. Cass County, 601.

SCHOOL AND SCHOOL DISTRICTS.

1. Schools of special districts are not under the official supervision of county superintendents, and are not to be taken into account in computing their salary, under section 652, Rev. Codes 1899; following Dickey County v. Denning, 14 N. D. 77, 103 N. W. 422. Dickey County v. Hicks, 73.
2. Construing section 652, Rev. Codes 1899, which provides a graduated salary for county superintendents of schools corresponding to the number of schools or departments of graded schools under their official supervision in the preceding year, it is held that schools in special districts are not under their official supervision, and are

SCHOOL AND SCHOOL DISTRICTS—Continued.

not to be included in computing their salary. Dickey County v. Denning, 77.

3. Under section 701, Rev. Codes 1899, providing that the board may call a meeting of the voters in a school district to select a site for a new school house, a selection of a site by such voters, describing the site, "for locating a new school house on the hill at the south end of Sixth street, in Peterson's field," is sufficiently definite on which to base a definite location of the site by the board. School v. Peterson, 344.
4. Under said section 701, Rev. Codes 1899, the voters are required only to select by a general designation, and not by definite description. School v. Peterson, 344.
5. Under said section 701, Rev. Codes 1899, the board is required to locate the site upon the land selected by general designation of the voters by fixing its boundaries, and it is vested with discretion as to the precise limits of the site selected by the voters, as well as to the amount of land taken, within the statutory limit. School v. Peterson, 344.

SENTENCE. See CRIMINAL LAW, 316.

1. A certificate of probable cause is not alone sufficient to stay execution in a criminal case, and an application for such certificate with a view to suspending the execution of sentence pending appeal in a criminal case will not be entertained by the supreme court, when the defendant has neither offered to give bail, nor applied to the trial judge under section 8340, Rev. Codes 1899, for a stay of execution without bail. State v. Sanders, 203.

SPECIAL VERDICT. See VERDICT, 26.

SPECIFIC PERFORMANCE.

1. Where a decree of specific performance of a contract, under which the vendee is not entitled to possession until conveyance, is awarded to the vendor, who appears to have used some or all of the land after the time when, as determined by the decree, the conveyance should take effect, the value of such use or the net profits thereof, as the vendor may elect, will be deducted from the purchase price remaining unpaid. Cotton v. Butterfield, 465.

STATEMENT OF THE CASE.

1. The specification contained in appellant's statement of case and set out in the opinion calls for a legal conclusion, and not the determination of a question of fact, and does not, therefore, authorize a review of the evidence under section 5630, Rev. Codes 1899. Stevenson v. Meyers, 398.

STATUTES.

1. A judgment notwithstanding the verdict will not be upheld, under chapter 63, p. 74, Laws 1901, on the ground merely that there was a variance between the cause of action stated and the proof adduced. Welch v. N. P. Ry. Co., 19.
2. A judgment notwithstanding the verdict will not be sustained, under chapter 63, p. 74, Laws 1901, on the ground that there was a failure of proof as to some essential element of the cause of action. Welch v. N. P. Ry. Co., 19.
3. No lien attaches to a building unless the owner thereof has some interest in the land that can be sold to enforce the lien, except in the cases provided for under sections 4794 and 4795, Rev. Codes 1899. Gull River Lumber Co. v. Briggs, 9 N. D. 485, 84 N. W. 349, followed. Green v. Tenold, 46.
4. Section 5032, Comp. Laws 1887, providing that all issues of fact for the recovery of money only must be tried by a jury, did not entitle the plaintiff to a jury trial as a matter of right in such an equitable action. Avery Mfg. Co. v. Crumb, 57.
5. Section 5420, Rev. Codes 1899, amending section 5032, Comp. Laws 1887, and providing that all issues of fact in an action for the recovery of money only shall be tried by a jury, does not restrict or change the right to a trial by jury, and its enactment was not a violation of section 7 of article 1 of the constitution, providing that right to a jury trial "shall be secured to all and remain inviolate." Avery Mfg. Co. v. Crumb, 57.
6. Where the judgment appealed from is not sustained by the evidence and the supreme court cannot definitely determine the question of the value of the property taken from such evidence, the court will not dispose of the appeal under section 5630, Rev. Codes 1899, but will order another trial. Avery Mfg. Co. v. Crumb, 57.
7. Section 5976, Rev. Codes 1899, designates three classes of persons who may maintain an action for the wrongful or negligent killing of another. Harshman v. N. P. Ry. Co., 69.
8. Schools in special districts are not under the official supervision of county superintendents, and are not to be taken into account in computing their salary, under section 652, Rev. Codes 1899, following Dickey County v. Denning, 103 N. W. 422. Dickey County v. Hicks, 73.
9. Construing section 652, Rev. Codes 1899, which provides a graduated salary for county superintendents of schools corresponding to the number of schools or departments of graded schools under their official supervision in the preceding year, it is *held*, that schools in special districts are not under their official supervision, and are not to be included in computing their salary. Dickey County v. Denning, 77.
10. An independent action to set aside a judgment is not maintainable when the remedy by motion provided by section 5298, Rev. Codes 1899, is available and adequate, Freeman v. Wood, 95.

STATUTES—Continued.

11. The order of discharge of an assignee for the benefit of creditors, which the court is authorized by section 4675, Comp. Laws 1887, to make after a hearing and upon notice, is, in effect, a final judgment, and as such is binding upon assignors and creditors, and is subject to attack only upon grounds upon which other judgments are assailable. Freeman v. Wood, 95.

12. Under section 8047, subd. 7, Rev. Codes 1899, an indictment otherwise sufficient will be held sufficient when "the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition and in such a manner as to enable a person of common understanding to know what is intended." State v. Erickson, 139.

13. Under the provisions of section 1115a, Rev. Codes 1899, relating to purchase of road graders by township boards, the township board may purchase such graders or other road machinery on its own motion, without previous authorization or petition by the freeholders or voters of the township. Bank v. Town of Norton, 143.

14. Under the provisions of section 1115a, providing that the township board may purchase road machinery "on credit or otherwise," such board may purchase such machinery, and order it paid out of the general fund in certain cases, instead of by taxation. Bank v. Town of Norton, 143.

In appeals to this court under section 5630, Rev. Codes 1899, the evidence cannot be reviewed unless the appellant demands a trial anew of all the issues or of some particular fact. Bank v. Town of Norton, 143.

15. Action to foreclose a mortgage on real property is not a proceeding *in rem*, but is an action *in personam*, and comes within the operation of section 5210, Rev. Codes 1899, which excepts from the period limited for commencing an action the time during which the person against whom the cause of action has accrued is absent from the state. Mortgage Co. v. Northwestern Thresher Co., 147.

16. An action to foreclose a mortgage is an action *in personam*, and comes within the operation of section 5210, Rev. Codes 1899, which excepts from the period limited for commencing an action the time during which the person against whom the cause of action accrued is absent from the state. Mortgage Co. v. Flemington, 181.

17. Action to foreclose a mortgage on real property is not a proceeding *in rem*, but is an action *in personam*, and comes within the operation of section 5210, Rev. Codes 1899, which excepts from the period limited for commencing an action the time during which the person against whom the cause of action has accrued is absent from the state. Paine v. Dodds, 189.

18. The clause in section 5210, Rev. Codes 1899, to the effect that only absences of one year or more shall toll the statute, refers to absences by one who has not established a residence out of the state. Paine v. Dodds, 189.

STATUTES—Continued.

19. In an action tried and appealed under section 5630, Rev. Codes 1899, where the evidence tends to show that the action is barred as to one or more undivided and unequal parts of the land and not barred as to other parts, but fails to disclose as to which parts the bar is complete, and the uncertainty in the proof is due to the fact that neither the trial court nor counsel for either party deemed such proof material, a new trial will be ordered. Paine v. Dodds, 189.

20. A certificate of probable cause is not alone sufficient to stay execution in a criminal case, and an application for such certificate with a view to suspending the execution of sentence pending appeal in a criminal case will not be entertained by the supreme court, when the defendant has neither offered to give bail nor applied to the trial judge, under section 8340, Rev. Codes 1899, for a stay of execution without bail. State v. Sanders, 203.

21. Where judgment was obtained and docketed for personal property taxes pursuant to the provisions of sections 57 and 58, c. 132, pp. 398, 399, Laws 1890, and became a lien upon the property in question before the Revised Codes of 1895 took effect, such lien continued notwithstanding the repeal of the law under which the lien was acquired. Gull River Lumber Co. v. Lee, 73, N. W. 430, 7 N, D. 135, overruled. Hagler v. Kelley, 218.

22. Section 6771a, Rev. Codes 1899, which provides that the district court may dismiss an appeal from justice court for failure on the part of the appellant to cause the transcript to be transmitted, does not make it the mandatory duty of the court to order a dismissal for that reason. DeFoe v. Zenith Coal Co., 236.

23. A bank organized under the state banking act has authority, under section 3230, Rev. Codes 1899, to receive deeds of real property as security for past indebtedness, as well as for contemplated advances agreed upon. Bank v. Tufts, 238.

24. A clerk of the district court cannot be amerced under sections 5555 and 5556, Rev. Codes 1899, for failure to pay over money paid him for the satisfaction of a judgment on file in his office except in cases where such money is paid him under the terms of a statute. Milburn-Stoddard Co. v. Stickney, 282.

25. Failure to comply with rules of court in reference to appeals under section 5630, Rev. Codes 1899, is not ground for affirming the judgment or dismissing the appeal in case of an appeal from a judgment rendered pursuant to section 5555, Rev. Codes 1899. Milburn-Stoddard Co. v. Stickney, 282.

26. Rev. Codes 1899, section 5200, subd. 2, limiting to ten years the time for commencing an action to foreclose a real estate mortgage, had no application to a proceeding to foreclose by advertisement, before the amendment of that section by chapter 120, p. 152, Laws 1901. Clark v. Beck, 287.

STATUTES—Continued.

27. Construing section 7614, Rev. Codes 1899, which makes the fact that one has or keeps posted in or about his place of business a United States revenue receipt or license for the sale of distilled, malt or fermented liquors *prima facie* evidence that he is selling and keeping for sale intoxicating liquor contrary to law, it is *held,* that by *prima facie* evidence is meant competent evidence, and evidence which is legally sufficient to justify the jury in finding the fact of unlawful sales, provided it satisfies them beyond a reasonable doubt, but not otherwise. It is not conclusive, and to so instruct is error. State v. Momberg, 291.

28. The definition of "intoxicating liquors," contained in section 7598, Rev. Codes 1899, includes liquors or liquids "that will produce intoxication," and not those which will not intoxicate. State v. Virgo, 293.

29. The part of section 8246, Rev. Codes 1899, which authorizes trial judges to receive verdicts in criminal cases in which the jury has fixed the punishment higher or lower than provided by law, and to pronounce judgment thereon for the highest punishment or the lowest punishment authorized by the statute for the offense of which the defendant is found guilty, is mandatory. State v. Barry, 316.

30. The purchasing of blank books, blanks and stationery for the use of county officers is to be made by a committee consisting of the county treasurer, county auditor and chairman of the board of county commissioners, pursuant to section 1906, Rev. Codes 1895, as amended by chapter 59, p. 69, Laws 1899. Knight v. Comm'rs of Cass County, 340.

31. The purchase of blank books, blanks and stationery for the use of county officers need not be made under competitive bids under section 1925, Rev. Codes 1895, as amended by chapter 59, p. 69. Laws 1899. Knight v. Comm'rs of Cass County., 340.

32. Under section 701, Rev. Codes 1899, providing that the board may call a meeting of the voters in a school district to select a site for a new school, a selection of a site by such voters, describing the site, "For locating a new school house on the hill at the south end of Sixth street, in Peterson's field," is sufficiently definite on which to base a definite location of the site by the board. School v. Peterson, 344.

33. Under said section 701, Rev. Codes 1899, the voters are required only to select by a general designation, and not by definite description. School v. Peterson, 344.

34. Under said section 701, Rev. Codes 1899, the board is required to locate the site upon the land selected by general designation of the voters by fixing its boundaries, and it is vested with discretion as to the precise limits of the site selected by the voters, as well as to the amount of land taken, within the statutory limit. School v. Peterson, 344.

STATUTES—Continued.

35. Since the amendment of section 5630, Rev. Codes 1899, by chapter 201, p. 277, Laws 1903, actions which are properly triable by a jury are no longer triable in the district court or reviewable upon appeal under that section. Couch v. State, 361.

36. An action to recover a reward is an action at law, triable to a jury. Such an action is not changed to one of equitable cognizance by the fact that other claimants have been permitted to intervene under section 5239, Rev. Codes 1899, and assert their claims to the same reward. The rule is otherwise when a defendant against whom there are other claimants for the same debt, interpleads such claimants and secures his own discharge, and pays the money into court, pursuant to section 5240, Rev. Codes 1899. Couch v. State, 361.

37. Under section 5500, Rev. Codes 1899, providing that a judgment may be enforced by execution at any time within ten years after its entry, a judgment cannot be properly enforced by execution issued after said time, although the judgment debtor has been continually absent from the state during said time, and the judgment remains in force for that reason. Weisbecker v. Cahn, 390.

38. A supervising architect, who furnishes plans and specifications and supervises the construction of a building pursuant to a contract with the owner for such services, is entitled to a lien therefor under section 4788, Rev. Codes 1899, which gives a lien to "any person who shall perform any labor upon any building." Friedlander v. Taintor, 393.

39. The specifications contained in appellant's statement of case and set out in the opinion calls for a legal conclusion, and not the determination of a question of fact, and does not, therefore, authorize a review of the evidence under section 5630, Rev. Codes 1899. Stevens v. Meyers, 398.

40. Under our statute (section 5055, Rev. Codes 1899) a fraudulent intent will not necessarilly be conclusively presumed as a matter of law from the fact that a conveyance was made without a valuable consideration, and by one who was at the time insolvent. Under the above section the intent is a question of fact and not of law. Stevens v. Meyers, 398.

41. The complaint in an action to annul a tax sale alleged numerous defects in the tax proceedings prior to sale. *Held*, that the defects alleged were all either cured or relief therefrom barred by section 1263, Rev. Codes 1899. Scott v. Nelson County, 407.

42. A sale of a patent medicine as medicine by a storekeeper in good faith is not a violation of law under section 7281, Rev. Codes 1899, although the same contains alcohol as one of its ingredients. State v. Williams, 411.

43. Whether a sale of liquids is made as a medicine or as a beverage, under section 7598, Rev. Codes 1899, is a question of fact for the jury. State v. Williams, 411.

STATUTES—Continued.

44. Under section 6670, Rev. Codes 1899, as amended by chapter 201, p. 259, Laws 1901, a justice of the peace does not lose complete jurisdiction of a case because a question of the title to or boundary of real property arises. He is authorized, and it is his duty, to certify the case to the district court for trial. Johnson v. Erickson, 414.

45. To warrant a court in setting aside a judgment upon a showing of surprise, under section 5298, Rev. Codes 1899, the party must move promptly, and within one year after notice. Keeney v. City of Fargo, 419.

46. In cases of motions to set aside judgments not within the provisions of section 5298, Rev. Codes 1899, the party seeking relief must move seasonably. Keeney v. City of Fargo, 419.

47. In application for relief under section 5298, Rev. Codes 1899, trial courts are vested with large discretion, and their action will not be disturbed unless such discretion has been abused. Keeney v. City of Fargo, 419.

48. The provisions of section 5297, Rev. Codes 1899, relating to the correction of mistakes in pleading, process or proceeding, is applicable to justice court. Morgridge v. Stoeffer, 430.

49. Under subd. 1, section 5274, Rev. Codes 1899, which authorizes a defendant to counterclaim upon "a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action," a mortgagor of chattels may counterclaim for their conversion by the mortgagee when sued upon the note secured by the mortgage. Hanson v. Skogman, 445.

50. The demand for appraisement required by section 1578, Rev. Codes 1899, must be made within a reasonable time after the estray is taken up. Mills v. Fortune, 460.

51. The person taking up an estray has no right to demand more proof of ownership on the part of the claimant than that prescribed by section 1575, Rev. Codes 1899. Mills v. Fortune, 460.

52. If the person holding an estray refuses to surrender the estray unless the claimant furnishes other evidence of ownership than that prescribed by section 1575, Rev. Codes 1899, such denial of the claimant's right works a forfeiture of the estray lien, if the claimant is in fact the owner. Mills v. Fortune, 460.

53. On a conviction for keeping and maintaining a nuisance, in violation of section 7605, Rev. Codes 1899, the court adjudged that the fine imposed and costs accrued should be a lien on the real estate on which the nuisance was kept, pursuant to section 7610, Rev. Codes 1899. Larson v. Christianson, 476.

54. The enforcement of the lien for fines and costs assessed under section 7610, Rev. Codes 1899, should be by action, and not by execution, in cases like the one under consideration. Larson v. Christianson, 476.

STATUTES—Continued.

55. The word "permit" as used in section 7610, Rev. Codes 1899, is to be construed as authorizing the enforcement of a lien on the premises on which a nuisance is maintained in violation of section 7605, Rev. Codes 1899, when the proof shows that the owner knowingly permitted such use. Larson v. Christianson, 476.

56. Under section 70 of the national bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565 U. S. Comp. St. p. 3451) a trustee in bankruptcy is vested with the title of all the bankrupt's property as of the date he was adjudged bankrupt, except exempt property, and he may enforce a trust in real estate existing in favor of the bankrupt. Currie v. Look, 482.

57. It is a settled doctrine in equity, and one declared by section 3386, Rev. Codes 1899, that "when a transfer of real property is made to one person, and the consideration thereof is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment was made," and under section 4263, Rev. Codes 1899, "one who gains a thing by fraud is an involuntary trustee for the benefit of the person who would otherwise have had it." Currie v. Look, 482.

58. The interrogatories to be filed under section 5942, Rev. Codes 1899, in contempt proceedings must relate to, and are intended to elicit, facts in respect to the contempt charged and to no other offense. State v. Harris, 501.

59. Subcontractors are entitled to a direct lien for work done or materials furnished under contract between contractors and the owner of the land or building, under section 4788, Rev. Codes 1899. Lumber Co. v. Bank, 511.

60. An information which alleges that the defendant, during a stated time, kept and maintained a nuisance defined and prohibited by section 7605, Rev. Codes 1899, in two adjacent buildings within the same curtilage, particularly describing the place, is neither uncertain nor double. State v. Brown, 529.

61. The erection of a residence for a governor at the capital is within the purposes of the grant of land made by congress to the state for public buildings at the capital, under section 17 of the enabling act (25 Stat. 681, c. 180). State v. Budge, 532.

62. On a trial for the offense of maintaining a nuisance in violation of section 7605, Rev. Codes 1899, under an information charging the maintenance of a certain frame building on certain described lots, evidence that a nuisance was also maintained in another building on the same lots is not relevant to the issue. State v. Poull, 557.

63. In information charging the keeping and maintaining of nuisances in violation of section 7605, Rev. Codes 1899, the information should particularly describe the place where the nuisance is maintained before abatement proceedings can be based on a conviction thereon. State v. Poull, 557.

STATUTES—Continued.

64. The word "place" as used in Rev. Codes 1899, section 7605, means the particular building or apartment where the unlawful sale is made or the intoxicating beverages are kept for sale. State v. Poull, 557.

65. The adjournment of a preliminary examination by a justice of the peace for more than three days, in violation of section 7954, Rev. Codes 1899, is not invalid, so as to render the subsequent examination a nullity, unless it has actually prejudiced the defendant, or has tended to his prejudice in respect to a substantial right. State v. Foster, 561.

66. The grounds for setting aside an information enumerated by section 8082, Rev. Codes 1899, are exclusive of all others, and do not include the failure to file an information at the term of court succeeding the defendant's commitment. State v. Foster, 561.

67. A regular term of court, within the meaning of section 8497, Rev. Codes 1899, which in the absence of good cause shown, requires the dismissal of a prosecution when the information is not filed at the next regular term after the defendant's commitment, means a jury term, as distinguished from a statutory term without a jury. State v. Foster, 561.

68. Section 4730, Rev. Codes 1899, which declares that a grant absolute in form but intended to be defeasible is not affected "as against any person other than the grantee," etc., unless a defeasance is recorded, construed and *held,* that the term "any other person" means any person otherwise entitled to the protection of the recording laws, namely, subsequent purchasers and incumbrancers, and does not include general creditors. Vallely v. First National Bank, 580.

69. In an action on a note by the legal representatives of the deceased payee, the defendant sought by his own testimony to prove when where the note was given and who was present when the transaction with the testator took place pursuant to which the note was afterwards given, in order to lay a foundation for the testimony of a third person, by whom he expected to prove what the bargain was. *Held,* that the testimony was properly excluded under section 5653, Rev. Codes 1899. Regan v. Jones, 591.

70. Testimony by the defendant in such action to the effect that the note in suit was the only note he ever gave to the deceased, and that he never had any other transactions with the deceased, was likewise prohibited by section 5653, Rev. Codes 1899. Regan v. Jones, 591.

71. While either party to a written contract may show that the true consideration therefor is different from that recited in the writing, yet it is not permissible, under the guise of proving the true consideration, to establish as a cause of action an oral agreement within the Statute of Frauds or one which violates the rule embodied in section 3888, Rev. Codes 1899, but a written contract supersedes

STATUTES—Continued.

all prior or contemporaneous oral agreements or stipulations concerning its matter. Alsterberg v. Bennett, 596.

72. The rule of comity expressed by section 5756, Rev. Codes 1899, bars not only the assertion by the foreign corporation itself of a cause of action or defense which a domestic corporation is forbidden to assert without express authority, but also bars the assignee of the foreign corporations. Walker v. Rein, 609.

73. Under section 5627, Rev. Codes 1899, the supreme court will review the evidence, in the absence of a motion for a new trial in actions at law tried by the court without a jury, to determine whether the findings of fact are sustained or not. Bessie v. N. P. Ry. Co., 614.

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STATUTORY CONSTRUCTION.

1. Whether a statute is permissive or mandatory depends upon the intent of the legislature. State v. Barry, 316.
2. It is a general rule of construction that statutes which confer upon public officers power to act, for the sake of justice or concerning public interests or the rights of third persons, although permissive in form, are mandatory, and impose a positive duty to act when the condition calling for the exercise of the power is present. State v. Barry, 316.
3. That part of section 8246, Rev. Codes 1899, which authorized trial judges to receive verdicts in criminal cases in which the jury has fixed the punishment higher or lower than provided by law, and to pronounce judgment thereon for the highest punishment or the lowest punishment authorized by statute for the offense of which the defendant is found guilty, is mandatory. Verdicts coming within the exceptions contained in this section are legal and valid verdicts, and it is the duty of trial judges to receive the same and enter judgment thereon. State v. Barry, 316.
4. In condemnation proceedings based on the right to acquire land for public purposes under the power of eminent domain, if a statute confers such power, it will be liberally and reasonably construed so as to make its purpose effective. School v. Peterson, 344.

STATUTE OF FRAUDS. See CONTRACTS, 596.

1. A trust of personal property is not within the statute of frauds and may be created by spoken words and proved by parol. Berry v. Evendon, 1.
2. Plaintiff employed the defendant to appear at a public sale of a tract of land provided for by the federal laws, and to bid in and purchase the land in plaintiff's name, and pay for the same with defendant's money. Plaintiff was to repay to defendant the funds paid out for the land immediately upon ascertaining the amount, and was to pay defendant a fixed sum for his compensation. Defendant bid in the land in his own name and refused to convey to plaintiff. *Held*, that the contract was a contract of agency, and not within the statute of frauds, and that an action at law for damages for a breach of such contract is properly brought by the principal. Schmidt v. Beiseker, 587.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS, 147, 181.

SUMMONS. See PROCESS, 430.

SUPREME COURT. See APPEAL AND ERROR, 278, 570, 614; PRACTICE, 361; VENUE, 542.

1. A certificate of probable cause is not alone sufficient to stay execution in a criminal case, and an application for such certificate with a view to suspending the execution of sentence pending appeal in a criminal case, will not be entertained by the Supreme Court, when the defendant has neither offered to give bail, nor applied to the trial judge, under section 8340, Rev. Codes 1899, for a stay of execution without bail. State v. Sanders, 203.
2. When a change has been granted, and another county selected, it will be presumed that the discretion of the presiding judge was exercised properly, and the burden is upon one attacking his order to show affirmatively a manifest case of abuse; and the Supreme Court will not, under its superintending power over inferior courts, revise his order, in the absence of such a showing and in no case will it substitute and enforce its discretion as against the discretion of the presiding judge. Murphy v. District Court, 542.

TAXATION. See DEEDS, 596.

1. Where the only injury to follow the levy of a tax for the payment of an illegal claim, is the imposition of a tax upon property, equity will not restrain the levy or suspend the regular course of tax proceedings on the ground of irreparable injury, when the property rights of a taxpayer are invaded by the imposition of an unlawful tax, his remedies at law or equity are adequate. Torgrinson v. School District, 10.
2. Where the city has received from the property owners the amount of taxes and special assessments levied for the purpose of pay-

TAXATION—Continued.

ing for a work of local improvement, it cannot justify its refusal to redeem the warrants issued in payment for such work on the ground that the contract and the taxes and assessments for the improvement were invalid because in violation of constitutional or statutory provisions designed solely for the protection of the taxpayers. Bank v. Fargo, 88.

3. Money derived by a city from special assessments becomes a trust fund in its custody, to be applied to the redemption of warrants drawn upon such funds in the order in which the warrants were presented for payment, and the city is liable to any warrant holder whose rights have been infringed by a misapplication of such funds. Bank v. Fargo, 88.
4. Where judgment was obtained and docketed for personal property taxes, pursuant to the provisoins of section 57 and 58, c. 132, pp. 398, 399, Laws 1890, and became a lien upon the property in question before the Revised Codes of 1895 took effect, such lien continued, notwithstanding the repeal of the law under which the lien was acquired. Gull River Lumber Co. v. Lee, 73 N. W. 430, 7 N. D. 135, overruled. Hagler v. Kelley, 218.
5 A statement in the complaint that "said real property was not described in the assessment thereof purported to have been made in said year," is, as against a demurrer, insufficient to show that the property had not been assessed. Scott v. Nelson County, 407.
6. The county auditor was authorized to include in the delinquent tax sale of 1897, the unpaid taxes of 1895, if for any reason the land charged with the latter taxes had not been sold therefor in 1896. Scott v. Nelson County, 407.
7. The complaint in an action to annul a tax sale alleged numerous defects in the tax proceedings prior to sale. *Held*, that the defects alleged were all either cured or relief therefrom barred by section 1263, Rev. Codes 1899. Scott v. Nelson County, 407.
8. An oral sale of personal property without actual or constructive delivery or payment of any part of the price, and without any special agreement as to immediate delivery or change of title, does not pass to the purchaser, but remains in the seller, and the property was properly assessed against the seller in whose possession it remained on April 1, 1897. Elevator Co. v. Cass County, 601.
9. The power to raise revenue by taxation is a necessary attribute of sovereignty, which may be exercised by the legislature subject only to the restrictions imposed by the federal or the state constitution, and includes the power to tax occupations. In re Lipschitz, 622.
10. Neither the federal constitution nor the constitution of this state inhibits the taxation of occupations. In re Lipschitz, 622.
11. Chapter 165 of the Laws of 1903, entitled "an act taxing the occupation of hawking and peddling," etc., is not open to the objection that it authorizes a tax upon interstate commerce. In re Lipschitz, 622.

TAXATION—Continued.

12. The rule of equity and uniformity in taxation required by section 170 of the state constitution applies only to taxes imposed upon property as such, and does not apply to taxes imposed upon occupations. In re Lipschitz, 622.

TOWNSHIPS.

1. Under the provisions of section 1115a, Rev. Codes 1899, relating to purchase of road graders by township boards, the township board may purchase such graders or other road machinery on its own motion, without previous authorization or petition by the freeholders or voters of the township. Bank v. Town of Norton, 143.
2. Under the provisions of section 1115a, providing that the township board may purchase road machinery "on credit or otherwise," such board may purchase such machinery and order it paid out of the general fund in certain cases, instead of by taxation. Bank v. Town of Norton, 143.

TRIAL. See PRACTICE, 476; VENUE, 542.

1. The fact that a party proceeds to trial upon a mistaken idea as to the nature of an action and the scope of the issues framed by the pleadings does not deprive him of the right to such relief as is consistent with the real issues and the proof in the case. Logan v. Freerks, 127.
2. Affidavits of jurors are not admissible to impeach their verdicts upon the alleged ground that they misunderstood the instructions of the court, or to show their reasons for agreeing to a verdict. State v. Forrester, 335.
3. The calling of a witness by a plaintiff in rebuttal, who gives testimony that pertains to his main case is not necessarily prejudicial, but is a matter resting largely in the discretion of the trial court. School v. Peterson, 344.
4. The latitude to be allowed in cross-examination is largely discretionary with the trial court, and its rulings in that respect will not be disturbed, except in cases of abuse. Schwoebel v. Fugina, 375.
5. Where, in an action at law, the answer interposes an equitable counterclaim, the issues arising on the latter should be heard and determined by the court before a trial of the legal issues, as if the counterclaim were a separate suit in equity. Cotton v. Butterfield, 465.
6. If the decree entered on the equity side of the case renders unnecessary the trial of any question arising on the law side, then such decree is the final determination of the action. Cotton v. Butterfield, 465.
7. The cause of action was at law and the counterclaim in equity, but the issues on the equity side of the case involved all disputed questions on the law side. The action was tried as if both the

TRIAL—Continued.

cause of action and counterclaim were in equity. *Held*, that the case is triable de novo on appeal. Cotton v. Butterfield, 465.

8. Whether leading questions shall be permitted or not is very largely discretionary with the trial court, and its rulings in that respect will not be disturbed unless it is apparent that the discretion was abused to the prejudice of the appellant. State v. Hazlett, 490.
9. If it clearly appears that the departure from the general rule against leading questions was unwarranted and prejudicial to the appellant a new trial will be granted. State v. Hazlett, 490.

TRUSTS AND TRUSTEES. See PUBLIC LANDS. 449.

1. A trust of personal property is not within the statute of frauds and may be created by spoken words and proved by parol. Berry v. Evendon, 1.
2. Where a trustee of personal property converts it into real estate, the trust attaches to the real estate in the hands of the trustee. Berry v. Evendon, 1.
3. Where a trustee forecloses a real estate mortgage held by him in trust, secures title to the land in his own name, which he conveys to an innocent purchaser, in an accounting with the cestui que trust, a judgment for the value of the land and its use, less sums due the defendant, will be sustained on the evidence of the case. Berry v. Evendon, 1.
4. Trustee is liable for use of land only for the period that he actually cropped it. Berry v. Evendon, 1.
5. To establish a resulting trust in real property by parol testimony the evidence must be clear, convincing and satisfactory, and of such a character as to leave in the mind of the judge no hesitation or substantial doubt. Carter v. Carter, 66.
6. Money derived by a city from special assessments becomes a trust fund in its custody, to be applied to the redemption of warrants drawn upon such fund in the order in which the warrants were presented for payment, and the city is liable to any warrant holders whose rights have been infringed by a misapplication of such funds. Bank v. Fargo, 88.
7. Under section 70 of the national bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565 U. S. Comp. St. 1901, p. 3451) a trustee in bankruptcy is vested with the title of all the bankrupt's property as of the date he was adjudged bankrupt, except exempt property, and he may enforce a trust in real estate existing in favor of the bankrupt. Currie v. Look, 482.
8. It is a settled doctrine in equity and one declared by section 3386, Rev. Codes 1899, that "when a transfer of real property is made to one person, and the consideration thereof is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made," and under section 4263, Rev. Codes 1899, "one who gains a thing by fraud" is an involuntary trustee for

TRUSTS AND TRUSTEES—Continued.

the benefit of the person who would otherwise have had it. Currie v. Look, 482.

9. Upon the facts stated in the opinion, and upon a review of the entire case in this court, in an action prosecuted by a trustee in bankruptcy to subject certain real estate which had been transferred to the bankrupt's wife to the payment of his debts, it is held, (1) that the bankrupt's wife was merely a trustee of the title, and (2) that the plaintiff is entitled to a decree transferring title to him. Currie v. Look, 482.

UNDERTAKING. See JUSTICE OF THE PEACE, 405.

USURY. See DEMURRER, 278.

1. Where the parties agree upon a lawful rate of interest for the forbearance of a money demand, but the debtor was induced, either by the fraud of the creditor, or by mutual mistake of the parties, to unintentionally pay in satisfaction of the debt a sum greater than the debt and accrued interest, computed at the maximum lawful rate; the transaction was not usurious, because there was no agreement to pay the excessive charge. Weicker v. Stavely, 278.

VARIANCE. See INDICTMENT AND INFORMATION, 203.

VENDOR AND PURCHASER.

1. Evidence examined and held, that there has been no rescission by the plaintiff of her contract to buy defendant's land, and that the latter are entitled to specific performance thereof. Cotton v. Butterfield, 465.
2. Where a decree of specific performance of a contract, under which the vendee is not entitled to possession until conveyance, is awarded to the vendor, who appears to have used some or all of the land after the time when, as determined by the decree, the conveyance should take effect, the value of such use or the net profits thereof, as the vendee may elect, will de deducted from the purchase price remaining unpaid. Cotton v. Butterfield, 465.

VENUE.

1. Under the statute of the state regulating change of place of trial in criminal cases, the judge is not limited to adjoining counties and districts in ordering such change. Murphy v. District Court, 542.
2. When a change of place of trial is obtained by a defendant because of local prejudice, the duty of selecting the place for trial rests exclusively upon the presiding judge, in the exercise of sound judicial discretion. Murphy v. District Court, 542.
3. When a change has been granted, and another county selected, it will be presumed that the discretion of the presiding judge was exercised

VENUE—Continued.

properly, and the burden is upon one attacking his order to show affirmatively a manifest case of abuse; and this court will not, under its superintending power over inferior courts, revise his order, in the absence of such a showing, and in no case will it substitute and enforce its discretion as against the discretion of the presiding judge. Murphy v. District Court, 542.

4. The defendant, who stands charged with the crime of forgery in the third degree in the district court of Ward county, applied for a change of place of trial and of judges, because of local prejudice and prejudice of the presiding judge, and requested a speedy trial. A change was granted to Cass county, and the judge of that district was designated as the judge to preside at the trial. After the order was made the defendant objected on two grounds: (1) Because the case was not sent to an adjoining or neighboring county, and (2) because of the added expense of taking witnesses to Cass county. It is shown that a speedier trial could be had in Cass county than elsewhere, and it is conceded in this court that the court's action was proper in not selecting an adjoining county, and it is also conceded that a fair and impartial trial is assured in Cass county and before an unprejudiced judge, and it is not claimed or shown that the defendant will be prejudiced in making his defense. It is held, upon defendant's application for a writ of certiorari to review said order, that these facts and those set out in the opinion do not show an abuse of discretion by the presiding judge such as will warrant the exercise of the superintending jurisdiction of this court, and the writ is therefore denied. Murphy v. District Court, 542.

VERDICT. See ESTRAYS, 460.

1. Where the facts found in a special verdict are insufficient to support the judgment for the plaintiff, by reason of absence of findings on matters in dispute essential to the complete determination of the issues, a new trial must be granted. Beare v. Wright, 26.
2. Where the circumstances surrounding the death of a person all point to death by suicide, and there are no facts from which a different conclusion might be reasonably reached or inferred, a directed verdict will be sustained that death was caused by suicide. Clemens v. R. N. of A., 116.
3. The plaintiff made a written contract to purchase certain real estate from the defendants. One of the inducements to make the contract was their false statement that they had the legal title to the land. Defendants perfected their title and tendered proper conveyances of title at the time and place fixed by the contract. At the trial of plaintiff's action to recover damages for the false statement the jury returned a verdict in his favor, general in form, but without fixing any sum as damages. They also made certain special findings. These were also silent as to the amount of damages.

VERDICT—Continued.

The trial judge thereafter awarded a recovery to plaintiff. Defendants moved upon the minutes to vacate the verdict and judgment upon the ground that (1) the verdict and damages were excessive, (2) that the evidence is insufficient to justify the verdict, and (3) that the verdict is against and contrary to law. Held, (1) that there is no evidence that the false statement was attended with or followed by injury or damage; (2) that the record presents a case of mistrial, and that the motion was properly granted and must be affirmed. Sonnesyn v. Akin, 248.

4. That part of section 8246, Rev. Codes 1899, which authorizes in criminal cases in which the jury has fixed the punishment higher or lower than provided by law, and to pronounce judgment thereon for the highest punishment or the lowest punishment authorized by statute for the offense of which defendant is found guilty, is mandatory. Verdicts coming within the exception contained in this section are legal and valid verdicts, and it is the duty of trial judges to receive the same and enter judgment thereon. State v. Barry, 316.

5. The defendant was tried and found guilty of murder in the first degree, and sentenced to imprisonment for life. At the trial he interposed the plea of former conviction under the same information, and supported his plea by offering a verdict returned by the jury at the former trial, in which they found him guilty of murder in the second degree and fixed the period of his punishment at seven years. The trial court instructed the jury to find against the defendant upon this plea. Held, that this was error; that, for reasons stated in the opinion, the verdict was legal and valid, and it was the duty of the trial judge to sentence defendant thereunder, and that the trial court exceeded its authority in sentencing the defendant for life. The judgment must therefore be modified to correspond with the lawful punishment which he was authorized to impose, and as of the date of the former verdict. State v. Barry, 316.

6. Affidavits of jurors are not admissible to impeach their verdict upon the alleged ground that they misunderstood the instructions of the court, or to show their reason for agreeing to a verdict. State v. Forrester, 335.

7. Evidence examined, and held, insufficient to justify a verdict, which found that the defendant was entitled to the possession of a horse as an estray. Mills v. Fortune, 460.

8. The verdict in this case rests upon evidence of a substantial nature, and it is not error to refuse a new trial, because of its alleged insufficiency. State v. Foster, 561.

VOTERS AND ELECTIONS. See ELECTIONS, 311.

WAIVER.

1. In granting or denying an action to vacate a judgment for irregularity, the court exercised a discretion governed by equitable principles, and the relief will not be granted if the moving party has, by conduct or otherwise, waived the irregularity, or if his conduct has been such as to render it inequitable to grant relief. Martinson v. Marzolf. 301.

WARRANTY.

1. In proving the value of an engine under an answer alleging it to be worthless on account of defects within the terms of a written warranty, the evidence should be confined to the value of the engine when delivered, and not to a time after its delivery, when it was in a different condition on account of breakages. Houghton Implement Co. v. Doughty, 331.
2. A written warranty of the quality of an article cannot be enlarged by proof of parol warranties of quality made before the written warranty was made. Houghton Implement Co. v. Doughty, 331.
3. A breach of a warranty of quality of personal property upon an exchange or sale thereof does not entitle a person to rescind such sale or exchange where it has become fully executed, unless fraud be shown or the agreement authorized a rescission. Simonson v. Jenson, 417.
4. A deed delivered and accepted merely transferring the grantor's right, title and interest in the land described, and containing no express or implied covenants as to title or incumbrances, is, in the absence of actionable deceit, conclusively presumed, in an action at law, to show that the grantor assumed no obligations as to the validity or extent of his title or interest, or as to incumbrances. Alsterberg v. Bennett, 596.
5. The grantee who has accepted a quitclaim deed cannot recover in an action at law, on the grantor's alleged promise, made before or at the time the deed was delivered and accepted, to pay certain taxes which were then an incumbrance on the land conveyed. Alsterberg v. Bennett, 596.

WITNESS. See TRIAL, 344, 490; VENUE, 542; EVIDENCE, 591.

1. An instruction given to a jury in the following language: "If you find from the evidence that any witness has sworn falsely as to any material fact or issue in this case, you should receive the testimony of such witness with caution. You have a right to reject the statement of such witnesses, excepting in so far as they may be corroborated by other credible evidence," is error, warranting the granting of a new trial. State v. Johnson, 288.
2. The calling of a witness by a plaintiff in rebuttal, who gives testimony that pertains to his main cause is not necessarily prejudicial, but is a matter resting largely in the discretion of the trial court. School v. Peterson, 344.